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eral different plans, the one most suitable being carried out, and this being the one upon which any compensation would be based. We are therefore eliminating from your statement the item of $225.00 for plan No. 1, which was never executed. (we) decline to consider the first item of this charge."

Said the court. " when respondent accepted the check with the conditions under which it was tendered, he must be deemed to be bound by those conditions."

Although the facts in the case of *First National Bank v. White-Dulaney Company*[54] are not entirely clear on the point, the condition there was apparently in the form of an oral statement, by the debtor as the check was handed to the creditor's representative, that the check was in full settlement of the account. And in *Northern Bank & Trust Company v. Harmon*[55] a condition was found in the fact that the debtor's remittance "was paid to the (creditor's) then attorneys as a tender of full payment and satisfaction."*

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[54] Note 40, *supra*.
[55] Note 26, *supra*.
*To be continued.
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The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions* Chapter 5

DUTIES AND RIGHTS WHERE MORE PERSONS THAN ONE ARE PROMISORS OR PROMISEES OF THE SAME PERFORMANCE**

Section 117. DUTY OF A JOINT PROMISOR, JOINDER OF CO-PROMISORS.

Each person bound by a joint promise is bound for the whole performance thereof, but by making appropriate objection can prevent recovery of judgment against him unless there are joined as defendants all promisors who were originally jointly bound with him, except such of them as are at the time of suit dead or beyond the jurisdiction of the court.

*The absence of annotations to particular sections of the Restatement indicates that no Washington decisions have been found on the principle therein stated.
**Continued from last issue.

Section 118. JUDGMENT IN AN ACTION ON A JOINT PROMISE.
In an action on a joint promise the judgment must be for or against all the defendants who were originally jointly bound unless judgment against one or more of the defendants is precluded by

(a) death, or
(b) lack of jurisdiction, or
(c) contractual incapacity, or
(d) a discharge in bankruptcy, or
(e) a discharge or barring of the remedy by the Statute of Limitations.

In any of these cases judgment may be given for or against the others.

Comment

a. Any number less than all those jointly bound by a promise may be successfully sued without the others, unless proper objection is taken to the non-joinder (see Section 117), but with the exceptions stated in the present section, if the facts appear, though no formal objection is raised by the parties to a different course, judgment in an action on such a promise must be for or against all those joint obligors who are made defendants.

ANNOTATION

In a suit against partners upon their implied contract, where only one of the partners was served with process, it is proper, under Bal. Code, Sec. 4881, to enter a judgment against all the partners conditioned that it be enforceable against the partnership property and the separate property of the defendant served, *Livingstone v. Lovegren*, 27 W 102, 67 P. 599 (1902) and in an action for rent against the executor of a deceased joint lessee and the surviving lessee, the latter not having been served with process, it is not error to enter judgment against the executor alone where there was no evidence that the defendants had any joint property within the state, notwithstanding Rem. and Bal. Code, Sec. 236, authorizes in such case entry of judgment against both defendants, enforceable against their joint property only, *Brownfield v. Holland*, 63 W 86, 114 P 890 (1911). However, where judgment is rendered against joint promisees on a joint promise, the judgment must bind them equally. The liability of partners for the wages of an employee is joint and recovery cannot be had in one sum against one partner and in another sum, or the same sum, against another partner, but verdict should be against both partners for the reasonable value of the services, *Panos v. Manthon*, 141 W 126, 250 P 953 (1926) Under Rem. Comp. Stat., Sec. 236, an action upon a joint partnership contractual obligation may be maintained against one of the partners and judgment entered against him alone, where neither the partnership, nor either of the other two partners, both non-residents, one of whom was deceased, had any property within the state, *Halverstadt v. Estus*, 160 W 390, 295 P 175 (1931).

Section 119. WHEN JUDGMENT AGAINST OR IN FAVOR OF ONE PROMISOR DISCHARGES THE DUTY OF CO-PROMISORS.

(1) A judgment rendered by a court of competent jurisdiction within the United States against one or more joint promisors, or against one or more joint and several promisors, upon a joint promise, discharges the joint duty of the other joint promisors.

(2) A judgment by such a court in favor of one or more of such promisors, unless based on

(a) lack of jurisdiction, or
(b) contractual incapacity, or

(c) a discharge in bankruptcy, or

(d) a discharge or barring of the remedy by the Statute of Limitations,

discharges the joint duty of the other joint promisors.

(3) The several duty of a promisor who is severally, or jointly and severally bound with others is not discharged by judgment for or against one or more of the others.

Comment

a. The rules stated in the first and second Subsections have been changed by statute in many States.

ANNOTATION

Subsection (1). Washington cases accord with Section 119, Subsection (1). Where, in an action against all of the members of an unincorporated society, jointly and severally liable, a several judgment is entered against all of the defendants served with process, but no judgment is entered, as authorized by Rem. and Bal. Code, Sec. 236, against all of the defendants, including those not served, a summons, after judgment, upon an unserved defendant to show cause why he should not be bound by the judgment, will not lie, under Rem. & Bal. Code, Sec. 436, such procedure being available only when a joint judgment has been entered binding the joint property of all, *Nolan v. McNamee*, 82 W 585, 144 P 904 (1914)

and a judgment against one partner upon a contract which is joint only is a bar to any action therein against partners who were not parties to the suit, *Warren v. Rickles*, 129 W. 443, 225 P. 422 (1924).

Section 120. WHEN PART PAYMENT RECEIVED FROM ONE PROMISOR OPERATES IN FAVOR OF CO-PROMISORS.

(1) Full or partial performance of his contractual duty by one promisor severally, or jointly, or jointly and severally bound for that performance, terminates to the extent of the performance received the right of the person receiving the performance to enforce for his own benefit the promises of the other promisors.

(2) Full or partial satisfaction by any method of the contractual duty of one joint, or joint and several promisor, satisfies to the same extent the duties of all the promisors.

(3) In the absence of an agreement in specific terms to the contrary the amount or value of any consideration received

(a) as satisfaction in full or in part of the duty of one or more promisors severally bound, or

(b) for a promise of permanent forbearance to enforce in full or in part the duty of one or more promisors severally, or jointly, or jointly and severally bound,

terminates to the extent of that amount or value the right of the person receiving the consideration to enforce for his own benefit the promises of the other promisors.

Comment

a. A distinction must be taken between receipt of actual performance of a duty, and an agreement to accept satisfaction in some form other than that which the promiser originally undertook to give. The effect of this distinction when applied respectively to several, joint, and joint and several promisors appears from the section.

b. Subsection (1) states that performance whether full or par-

tial (as distinguished from an agreed substituted performance) terminates the right of the person receiving the performance against the other promisors to the same extent that it terminates the right against the promisor who rendered the performance. It is immaterial whether the co-promisors promise severally or jointly, or jointly and severally As is stated in Chapter 6, not only the promisee but a beneficiary of the promisee may have the right to enforce it. Consequently the section is applicable to persons, whether they are promisees or beneficiaries, who have the right to receive the performance which has been rendered.

Comment on Subsection (2)

c. The idea of unity in a joint duty involves the consequence that performance, payment, or accord and satisfaction of the duty of one promisor destroys the duty of all. Similarly partial satisfaction of the duty of one joint promisor satisfies to the same extent the duty of all. If the payment or satisfaction is by a surety or co-surety, he may not only have a right of indemnity or of contribution, but if he fully performs may by subrogation enforce the joint duty against the other joint contractors. This right, however, is that of the surety, and the person originally entitled to per formance cannot even though professing to act as a fiduciary for the surety maintain an action.

Comment on Subsection (3)

d. It is possible for a promisee to make an agreement in specific terms with one of several promisors each of whom is bound for the same performance, that a payment or performance made by him which differs from that originally promised, shall not be taken in whole or in partial discharge of the duty but shall merely terminate or limit the right of the person receiving the payment to enforce the several duty of that promisor. Under the rule stated in Subsection (1) even such an agreement cannot have this effect if all or part of what was originally promised is given, and as stated in Subsection (2) even where substituted performance is accepted as full or partial satisfaction, all joint or joint and several promisors are discharged to the same extent that any one of them is. But where the duties of the promisors are only several it is possible to make a settlement with one of them for substituted performance without thereby diminishing the creditor's rights against the others. Though this is legally possible, an inference should not be drawn that the duty of one promisor only is to be affected, unless circumstances clearly require that conclusion. Therefore unless there is express agreement that payment or satisfaction shall merely affect the duty of one, it is inferred that the performance due from all is limited. This is stated in Clause (a)

e. The same arguments are applicable to cases where a creditor has contracted to forbear permanently to enforce his claim against one promisor. Though the creditor may make such a contract and bargain that the consideration received for so doing shall not diminish his claim against the other promisors, the inference in the absence of proof to the contrary should be that whatever the creditor receives diminishes the original debt *pro tanto.* Unlike the case of accord and satisfaction, a contract even for permanent

forbearance may be made with one joint promisor without affecting the duty of the others (see Section 121), so that Clause (b) of Subsection (3) is applicable to joint and joint and several promisors as well as to several promisors, while Clause (a) relates only to several promisors.

ANNOTATION

Subsection (3) (*a*). Where a firm of contractors entered into an agreement to indemnify their surety against loss, and one of the partners at the same time deposited $1,000 with the surety as additional security, the liability of that partner is not limited to the $1,000 but each partner is liable to the surety for any balance due to it in excess of said sum, *Empire State Surety Co. v. Ballou*, 66 W 76, 118 P. 923 (1911)

Section 121. EFFECT OF DISCHARGE AND OF CONTRACT NOT TO SUE A JOINT PROMISOR ON THE DUTY OF A CO-PROMISOR.

(1) Where the obligee of a joint contractual promise discharges a promisor by release, rescission or accord and satisfaction, the other joint promisors are thereby discharged.

(2) Where such an obligee contracts not to sue a joint promisor, the other joint promisors are not discharged except in the cases and to the extent required by the law of suretyship.

Comment

a. A discharge of one or more of a number of promisors bound for the same performance may affect the other promisors by virtue of the rules governing joint promisors or by virtue of the rules governing principal and surety Only the first of these two sets of rules is dealt with in this Chapter. It may be said, however, that a surety whether bound merely severally, or jointly, or jointly and severally, may be discharged in whole or in part if the creditor deals with the principal debtor, knowing that he is such, to the prejudice of the surety

b. The word obligee as used in the Section, and in Sections 123, 128-132, includes not only a promisee but any beneficiary who under the rules of Sections 133-145 has the right to enforce a promise.

ANNOTATION

Subsection (1). Release of the estate of a deceased joint guarantor of a note, through failure of the holder to present a claim therefor to the probate court administering the deceased's estate, being brought about not by any affirmative act of the holder, does not release a co-guarantor, or his estate, *Donnerberg v. Oppenheimer*, 15 W 290, 46 P. 254 (1896)

where the obligee of a contract guaranteed by a number of co-guarantors compromised with some of them by accepting money and notes from them individually and surrendered the guaranteed contract and other valuable considerations, a guarantor sued upon his note given in such settlement is estopped from denying liability in the note by reason of release of his co-guarantors, *Simonds v. Noland*, 142 W 423, 253 P. 638 (1927).

Section 122. EFFECT OF RESERVATION OF OBLIGEE'S RIGHTS AGAINST CO-PROMISOR.

Written or oral words of a person entitled to enforce a promise which purport to discharge the promisor but expressly to reserve rights against other promisors jointly bound for the same performance do not operate as a discharge of the promisor but only as a promise not to sue him, except that a written discharge cannot be varied by an

accompanying oral statement or agreement that rights against other promisors are reserved.

Comment

a. Words which, if taken literally, purport to discharge a joint promisor are repugnant to words which purport to reserve rights against other joint promisors, since, if one of them is discharged, it necessarily follows that the others are. A similar principle is applicable where co-promisors, whether jointly bound or not, are principal and surety Words which purport to discharge the principal are repugnant to words which purport to reserve rights against the surety In both these cases the nearest approach that can be made to giving effect to the expressed intention is to interpret the words as a promise not to sue (instead of a release or discharge), coupled with a reservation of rights against co-debtors. This interpretation is given to the words whether they are written or oral, except that where the words of release or discharge are written and the attempted reservation of rights is oral, the parol evidence rule precludes effect being given to the attempted reservation. Whether words which are interpreted as a promise not to sue areoperative as a contract depends on the existence of the requisites for the formation of a contract as stated in Sections 19-95.

b. The word discharged is a general word covering all methods by which legal duty is extinguished. It does not include a contract not to sue or an unexecuted accord.

ANNOTATION

A release by the holder of a promissory note of one of its joint makers, coupled with a reservation of the holder's rights against the remaining parties liable therein, does not release the original payee who had sold and indorsed the note, except *pro tanto*, *Davis v. Gutheil*, 87 W 596, 152 P 14 (1915).

Section 123. DISCHARGE OF A JOINT AND SEVERAL PROMISOR. **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.**

Comment

a. The rule stated in the Section follows the analogy of the rule governing judgments. A judgment against one joint and several debtor does not discharge the other debtors from their several duties.

b. The statements with reference to suretyship in the Comment to Section 122 are applicable also to this Section.

ANNOTATION

This Section is contra to *North Pacific Mortgage Co. v. Krewson*, 129 W 239, 224 P 566 (1924), which held that the release of three of six joint and several makers of a promissory note releases all.*

*The annotations to this Chapter were prepared in memorandum form by the late Professor Harvey Lantz of the University of Washington Law School. His notes were arranged for publication by Dean Harold Shepherd and Warren Shattuck.