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Joint Tort-Feasors -- Validity of Covenant Not to Sue

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take the attitude\textsuperscript{11} that jurors are able to wipe impressions so formed from their minds as they enter the courtroom seems unrealistic. The defendant may find himself with a constitutional guarantee of jury trial which he is unable to accept, and is forced to choose a trial without a jury in those jurisdictions where such is permissible.\textsuperscript{12} Freedom of the press must not be impaired but: "Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial."\textsuperscript{13} The concurring opinion is some indication of a new awareness of a problem which the courts must eventually resolve.

\textit{JACK H. POTTS.}

\textbf{Joint Tort-Feasors—Validity of Covenant Not to Sue}

Plaintiff, \textit{A}, brought action against tort-feasors \textit{B} and \textit{C} to recover for assault and battery. Subsequently by amendment \textit{A} struck the name of \textit{C} as a defendant. The remaining defendant filed a plea in bar, alleging that the amendment was filed in consideration of $2500 paid to \textit{A} by \textit{C} in settlement of \textit{C}'s liability and that the agreement purporting to be a covenant not to sue was in fact a release; if for no other reason, because it was executed \textit{lis pendens}.\textsuperscript{1} \textit{Held}, that since the clear intendment of the agreement shows only a covenant not to sue and not an accord and satisfaction of the claim itself, the mere fact that it was executed during the pendency of the suit does not release \textit{B}.\textsuperscript{2}

The dissenting judge agreed with the defendant, saying that an

\textsuperscript{12} State v. Smarr, 121 N. C. 669, 673, 28 S. E. 549, 550 (1897) ("The impression once entertained of the dangerous effect upon a juror's mind of having read newspaper versions of an offense and comments thereon has long since worn out. . . .")


A liberalization of change of venue statutes would be of little aid in this age of widespread newspaper circulation and radio-television coverage.

\textsuperscript{1} "\textit{Lis pendens}" as used in this case means a pending suit. "A suit is pending after complaint is filed and process served on the defendant, or defendant has voluntarily appeared." Massey v. United States, 46 F. 2d 78, 79 (W. D. Wash. 1930).


A mere covenant not to sue is not a technical release and will not operate to release any of the joint tort-feasors other than the one in whose favor it is drawn. Papenfus v. Shell Oil Co., 254 Wis. 233, 35 N. W. 2d 920 (1949); Aljian v. Ben Schlossberg, Inc., 8 N. J. Super. 461, 73 A. 2d 290 (1950).

However, the courts are not in agreement that the covenantee is absolutely discharged from liability for the tort. Some hold that he must, if sued, bring a separate action for breach of covenant. Chicago & A. R. R. v. Averill, 224 Ill. 516, 79 N. E. 654 (1906); Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (1892); Oliver v. Williams, 190 Tenn. 54, 83 S. W. 2d 271 (1935); Byrd v. Crowder, 166 Tenn. 215, 60 S. W. 2d 171 (1933). Others allow the covenant to be pleaded as a defense to an action brought against the covenantee. Davis v. Moses, 172 Minn. 171, 215 N. W. 225 (1927); Judd v. Walker, 158 Mo. App. 156, 138 S. W. 655 (1911); Ellis v. Eason, 50 Wis. 138, 6 N. W. 518 (1880).
instrument which had the effect of letting one of the parties out of the suit after it was commenced amounted to a release no matter what it was called. Much material has been written, in court opinions and otherwise, concerning the interpretation and effect of instruments which purport to be either a release or a covenant not to sue. But no instance has been found in which pendency of the suit has admittedly formed any part of the basis for the court's decision. An increasing number of the courts today hold, in accord with the majority opinion in the principal case, that the intention of the parties is the controlling factor. Regardless of the label placed upon the agreement, if it is evident by construing the entire agreement that a covenant is not a release and will ignore it and hold that the instrument operates as a release of all persons jointly liable. Aiken v. Insull, 122 F. 2d 626 (Utah 1949).

The dissent states: "A covenant not to sue an action already filed is not a covenant not to sue no matter what it is called by the parties or anybody else. "... The law should not add to the anomalous holdings one to the effect that a party can do an impossible thing by agreeing not to do what he has already done and call a spade a club with impunity." Register v. Andris, supra note 2 at _--_ 64 S. E. 2d 196, 197-198 (1951).


5 Notes, 51 Dick L. Rev. 191 (1947); 22 Minn. L. Rev. 692 (1938); 28 Texas L. Rev. 599 (1950); 19 Va. L. Rev. 881 (1933); 24 Yale L. J. 505 (1915).


7 The troublesome agreements are those which use the language of a release but which also contain a reservation of a right of action against the remaining joint tort-feasor. Some courts take the view that such a clause is repugnant to the operation of the release and will ignore it and hold that the instrument operates as a release of all persons jointly liable. Aiken v. Insull, 122 F. 2d 746 (7th Cir. 1941) (construing the Illinois law). Other courts, which give effect to the intent of the parties, will honor this reservation and say that a mere covenant not to sue was intended. Carey v. Bilby, 129 Fed. 203 (8th Cir. 1904); Home Telephone Co. v. Fields, 150 Ala. 305, 43 So. 711 (1907); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); Edens v. Fletcher, 79 Kan. 143, 98 Pac. 784 (1908); Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133 (1903); All American Bus Vines v. Saxon, 197 Okla. 395, 172 P. 2d 424 (1946); Duck v. Mayeu, 2 Q. B. 511 (1892). In a leading case, Bloss v. Plymale, 3 W. Va. 293 (1869), at page 307 it was said: "... a contract or agreement ... plain and express in its terms, shall not be construed, nor made to defeat the object and intention of the parties. ..." See also Garbee v. Halloran, 150 Ohio St. 476, 83 N. E. 2d 217 (1948).

Some states now have statutes which specifically provide that all releases and discharges of obligations in writing must be construed according to the intention of the parties. Ala. Code Ann. tit. 7, §391 (1940).

RESTATEMENT, TORTS §885 (1939) provides: "(1) A valid release of one tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others, if the release is embodied in a document, unless such agreement appears in the document. (2) A covenant not to sue one tort-feasor for a harm does not discharge any other liable for the harm.

In McKenna v. Austin, 134 F. 2d 659, 665 (D. C. Cir. 1943), it was said: "It is not material whether the instrument be considered a release or a covenant not to sue."
not to sue, or its legal equivalent, was intended then the other joint tort-feasor will not be released.

Another factor that is considered by most of the courts is whether there has been partial or complete satisfaction of the claim for damages. The injured party is entitled to but one complete satisfaction since this is acceptance of full compensation for an injury. Partial satisfaction is not to be treated as a release, but usually will be applied pro tanto towards satisfaction of the claim.

The primary purpose of a covenant not to sue is to release the covenantee from liability to the injured party for a particular wrong without affecting the injured party’s rights against the remaining joint tort-feasors (except, in most jurisdictions, in so far as satisfaction of the claim has been received). Therefore, the courts that give effect to the reservation of a right of action against the remaining joint tort-feasors are giving the legal effect usually desired and accomplished by executing a covenant not to sue, even though they might continue to call the instrument a release.

Many of the courts today apply the same rules regarding releases and covenants not to sue to joint tort-feasors and joint obligors. See Corbin, Contracts §1251 (1950) where it is said regarding the English practice: “In the case of joint obligors, the devise of a contract not to sue was adopted in order to escape the technical rule applicable to joint contractors, that the discharge of one joint obligor necessarily discharges all the others. Not wishing to give effect to their own unreasonable rule, the common law courts held that a release of one joint obligor, expressly reserving all rights against the other joint obligor, would be interpreted as a mere contract not to sue the one instead of a release.”

See note 1 supra.


“Plaintiff had the right to receive full damages for her cause of action.” City of Covington v. Westbay, 156 Ky. 839, 844, 162 S. W. 91, 94 (1914). Accord, Louisville & Evansville Mail Co. v. Barnes’ Adm’r, 117 Ky. 860, 79 S. W. 261 (1904); McKenna v. Austin, 134 F. 2d 659 (D. C. Cir. 1943). And see Booker v. Melike, 96 S. W. 2d 919, 921 (Mo. App. 1936) where it is said that the burden should be on the "unreleased" tort-feasor to allege and prove full satisfaction of the claim. "The issue of accord and satisfaction is one of fact for the jury." Matheson v. O’Kane, 211 Mass. 91, 96, 97 N. E. 638, 640 (1912).

A minority view is illustrated by the Illinois court. In *Aiken v. Insull* 15 the federal court in following the Illinois law (although criticizing it), held that an instrument which contained the following language, "Nothing in this agreement and compromise . . . shall be construed to operate or to affect any cause of action, claims or demands . . . against any person . . . other than any party to this settlement and compromise. . . .", was a release because it was couched in the terms of a release although the obvious intent of the parties was otherwise. 10 Still another minority view is taken by the Tennessee court which holds that any agreement which stipulates that it may be pleaded as a defense to an action against the covenantee is a release of all joint tort-feasors regardless of the form of the instrument. 17

Confusion and perhaps injustice could possibly be avoided if a court when faced with such instruments would, instead of concerning itself with the technical language of the agreement, base its decision on the answers to the following questions: (1) What was the intent of the parties as determined by the agreement and the surrounding circumstances? (2) To what extent has the injured party received full compensation for the injury to him? 18

ROY M. COLE.

**Labor Law—Government Seizure—Liability for Operating Loss**

Presidential Executive Order No. 93401 of May 1, 1943, directed the Secretary of the Interior to take immediate possession, so far "as necessary or desirable," of all coal mines in which a strike had occurred 12 122 F. 2d 746 (7th Cir. 1941).

15 The Illinois rule is otherwise in contract cases. Parmelee v. Lawrence, 44 Ill. 405 (1867).

16 Byrd v. Crowder, 166 Tenn. 215, 60 S. W. 2d 171 (1933).

17 The practicing attorney should use great care in drafting an instrument which is intended to be only a covenant not to sue in order to avoid a possible interpretation by the court that it is an unqualified release of the claim for damages, and to insure against the finding that it was executed in return for what the plaintiff considered to be full compensation for the injury. The use of the word "release" should be avoided lest it be given its technical connotation. *Aiken v. Insull*, 122 F. 2d 746 (7th Cir. 1941). And neither should all-inclusive language be employed. *Lisoski v. Anderson*, 112 Mont. 112, 112 P. 2d 1055 (1941). It should be stated in the instrument that the amount paid was not intended as an accord and satisfaction of the entire claim for damages (*Aljian v. Ben Schlossberg, Inc.*, 8 N. J. Super. 461, 73 A. 2d 290 (1950)) and that it was the intention of the parties that the agreement be merely a covenant not to sue and not a release. *Chicago & A. R. Co. v. Averill*, 224 Ill. 516, 79 N. E. 654 (1906). The agreement should contain a reservation of a right of action against the remaining tort-feasor (*Aljian v. Ben Schlossberg, Inc.*, *supra*; *Garbe v. Halloran*, 150 Ohio St. 476, 83 N. E. 2d 217 (1948)) and this reservation should be included in the same instrument. *Natrona Power Co. v. Clark*, 31 Wyo, 284, 225 Pac. 586 (1924) (release discharges all liability instantaneously); *but see*, Wright v. Fischer, 24 Tenn. App. 650, 148 S. W. 2d 49 (1940) (allowed supplementary agreement to vary original agreement).