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JOINT LIABILITY—EFFECT OF THE DISCHARGE OF ONE OF THOSE JOINTLY LIABLE IN A CIVIL ACTION. *Louisville and Evansville Mail Co.* v. *Barns' Administrator*, 79 S. W. 261 (Court of Appeals of Kentucky, March 16, 1904).—The facts of the case were as follows: Clara Barnes was a passenger on board a steamer belonging to the Marsden Company. The latter provided no gangplank by which the passengers might disembark. At the moment that Clara Barnes was about to step off the steamer on to the wharf another steamer, owned by the Louisville and Evansville Mail Company, approached the wharf and struck it violently, thereby causing a separation between the steamer of the Marsden Company and the wharf, through which Clara Barnes fell and was drowned. Suit was brought by the administrator of Barnes against the Marsden and the Mail Companies charging joint and concurrent negligence Just before trial the plaintiff dismissed without prejudice his action against the Marsden Company, but proceeded with suit as regards the Mail Company. Verdict and judgment were given in favor of the plaintiff for $2000. Seven

days after the judgment the Marsden Company paid the plaintiff $1000, and the latter immediately entered credit to that amount on the judgment against the Mail Company. The Mail Company appealed on the ground that the appellee's cause of action had been satisfied. The court decided that each company had been guilty of negligence, the one in the manner of approach to the wharf and the other in not providing a gangplank. That the two companies were joint tort feasors, and the appellee could have sued both jointly or either separately for the full damages suffered. That recovery of full satisfaction from one of two joint tort feasors bars an action against the other for the same cause of action. That in the present case the appellee recovered partial satisfaction only from the Marsden Company and was not barred from recovering the balance from the Mail Company. Judgment was rendered in favor of the appellee.

Our principal case is one illustration of the effect of the discharge of one of those jointly liable in a civil action. The joint liability arose from joint negligence causing death. The discharge was by accord and satisfaction by payment of a part of the damages. The joint liability may arise either ex contractu, as on a joint or joint and several obligation, or ex delictu, for wilful or negligent injuries to persons or property. The various discharges fall into four classes: (I) Discharge by operation of law. (II) Discharge by a release. (III) Discharge by a covenant not to sue, and by an accord and satisfaction. (IV) Discharge by a judgment, by a judgment and execution, and by a judgment, execution, and satisfaction. We shall classify the cases according to the character of the discharge and consider each in turn. We shall note the effect of the different rules upon the facts in our principal case.

(I) Our first head comprises discharges by operation of law. The rules with respect to the more important of these discharges are well settled both in England and the United States. If the discharge is brought about without the consent of the party having the right of action and by no act of his, it will not impair his rights against those jointly liable. Thus, if one of the joint obligors or joint tort feasors dies, the survivors are not thereby discharged. *Penoyer* v. *Brace*, 1 Ld. Raymond, 244 (Eng. 1697); Act of 8 and 9 Wm. III, c. 2, s. 7; *Union Bank* v. *Mott*, 27 N. Y. 633 (1863); *Colt* v. *Learned*, 133 Mass. 409 (1883); *Seaman* v. *Slater*, 18 Fed. R. 485 (1883); *Githens* v. *Clark*, 158 Pa. 616 (1893); *Henning* v. *Farnsworth*, 23 S. W. 663 (Va. 1895).

The same is true if one joint debtor is discharged in bankruptcy. *Megrath* v. *Gray*, 43 L. J. C. P. 63 (1873); Act of July 1, 1898, s. 16 (U. S.). Since unliquidated damages for

a tort are not provable under a commission these are not barred by a discharge in bankruptcy and the liability of those jointly liable is not affected. Act of July 1, 1898, s. 17 (U. S.).

On the other hand, if the discharge by operation of law occurs through the voluntary act of the plaintiff or of the person in whose favor the joint liability arose, and whose legal representative is the plaintiff, then all those who are jointly liable are likewise discharged. Thus, if the plaintiff marries one of the joint obligors or joint tort feasors. *Turner* v. *Hitchcock*; 20 Ia. 310 (1866).

So also if the obligee makes one of the obligors his executor and the latter receives assets and acts in that capacity, all the joint obligors are discharged. *Fryer* v. *Gildridge*, Hob. 14 (1641); *Cheetam* v. *Ward*, 1 B. and P. 630 (1797); *Rawlinson* v. *Shaw*, 3 T. R. 577 (1790); *Freakly* v. *Fox*, 9 B. and C. 130 (1829); *Low* v. *Peskett*, 16 C. B. 500 (1855).

(II) The second kind of discharge is by a release. The rule in England is that the execution of a release of all claims against one, effects the discharge of all those liable jointly with the party released. The attitude of the English courts has been to consider the debt or tort as giving rise to one cause of action. Each of the wrongdoers is responsible to the injured party for the entire damage. Hence, if the latter releases all his claims against one of them he is conclusively presumed to have released his entire cause of action, although his manifest intention was otherwise. Co. Litt. 232, a (1803). With this attitude it is immaterial whether the release is under seal or not, provided that it is supported by a sufficient consideration. This point that a seal is unnecessary is doubtful, but such is the opinion of Lord Denman in *Nicholson* v. *Revill*, 4 A. and E. 675 (1836), which was the first case to deliberately consider the question. In most of the earlier cases the release was under seal. *Cocke* v. *Jenner*, Hob. 90 (1616); *Clayton* v. *Kynaston*, 2 Salk, 574 (1712); *Everhard* v. *Heine*, Litt. 191 (1668). But it was not under seal in *Hammon* v. *Rolle*, March. 202 (1643), and *Rex* v. *Bayley*, 1 C. and P. 435 (1824). So little emphasis was laid upon the seal that for several years the courts held that a mere non-suit of one of those jointly liable destroyed the cause of action against all of them. This doctrine was introduced in *Parker* v. *Lawrence*, Hob. 96 (1617), and was overruled in *Walsh* v. *Bishop*, 3 Croke, 243 (1632). Story, J. (1 Contracts, 53, 5th ed.), concurs with Lord Denman's opinion that in England a seal is unnecessary to a release. The broad rule that a release of one discharges all those jointly liable is now firmly established in England. In addition to the cases just cited, see *Morton's Case*, Cro. Eliz. 30 (1580); *Blundt* v. *Snedson*, Cro. Jac. 116 (1608);

Kiffin v. *Willis*, 4 Mod. 379 (1708); *Thurman* v. *Wilde*, 11 A. and E. 453 (1840). However, two early cases held contra: *Penruddick's Case*, 3 Co. Rep. 205 (1593), and *Greely* v. *Lee*, Palmer, 319 (1624).

The American courts have adopted a different attitude and have sought to assure to the injured party one complete satisfaction. Accordingly, emphasis is laid upon the seal. If the plaintiff executes a release under seal of all claims against one of those jointly liable, the reasoning of the English judges applies, and all those jointly liable are discharged. Since the instrument is under seal, he is conclusively presumed to have received full satisfaction, and no evidence is admissible to show that he did not receive satisfaction in full. But if the release is merely by parol, such evidence is admissible, and if complete satisfaction has not been received, the plaintiff may proceed for the balance against the rest. Thus the rule in the United States is that a release as to all claims again one will not discharge those jointly liable unless it is a technical release under seal. Liability arising from a joint obligation: *Ward* v. *Johnson*, 13 Mass. 148 (1816); *Rowley* v. *Stoddard*, 7 John. 207 (N. Y. 1810); *Bank* v. *Messenger*, 9 Cow. 37 (N. Y. 1828); *Harvey* v. *Sweatley*, 23 Tenn. 449 (1844); *Armstrong* v. *Hayward*, 6 Cal. 183 (1856); *Maslino* v. *Hiet*, 37 W. Va. 536 (1892); *Arnett* v. *Mo. Pac. Ry. Co.*, 64 Mo. App. 368 (1895). The early cases in Pennsylvania are contra: *Mortland* v. *Himes*, 8 Pa. 262 (1848), and are overruled in *Burke* v. *Noble*, 48 Pa. 168 (1864). Liability arising from a joint and several obligation: *Tuckerman* v. *Newhall*, 17 Mass. 581 (1822); *Bradford* v. *Prescott*, 85 Me. 581 (1893). Liability arising from a joint tort: *Ellis* v. *Bitzer*, 2 Ohio, 89 (1825); *Ayer* v. *Ashmead*, 31 Conn. 452 (1863) (trespass); *Tompkins* v. *Clay Street Ry. Co.*, 66 Cal. 163 (1884) (personal injury from collision); *Spurr* v. *North River Ry. Co.*, 56 N. J. L. 346 (1894); *Urton* v. *Price*, 57 Cal. 270 (1881) (personal injury from explosion); *Long* v. *Long*, 57 Ia. 497 (1881) (tort by election judges); *Cheetwood* v. *Cal. Nat. Bank*, 113 Cal. 414 (1896) (fraud by trustees); *Atwood* v. *Brown*, 72 Ill. 723 (1886) (wrongful levy).

(III) The third class of discharges includes a covenant not to sue and an accord and satisfaction. These two discharges are analogous and merge into each other. The English courts have established the rule that a covenant not to sue one does not discharge any of those jointly liable. It may not be pleaded as a defence even by the party to whom it is given. It merely confers upon the latter the right to a cross-action for breach of contract. This principle seems to have had its origin in the older rule that a covenant not to sue a sole obligor for a

limited time merely gave the right to a cross-action. *Deux* v. *Jefferies*, Cro. Eliz. 352 (1589); *Alyff* v. *Scrimpshire*, 1 Show. 46 (1709). However, a covenant not to sue a sole obligor was allowed to be pleaded in bar to avoid circuity of action. *Lacy* v. *Kynaston*, 1 Lord Raymond, 690 (1715).

The different attitude of the judges of the two countries is again apparent. The English courts do not treat the consideration received for the covenant not to sue as a partial satisfaction of the damages unless it was so intended. *Dean* v. *Newhall*, 8 Term, 168 (1799); *Hutton* v. *Eyric*, 6 Taunt. 288 (1815).

On the other hand, the American courts, with their emphasis upon the securing of one and only one complete satisfaction, credit as partial payment of the damages any moneys received in consideration for a covenant not to sue. The plaintiff may proceed for the balance against the rest. *Tuckermann* v. *Newhall*, 17 Mass. 581 (1822); *Bowman* v. *Davis*, 13 Col. 297 (1889). Any money received in accord and satisfaction will be thus credited. Because of this rule the plaintiff in our principal case credited on the judgment against the Louisville and Evansville Mail Company the amount received from the Marsden Company.

The question frequently arises in the United States whether full or partial satisfaction was received in return for the covenant not to sue. When there is a fixed debt or liquidated damages the receipt of a smaller sum from a joint obligor is clearly in but partial satisfaction. *Couch* v. *Mills*, 21 Wend. 424 (1839); *McAllister* v. *Sprague*, 24 Me. 297 (1844).

The same is true where the amount of damages is ascertainable with reasonable certainty. Trespass and conversion: *Ellis* v. *Esson*, 50 Wisc. 128 (1880); *Smith* v. *Bayle*, 58 Ala. 600 (1877); *Horsely* v. *Moss*, 5 Tex. Civ. App. 341 (1893); *Snow* v. *Chandler*, 10 N. H. 92 (1839); *Pogle* v. *Meilke*, 60 Wisc. 248 (1884). Fraud: *Parsons* v. *Hughes*, 9 Paige, 500 (N. Y. 1841); *Miller* v. *Fenton*, 11 Paige 18 (N. Y. 1844); *Merchants' Bank* v. *Curtis*, 37 Barb. 317 (1861); *Irwin* v. *Scribner*, 15 La. An. 583 (1860).

But where the damages are not reasonably ascertainable and the plaintiff makes an accord and satisfaction with one of the joint tort feasors and receives or agrees to receive a particular sum in discharge of the releasee's liability, then the courts will not permit the plaintiff to assert that the damage which he suffered exceeded the amount he received in accord and satisfaction. It is immaterial whether he intended to reserve the liability of the rest and recover further sums from them. The same is true if the case has once come before a jury and the jury have awarded any sum in satisfaction of the plaintiff's

cause of action. The damages are liquidated in both cases and cannot be increased. *Ellis* v. *Betzer*, 2 Ohio Rep. 89 (1825); *Eastman* v. *Grant*, 34 Vt. 387 (1835); *Brown* v. *Kencheloe*, 3 Cold. 292 (Tenn. 1866); *Ayer* v. *Ashmead*, 31 Conn. 44 (1863); *Stone* v. *Hickinson*, 89 Mass. 26 (1863); *Bromley* v. *School District*, 47 Vt. 381 (1875); *Donaldson* v. *Carmichael*, 102 Ga. 40 (1897); *Hubbard* v. *St. Louis R. R. Co.*, 72 S. W. 1073 (Mo. 1903); *Tompkins* v. *R. R. Co.*, 66 Cal. 63 (1884); *Wagner* v. *R. R. Co.*, 41 Ill. App. 408 (1891); *Spurr* v. *R. R. Co.*, 56 N. J. L. 346 (1894); *Denver R. R. Co.* v. *Sullivan*, 22 Col. 302 (1895); *Miller* v. *Back*, 168 Ia. 576 (1899); *Hartigan* v. *Dickson*, 81 Minn. 284 (1900); *Dufur* v. *Boston and Me. R. R. Co.*, 53 Atl. 1068 (Vt. 1903).

Under this rule, if the appellee in our principal case had made an accord and satisfaction with the Marsden Company at the time when he dismissed the suit without prejudice as to them, the courts would not have allowed him to recover any further sum from either of the companies. He shrewdly waited until the jury liquidated the damages. The subsequent receipt from one joint tort feasor of a sum less than the amount of damages fixed by the jury does not discharge the joint tort feasor from paying the balance. *Irwin* v. *Milbank*, 56 N. Y. App. 635 (1874).

Another important question arises in the construction of an instrument in ascertaining whether it is a release of a covenant not to sue. The English courts looked to the words to see whether they verbally amounted to a release or a covenant not to sue. As we have seen, the seal is not considered as a distinguishing feature. During the first half of the nineteenth century a difficulty arose as to the interpretation of an instrument which contained a release in general terms followed by a reservation that it should not discharge those jointly liable. The issue was, shall the intention of the parties govern, or does a release effect the discharge of the rest by operation of law? The early rule was voiced in *Everhard* v. *Heine*, Littleton Rep. 191 (1668), in which it was held that the proviso of reservation shall be construed as void as inconsistent with the rest of the instrument. 5 Bac. Abr. 702, 18 Vin. Abr., "Release," G, a, 4. Contemporaneous with this reason, which treats the release as a discharge by operation of law, existed another reason applicable only where the right of contribution existed between the debtors, which based the rule upon a presumption of the releasor's intention. The reasoning was that if X release A, one of two joint debtors, A and B, he is presumed to have intended the complete discharge of A. Since the right of contribution exists between A and B, if B is called upon to pay any of the debt, B may sue A for contribution. Thus

the release to A would not have worked his discharge. Hence X must be presumed to have intended to release B as well as A in order to defeat this possible contribution. *Kearseley* v. *Cole*, 16 M. and W. 128 (1849).

The transition to the position that a release with a proviso amounts to a covenant not to sue was gradual, and the initial steps were taken unconsciously. The first case which shook the strength of the old rule was *Ex Parte Gifford*, 6 Ves. Jr. 805 (1802). A receipt was given to one of several co-sureties expressed to be in payment of £191 and two notes which when duly paid would be in full of said debt and all other demands from the party released. Lord Eldon held that this instrument did not discharge the co-sureties.

The next case was *Solly* v. *Forbes*, 2 Broad and Bing. 38 (1820). X gave a release to A, one of two partners, A and B, containing a proviso that it should not prejudice any claims against B, and that it should be lawful for X to sue B or both A and B, or whoever had the joint estate of A and B or the separate estate of B. X brought suit against both A and B. A pleaded the release. In the replication X set forth the agreement and averred that the present suit was brought with the intention of reaching the joint estate or the separate estate of B. The court overruled the demurrer. Dallas, C. J., relied upon an obscure case, *Morris* v. *Wilford*, 2 Show. 47 (1691), which he considered an authority for the proposition that a release shall be construed according to the particular purpose for which it was made. These were the words of the reporter's note, but the case did not decide such a broad principle; it merely held that a release as to all claims given to an executor did not release claims against him in his individual capacity. Dallas, C. J., relied upon it as holding that in all cases a release shall be construed according to the maker's intention. He ignored the old rule that the proviso was void.

It does not appear that the preceding case was brought to the attention of Lord Denman, who gave the decision in the next case in this series, *Nicholson* v. *Revill*, 4 A. and E. 675 (1836). The obligee struck off the name of one of two joint and several debtors from the instrument containing the obligation, and sued his co-debtor. The court held that this discharged the latter also. *Cheetam* v. *Ward*, 1 Broad. and Bing. 130 (1819), was relied upon, and *Ex Parte Gifford* was strongly disapproved of.

Ten years later Baron Parke in *Kearsley* v. *Cole*, 16 M. and W. 128 (1846), decided that the discharge of the principal with a reservation of rights against the surety and executed with the latter's consent did not discharge the obligee's right of action against the surety. He based his opinion on the con-

sent obtained from the surety, whom he treated as a co-debtor. If the latter subsequently was compelled to pay the debt, he had already consented to the release of the principal debtor and had thus waived his right to contribution. Hence, the principal debtor alone was discharged by this instrument.

Thompson v. *Lacke*, 54 Eng. Com. Law R. 540, was decided in the same year and reached the same conclusion even in the absence of the consent of the joint debtor who was not released. This position was reached by a reliance upon the authorities, not by reasoning out the position of the parties. Wilde, J., considered *Solly* v. *Forbes* as an authority for his position and thought that the remarks in *Nicholson* v. *Revill* were mere dicta to the contrary.

In 1853 Lord Thurlow, in the case of *Owen* v. *Homer*, 15 Jurist, 339, doubted the ability of a creditor to grant time to his debtor and yet maintain unimpaired his right of action against the surety. The case was sustained in the House of Lords (11 Jurist, 816), but on different grounds, and Chancellor Cranworth strongly dissented from the dicta of Lord Thurlow. This case was relied upon in *Price* v. *Barker*, 4 E. and B. 779 (1855), which held that a release to one joint and several obligor containing a proviso of reservation of remedies against the remaining obligors and executed without the consent of the latter does not effect their discharge. The rule in this case has not been questioned since, and such is the law of England to-day.

This same problem of distinguishing a release from a covenant not to sue has arisen in the United States and a different principle has been adopted. The general test, as we have noted already, is that an instrument to be a release must be under seal; all other instruments are to be construed as covenants not to sue. The earlier Pennsylvania cases are exceptions and have adopted the English rule and held that a parol release might have the same effect as a sealed release. *Milliken* v. *Brown*, 1 Rawle, 391 (1829). These cases were definitely overruled in *Burke* v. *Noble*, 48 Pa. 168 (1864).

When the instrument is not under seal and the amount of damages is not reasonably ascertainable, the principles which we have already noted are adopted (*supra*, page 187).

When the instrument is not under seal and the amount of damages are reasonably ascertainable, the intention of the parties governs on the question whether one or all of those liable are discharged. In the absence of words in the instrument expressing the intention the presumption seems generally to be in accord with the verbal distinctions adopted in England. That is, that those words which in England would be construed as a release would in this country be presumed in the absence of

other evidence to have been intended as a release, and thus likewise as to a covenant not to sue. *Walker* v. *McCulloch*, 4 Me. 421 (1827); *Williamson* v. *McGinnis*, 50 Ky. 74 (1850); *Mullendore* v. *Wertz*, 75 Ind. 431 (1881); *Browne* v. *Bank*, 45 N. J. L. 360 (1883); *City of Chicago* v. *Smith*, 95 Ill. App. 387 (1901); *Bank* v. *Mercer*, 55 Atl. R. 435 (Md. 1903). It seems doubtful whether evidence of the maker's intention will be admitted if it is not apparent from the instrument. Evidence admitted: *Burke* v. *Noble*, 48 Pa. 168 (1864); *Winslow* v. *Brown*, 7 R. I. 95 (1861). Evidence excluded: *Heckman* v. *Manning*, 4 Col. 543 (1878); *Goss* v. *Ellson*, 136 Mass. 503 (1884). When the intention is apparent on the face of the instrument it is well settled that this intention shall govern. *Parmerlee* v. *Lawrence*, 44 Ill. 405 (1807); *Bloss* v. *Plymale*, 3 W. Va. 393 (1869); *Bradford* v. *Prescott*, 85 Me. 482 (1893); *Merchants'* v. *Nat. Bank*, 31 S. W. 1091 (Tex. 1895); *Elgin City Bank* v. *Self*, 35 S. W. 953 (Tex. 1896).

When the instrument is under seal it is construed as a release unless it contains an express proviso that those jointly liable shall not be discharged. The courts are not uniform in their interpretation of the sealed instrument with a proviso. A few have adopted the rule of *Everhard* v. *Heine* (*supra*, page 188) and held that the proviso is void as inconsistent. *Collier* v. *Field*, 1 Mont. 612 (1872); *Gunther* v. *Lee*, 45 Md. 60 (1876). The general rule seems to be that the proviso will be honored if the damages are ascertainable. *North. Ins. Co.* v. *Potter*, 63 Cal. 157 (1883); *Pettigrew Machine Co.* v. *Harmon*, 45 Ark. 290 (1885); *Bradford* v. *Prescott*, 85 Me. 482 (1893); *Irwin* v. *Scribner*, 15 La. An. 583 (1860).

But when the damages are not ascertainable the proviso will be treated as void on the grounds that the plaintiff has received one complete satisfaction. *Brownson* v. *Fitzhue*, 1 Hill, 188 (N. Y. 1841); *Mitchell* v. *Allen*, 25 Hun. 543 (N. Y. 1881); *O'Shea* v. *C. and St. L. R. R. Co.*, 44 C. C. A. 60 (U. S. 1899); *Abb* v. *N. Pac. R. R. Co.*, 28 Wash. 428 (1902); *Dunlaney* v. *Buffon*, 173 Mo. 1 (1902); *McBridge* v. *Scott*, 93 N. W. 243 (Mich. 1903); *Leeds* v. *N. Y. Tel. Co.*, 79 N. Y. Ap. 121 (1903).

(IV) The fourth and remaining class of discharges consists of a judgment, a judgment and execution, and a judgment, execution, and satisfaction. The nature of the joint liability largely determines the rules with respect to this class of discharges. Where two or more are jointly and not severally bound, and the plaintiff fails to join all of the joint obligors who are within the jurisdiction of the court, a plea in abatement lies, and if the defendants fail to file the plea in abatement before the case comes to judgment, those not joined are

completely discharged from liability. It is immaterial whether execution or satisfaction follow. 3 and 4 Wm. IV, c. 42, s. 8; Freeman on Judgments, 231; *Munn* v. *Haynes*, 46 Mich. 140 (1881); *Groat* v. *Agens*, 107 N. Y. 633 (1887); contra: *Sheey* v. *Manderville*, 6 Cranch, 253 (1810), which was overruled in *Mason* v. *Eldred*, 6 Wall. 231 (1867).

The old rule in England was that the court would not allow the plaintiff on obtaining a joint judgment to sue out execution against less than the entire number of the judgment debtors. 1 Rolle Abr., "Execution." N. From this we could gather that if the plaintiff actually did sue out execution against some only of the defendants he would thereby discharge those omitted. But this principle does not seem to hold in the United States. *Michel* v. *Benner*, 24 La. An. 287 (1872); *Nichols* v. *Dunbar*, 58 Cal. 605 (1881); *Crisset* v. *Wilcs*, 13 Civ. Pro. Rep. 527 (N. Y. 1888).

If the liability arise from a joint and several contract, the obligee may treat the contract as a joint one, in which case the liability will be exactly like that arising from joint and not several contract, or he may treat it as a several contract. In the latter case no question of joint liability arises. But he may not sue more than one and less than the entire number of obligors. *Winslow* v. *Herrick*, 9 Mich. 380 (1861).

If the plaintiff proceeds and obtains a judgment against several debtors jointly and one of them pays his share or makes an accord and satisfaction, the court will interpret the receipt as regards the discharge of the other judgment debtors either as a release or a covenant not to sue by the same principles which are applicable in the case of an ordinary debt. *Kolb* v. *Nat. Surety Co.*, 176 N. Y. 133 (1903). Altered in Pennsylvania by Act of 1862, March 22, P. L. 167.

When the liability arises from a joint tort the person injured may sue any one or several or all of the joint tort feasors. Each is responsible for the entire damage and no plea in abatement lies for non-joinder. *Needam's Case*, 5 Co. 52 (1612).

However, the question still arises whether or not judgment, execution, or satisfaction against one tort feasor bars subsequent actions against the rest. The modern English rule is that a mere judgment bars, most of the American jurisdictions hold that nothing short of satisfaction discharges the joint tort feasors, while a few courts adopt the intermediate position that an execution will accomplish this result. It is to be noted that the rules prevailing in England and the United States are in harmony with the different attitudes (*supra*, page 185) of the judges of the two countries.

It is very difficult to determine from the early cases in Eng-

land what was the exact position held by the court. The language in nearly all is that judgment and execution are a bar, but there is nothing which would lead us to believe that "execution" was not used synonymously with "satisfaction." *Honey* v. *Rice*, 2 Rolle, 224 (1217); *Anonymous* Jenkins 1 Cent. case 89 (1893); *Lindell* v. *Pinfold*, 1 Leon. 19 (1584); *Hitchcock's Case*, 3 Leon. 122 (1585); *Hitcham* v. *Murcham*, Noy, 4 (1656); *Heydon's Case*, 11 Co. 8 (1614).

Cocke v. *Jenner*, Hob. 60 (1703), laid down the rule that where there are several actions against several defendants the plaintiff may take his choice of the best damages, yet when he has taken satisfaction he can take no more. This case is the precedent for those courts which hold that execution, although unsatisfied, precludes further recovery.

The case which unsettled the law in England and led the way to the modern English rule is *Brown* v. *Wooton*, Cro. Jac. 73, also in Moore, 762, and Yelv. 67 (1606). It was an action on the case for trover and conversion of some plate. The defendant pleaded that the plaintiff had brought an action of trover against J. S. and had recovered judgment and execution. On demurrer, the plea was adjudged good. Popham, C. J., said: "If one had judgment in trespass against one and recovered damages certain, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *e contra*, if one hath cause of action against two and obtain judgment against one, he shall not have a remedy against the other; and the difference between this case and the case of debt and obligation against two is because there every one of them is charged and liable for the entire debt, and therefore a recovery against one is no bar against the other until satisfaction." Fenner, J., added: "In case of trespass after judgment given the property of the goods is changed so that he may not seize them again." The further reason is added that the demand rested in damages and the judgment reduced them to certainty, and therefore another suit could not be maintained for that which was uncertain.

This case was not immediately followed. *Higgen's Case*, 6 Co. (1793); *Drake* v. *Mitchell*, 3 East, 258 (1803). The court in *Claxton* v. *Swift*, 2 Shower, 494, also in 3 Mod. 86, and in 1 Lutw. 882 (1685), likewise adopted the old rule and said that it was never pretended till Brown v. *Wooton* that a mere judgment would act as a bar.

In 1844 *Brown* v. *Wooton* was affirmed by *King* v. *Hoare*, 13 M. and W. 494 (1844). The court upheld three propositions: (1) A judgment without satisfaction against one of two joint debtors is a bar to a suit against the other. (2) A judgment in a court of record changes the nature of the cause

of action and prevents it being the subject of another suit, and the cause of action being single cannot afterwards be divided into two. (3) As regards a discharge, a joint contract cannot be distinguished from a joint tort. In spite of the strong language used this case did not fix the law. A case in 1865 was decided according to the old rule, *Priestly* v. *Fernie*, 13 Weekly Rep. 1089. But the law of England on this point as it stands to-day was determined by *Brinsmead* v. *Harrison*, L. J. 6 C. P. 584, in 1871, which held that a mere judgment against one tort feasor barred an action against another. See *In Re Morgengry*, 69 L. J. Probate N. S. 3, also in 81 L. T. N. S. 417, and 48 Week. R. 121 (1899).

The rule of England that a judgment bars has been adopted in only one of the American states, the one in which the question first arose—Virginia. Two early cases adopted the rule, *Ammonett* v. *Harris*, 1 Hen. and M. 488 (1807), and *Wilkes* v. *Jackson*, 2 Hen and M. 355 (1808). In 1895 the Supreme Court of the state reaffirmed these earlier cases. *Petticolas* v. *Richmond*, 95 Va. 456.

Pennsylvania and Tennessee in the early cases adopted the English rule, but subsequent decisions in each state have firmly established the principle that nothing less than a satisfaction bars. *Floyd* v. *Brown*, 1 Rawle, 121 (1829), and *Marsh* v. *Pier*, 4 Rawle, 285 (1833), overruled in *Fox* v. *Northern Liberties*, 3 W. and S. 103 (1841). *Rochester* v. *Anderson*, 1 Bibb. 439 (1804), overruled in *Knott* v. *Cunningham*, 2 Sneed, 204 (1854).

Rhode Island in *Hunt* v. *Bates*, 7 R. I. 217 (1802), adopted the same position, but has since returned to the intermediate principle that execution bars. *Parmenter* v. *Barstow*, 21 R. I. 480 (1899).

The rule that execution bars was also adopted in Maine, Michigan, Indiana, and Arkansas. Michigan, Indiana, and Arkansas have not altered their position. *Davis* v. *Scott*, 1 Blackf. 169 (Ind. 1832); *Ashcraft* v. *Knoblock*, 146 Ind. 174 (1896); *McGee* v. *Overly*, 12 Ark. 164 (1851); *Boardman* v. *Acer*, 13 Mich. 77 (1866); *Kenyon* v. *Woodruff*, 33 Mich. 310 (1876). The early Maine case has been definitely overruled. *White* v. *Philbrick*, 5 Me. 147 (1828); *Cleveland* v. *Bangor*, 87 Me. 259 (1898).

The most important cases holding that a satisfaction bars are as follows: *Lovejoy* v. *Murray*, 3 Wall. 1 (U. S. S. C. 1865); *Smith* v. *Gayle*, 58 Ala. 600 (1877); *Vandever* v. *Pollak*, 107 Ala. 551 (1899); *Cheetwood* v. *Cal. Nat. Bank*, 113 Cal. 414 (1896); *Sheldon* v. *Kibbe*, 3 Conn. 214 (1819); *Vincent* v. *McNamara*, 70 Conn. 332 (1897); *Norfolk Lumber Co.* v. *Simmons*, 2 Marv. 317 (1895); *Worrick* v. *People*,

187 Ill. 110 (1900); *Miller* v. *Peck*, 108 Ia. 575 (1898); *Westbrook* v. *Mize*, 35 Kas. 299 (1881); *Elliott* v. *Porter*, 5 Dana. 299 (1837); *Berkley* v. *Wilson*, 87 Md. 219 (1898) (the satisfaction received was one cent); *Loring* v. *Salisbury Mills*, 125 Mass. 153 (1878); *Haydon* v. *Woods*, 16 Neb. 306 (1884); *Fowler* v. *Owen*, 68 N. H. 207 (1895); *Allen* v. *Craig*, 14 N. J. L. 104 (1834); *Russell* v. *McCall*, 141 N. Y. Ap. 437 (1894) (libel); *Martin* v. *Buffaloe*, 128 N. C. 308 (1901); *Maple* v. *R. R. Co.*, 40 Oh. St. R. 313 (1884); *Deroca* v. *Hamilton*, 14 Pa. Co. Ct. 317 (1894); *Hawkins* v. *Hatton*, 1 Nott and McCord, 318 (1818); *Huffman* v. *Hazlett*, 11 Lea, 549 (Tenn. 1883); *Saderson* v. *Caldwell*, 2 Aik, 195 (Vt. 1827); *Griffie* v. *McClung*, 5 W. Va. 131 (1872).

A. S. F.