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Release of Joint Tortfeasors in Montana

Cecil N. Brown

RELEASE OF JOINT TORTFEASORS IN MONTANA

In a recent decision[1] the court examined the question of the effect of the release of one of two or more joint tortfeasors. At the instance of D, S put P in jail. P was released and subsequently sued S for damages for false imprisonment. S and his surety settled for $1000, and a written release was given by P. The release was entitled "Release in Full of All Claims," but the body of the instrument stated, "I do hereby release and forever discharge S and his surety Co," and further, ". . . hereby agree to accept said sum as complete compensation for all injuries sustained in connection therewith." The court said that the intention of the parties is the controlling element. From its examination of the release, the court found that it was intended as a release of all claims. Under the rule laid down that a release must expressly reserve the rights against the other party or be a covenant not to sue to prevent its being a discharge, it might be argued that the court had good grounds for so treating the release. But it is submitted that a closer examination of the instrument and relevant statory provisions as to the interpretation of contracts[2] would lead to the view adopted by the dissenting judge. By construing the two parts of the agreement together in compliance with those statutory rules[3], we discover a reasonably clear intention not to release the other parties.[4]

It is not the purpose of this comment to criticize the particular narrow decision in this case, but rather to suggest a remedy which will make the law certain in all such cases and remove this "surviving relic of the Cokian period of metaphysics"[5] from our law. Decisions on release are many and

[1]Beedle v. Carolan et al. (1944) 115 Mont. 587, 148 P. (2d) 559.
[2]R. C. M. 1935.
§7532: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
§7534: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."
§7538: "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."
§7539: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."
[3]*Ibid.*
[4]In 148 P. (2d) at p. 562 the dissent says, "if P intended to release D, or if S believed P intended to release any others than those named in the agreement, particularly D, it would have been a simple matter to have inserted D's name in the agreement."
[5]*Release to One Joint Tortfeasor*, John H. Wigmore, 17 ILL. L. REV. 563.

varied. As early as 1432[6] the court makes a clear statement of the rule that

> ". . . when two join in a trespass, they so make one trespasser, as either of them is as well answerable for his fellows' act as for himself. And therefore a release to one dischargeth the whole trespass."

The earliest authoritative statement found was taken from Littleton by Coke.[8] By Coke's time the doctrine was well established[9] in English law and subsequently was incorporated into American decisions.[10]

At common law releases were under seal,[11] and until recent times a release under seal of one joint tortfeasor was held to release all according to the great weight of authority.[12] The reason most frequently advanced was that because one joint tortfeasor was liable for all damages inflicted, when he has paid a consideration and received a release, the injured party will be presumed to have received a consideration for the whole injury,[13] and it was held that the meaning of such release cannot be controlled by parol evidence and that the law raises a *conclusive presumption* that it was given in full satisfaction of the injury.[14] In a large number of cases, therefore, it came to be held that a release under seal of one joint tortfeasor released all even though it expressly reserved the party's right against other joint tortfeasors[15] on the ground that it was inconsistent with

[6]Cocke v. Jennor, Hobart 66, 80 Eng. Reprint 214.
[7]80 Eng. Reprint 218.
[8]2 Coke on Littleton (1818) 376. 232a.
[9]Supra, note 5.
[10]Ibid.
[11]6WILLISTON, CONTRACTS (Revised Edition, 1936) pp. 5161, 5162.
[12]50 A. L. R. 1058, anno.
[13]Gunther v. Lee (1876) 45 Md. 60, 24 Am. Rep. 504; Masterson v. Berlin Street R. Co. (1927) 83 N. H. 190, 139 A. 753. See Arnett v. Missouri P. R. Co. (1896) 64 Mo. App. 368. In the Gunther case it was said that the opinion most generally adopted was that a recovery of one of several tortfeasors is not of itself, without satisfaction, a bar to the right of recovery against others. But as consideration is always implied in a release under seal, the release by deed of one joint tortfeasor will discharge all.
[14]See O'Shea v. N. Y., C. & St. L. R. Co. (1901) 44 C.C.A. 601, 105 Fed. 563; Ellis v. Esson (1880) 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830,-833. The Ellis case was not a case of a technical release, but rather of an ordinary writing in which it was not the intention to discharge other parties but only the one mentioned, it further appearing that full satisfaction was not received.
[15]PROSSER, TORTS (1941) p. 1108; Gunther v. Lee, note 13 *supra;* Babcock & Wilcox Co. v. Pioneer Iron Works (1888) 34 Fed. 338; O'Shea v. N. Y., C. & St. L. R. Co., note 14 *supra;* Louisville & N. R. Co. v. Allen (1914) 67 Fla. 257, 65 So. 8, L. R. A. 1915 C 20.

the legal effect of the release and therefore was to be ignored.[16] This should properly be true where a satisfaction has been received for all injuries suffered. But where a complete satisfaction has not been received, it operates harshly against a party who in ignorance of the effect of his action, executes a release to a tortfeasor who pays a portion of the damages. The fact that it is under seal should have no such finality as has been attributed to it. Especially should this be true where the seal has been deprived of its efficacy. A few cases have reached a result different from those above considered. In one of these [17] the court said,

> "What the law under our theory regards is not technical or artificially created conditions, but the substantial matter of acceptance of consideration in satisfaction for the injury received, and receipts in full and releases, sealed an unsealed, are only incidents which have their bearing on the ultimate question. Different degrees of significance may attach to the several kinds of writing as evidence of satisfaction received, but behind them all lies the ultimate decisive fact sought after, of the acceptance or non-acceptance of consideration in full satisfaction."

Further in discussing the question as to the presumption of consideration, the court said,[18]

> "When the instrument is in the form of an absolute and unqualified release, as most such instruments are, the releasor, when he endeavors to get behind it is met by the irrebuttable presumption that satisfaction of the wrong has been received. But as addressed to qualified or limited releases whose terms expressly negative the receipt of full satisfaction, there is no reasonable basis for the presumption of the receipt of full satisfaction for the wrong or obligation due to the presence of the seal. . . . The cardinal rule of interpretation is the discovery of the intent and meaning of the parties from the language used, and that rule applies as well to sealed as to unsealed instruments."

But that was a very liberal holding and the great weight of authority was contra. There seems to be a recent trend away from the strict application of the ancient rule as regards sealed instruments. In a recent Mississippi case[19] a release under seal

[16]See Walsh v. N. Y., C. & H. R. R. Co. (1912) 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137.
[17]Dwy v. Connecticut Co. (1915) 89 Conn. 74, 92 A. 883, L. R. A. 1915 E 800, Ann. Cas. 1918 D 270.
[18]L. R. A. 1915 E 807.
[19]Gulf Refining Co. v. Ferrell (1933) 165 Miss. 296, 147 So. 476.

was held ineffective as against another tortfeasor on the ground that it wasn't *intended* to release the other. This tendency shows a recognition by some courts of the inadequacy of the common-law rule in meeting a variety of situations.

As regards releases not under seal, the courts are not agreed.

> "In a good many jurisdictions there has been a definite retreat from the rule that a release to one tortfeasor necessarily releases all who are liable for the same damage.[20]"

One who is injured by another party and releases him cannot thereafter, so long as the release has not been set aside, recover from that other for the injury. And a good many courts take this same view in case of joint torts.[21] An example of the absurd lengths to which some courts have gone is seen in an early Iowa case.[22] There several women raided plaintiff's saloon and destroyed his property. Subsequent thereto and prior to suit plaintiff married one of the women. The court held that this marriage amounted to a release operating as a satisfaction or discharge of the remainder of the women—not only holding

> "that the marriage, by operation of law, released or discharged the plaintiff's wife, but that this by like operation released or discharged the other wrongdoers. And thus it occurs that in the absence of any agreement or contract to that effect, an act not intended to release one but which does so by legal operation, goes still further and as an additional consequence releases others.[23]

And while some courts treat the release as a satisfaction of the cause of action,[24] others say that if the injured party has accepted satisfaction, the other tortfeasor should be released,[25] but often without seeing whether or not satisfaction has been received.[26] Such cases hold the release of one releases all, regardless of the intention of the parties.[27] But it is submitted that this result

[20]PROSSER, TORTS (1941) p. 1109.
[21]For illustrative cases see Tanner v. Bowen (1906) 34 Mont. 121, 85 P. 876, 115 Am. St. Rep. 529, 7 L. R. A. (N. S.) 534, 9 Ann. Cas 517; Tanana Trading Co. v. North American Trading & Transp. Co. (1915) 136 C. C. A. 389, 220 Fed. 783; Tompkins v. Clay Street Hill R. Co. (1884) 66 Cal. 163, 4 P. 1165, 11 Am. Neg. Cas. 181; Turner v. Hitchcock (1866) 20 Iowa 310; Goss v. Ellison (1884) 136 Mass. 503; Natrona Power Co. v. Clark (1924) 31 Wyo. 284, 225 P. 625.
[22]Turner v.... Hitchcock (1866) 20 Iowa 310.
[23]*Ibid.*, p. 330.
[24]Tanana Trading Co. v. North American Trading & Transp. Co. (1915) 136 C. C. A. 389, 220 Fed. 783.
[25]Seither v. Philadelphia Traction Co. (1889) 125 Pa. 397, 17A. 338, 4 L. R. A. 54, 11 Am St. Rep. 905.
[26]Ruble v. Turner (1808) 2 Hen. & M. 38.
[27]Flynn v. Manson (1912) 19 Cal. App. 400, 126 P. 181; Sunlin v. Skutt (1903) 133 Mich. 208, 94 N. W. 733.

should be reached only where a full satisfaction of the claim has been received and not where a satisfaction of a share only of the claim is in the minds of the parties.

There is an increasing tendency to give effect to the intention of the parties,[28] particularly where rights against others have been reserved[29] or where the amount received for the consideration is not in full satisfaction for the injuries.[30] And some courts circumvent the rule by treating a release of one, reserving the right to sue others jointly liable, as a mere covenant not to sue.[31] And such a covenant does not amount to a release so as to discharge another tortfeasor.[32] Though this treatment is widespread the courts admit that this distinction between a release and a covenant not to sue "is finespun and seems overtechnical."[33] But this distinction is made to avoid by indirection the harsh results of rigid application of the common law rule.

The foregoing paragraphs give but slight insight into the variation achieved without statute. In addition there are statutes in a few states[34] not important for our present consideration which have modified the common law rules. On this one question the law is unsettled, and it is of the utmost importance that we adopt a rule which will lead to a just result and one which will be uniformly applied.

As in other jurisdictions Montana has had decisions which have not always presented a criterion for satisfactory settlement

[28]Black v. Martin (1930) 88 Mont. 256, 267; 292 P. 577.

[29]Carey v. Bilby (1904) 63 C. C. A. 361, 129 Fed. 203; Greenhalch v. Shell Oil Co. (1935) 78 Fed. (2d) 942, under a statute.

[30]See Carey v. Bilby, note 29 *supra;* Pearce v. Hallum (1930), Tex Civ. App. S. W. (2d) 399.

[31]Dwy v. Connecticut Co. note 17 *supra;* Gilbert v. Finch (1903) 173 N. Y. 445, 63 N. E. 133, 93 Am. St. Rep. 623, 61 L. R. A. 307; Ellis v. Esson (1880) 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

[32]The Thomas P. Beal (1924; D. C., Wash.) 298 Fed. 121; Kropidlowski v. Pfister & V. Leather Co. (1912) 149 Wis. 421, 135 N. W. 839, 39 L. R. A. (N. S.) 509.

[33]Cook v. City Transport Corp. et al. (1935) 272 Mich. 91, 261 N. W. 257. The majority opinion continues.

> "However the whole law of joint tortfeasors is of like character and the overwhelming weight of authority draws the distinction and denies the effect of an agreement not to sue as a release of other joint tortfeasors, . . . We should follow the weight of authority, not because I approve the distinction, except as a mental exercise, but because such effect of an agreement not to sue offers a way for a party to buy his peace and allow an opportunity to compromise a doubtful claim without requiring an injured party to forego the right of full compensation against known wrongdoers."

[34]PROSSER, TORTS (1941) p. 1110 lists Alabama, Missouri, New York, Virginia and West Virginia.

of other cases. In 1906[35] the court was presented with a situation in which A let his horse to B, a libery stable keeper, and B hired the horse to C, whose alleged negligence caused its death. A demanded recovery from both B and C. B acknowledged liability, paid the value of the horse and took an assignment of A's cause of action against C. It was held that B could not maintain an action against C, since A having been satisfied by B could not have maintained any action against C. Actually no common law release was involved, and it is questionable whether there was joint liability. But there was a satisfaction of A's claim which was thereby extinguished. As in all cases where satisfaction is obtained, the right against other tortfeasors was lost. In 1930[36] the court had before it a case of concurrent negligence of X and D. After compromise with X, P executed an instrument which contained words of release with an express reservation of rights against D. The court, unhampered by any precedents, examined the conflicting rules, and noted particularly a tendency, by construing releases containing reservations of rights to be covenants not to sue, to break away from this "harsh doctrine" that a discharge of one operated as a discharge of all.

> "An instrument, qualified as is the one in suit, even if it be termed a 'release,' shows on its face that it was not the intention of the parties to destroy the injured person's right of action against the other tortfeasors, and negatives the idea that the injured person has received more than part satisfaction. Such an instrument is to be considered according to its intention. It releases the tortfeasor to whom it is executed as if it were in fact an express agreement not to sue, and to that extent releases the other tortfeasors pro tanto only.[37]"

The court expressly stated that Tanner v. Bowen[38] had no application to the present case. In 1941[39] the Montana court was again confronted with a case of joint tortfeasors in which a release had been given. The release was in effect as follows:

> "For the consideration of $4804.42 I have released and forever discharged said Glasgow Motors, Inc. (one of the joint tortfeasors) and all other persons, firms or corporations from all claims resulting, or to result, from an accident to me on or about the 1st day of November, 1936. . . ."

[35]Tanner v. Bowen (1906) 34 Mont. 121, 85 P. 876, 115 Am. St. Rep. 529, 7 L. R. A. (N.S.) 534, 9 Ann. Cas. 517.
[36]Black v. Martin (1930) 88 Mont. 256, 292 P. 577.
[37]88 Mont. at p. 267.
[38]Note 35, supra.
[39]Lisoski v. Anderson et al. (1941) 112 Mont. 112, 112 P. (2d) 1055.

"It is understood and agreed that this is a full and final release of all claims of every nature and kind whatsoever."

The court quoted extensively from Black v. Martin and stated the rule of law as it had been there stated. From the wording of the release the court found that it was intended to release other claims, and be a satisfaction of the cause of action. The decision is in conformity with Black v. Martin and appears to be a fair interpretation of the intent of the parties.

It is readily seen that no one of the doctrines which we have been considering is quite satisfactory. Each has its defects. And while the rule as to construing the instrument in accordance with the intent of the parties seems just, it may well result in the improper construction of an instrument as occurred in the principal case. Montana is at present one of the states which adheres to this relatively liberal rule, but it is believed that a further step must be taken before we reach a stage at which we may be satisfied with our law as to releases. Perhaps the most advanced statement of the doctrine has been set forth in the Uniform Contribution Among Tortfeasors Act,[40] prepared by the National Conference of Commissioners on Uniform State Laws. That act provides that a release by the injured person of one joint tortfeasor doesn't discharge the other tortfeasors *unless the release so provides,* but that it reduces the amount of the claim against the others in the amount of the consideration paid for the release or by the proportion provided if greater than the consideration paid.[41] But a release of one tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release was given before the right of the joint tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction to the extent of the pro rata share of the released person.[42] The act therefore provides that a tortfeasor cannot escape the liability for his just share of the loss. If the injured party desires that

[40](1939) 9 Unif. Laws Ann. 161. Enacted in Arkansas, Hawaii, Maryland and Rhode Island. This act voices the most liberal doctrine yet advanced for allowing contribution. The doctrine of release is so connected with contribution that it was deemed advisable.

"... . to obviate what must frequently be considered a technical pitfall by an injured person who releases one of two or more joint tortfeasors for a certain sum presumably approximately the released person's share of the damages, intending to pursue his claim against the others."

The consideration of the contribution aspect is beyond the scope of this comment.

[41]Uniform Contribution Act §4.

[42]Uniform Contribution Act §5.

the released party be held not liable to any extent, that can be achieved only by a release of that party's pro rata share of the claim. The general effect is that no tortfeasor may be made liable for more than his share of the claim asserted. The injured party (creditor) is prevented from throwing the loss at his caprice to one or the other of the parties. We should note the effect of the act upon the concluding statement of the Montana court in the Lisoski case.[45]

> "It may be noted here additionally that under the facts as pleaded the Glasgow Motors, Inc., would get no benefit from its voluntary payment to this plaintiff if she may maintain her suit against these defendants, as from the allegations it appears that these defendants might in a second suit recover from it whatever amount the plaintiff might recover from them in this suit."

Under the uniform act, that result would not be reached since the amount paid by the released party would be charged against its share of the liability. No contribution could be obtained from it unless its pro rata share exceeded the amount paid.

In the writer's opinion the Montana legislature would do well to consider the Uniform Contributions Act from its effect on the broad field of contribution. It is thought advisable that the act be given serious consideration with a view toward certainty and uniformity in our law. And it is believed that after examining these and other closely related problems, the legislature will find that the adoption of the act will be a further step in the direction of a modern liberal code.

Cecil N. Brown.

[45] *Supra* note 39.

HOLOGRAPHIC WILLS
ANIMUS TESTANDI—INCORPORATION BY REFERENCE

In *In re Watts' Estate,*[1] a widower wrote a letter in lead pencil to his sister, Ida, some seven years before his death. In this letter, he discussed the condition of his health, conditions of weather and crops, and advised that if anything should happen to him, "you Will all Find By Bisnes Fix and in the Citszen Bank Still looks like Rain made ida over every thing." Upon learning of her brother's death, Ida went to the bank's attorney who obtained from decedent's safety deposit box an undelivered warranty deed to a farm and an undelivered bill of

[1] (1945) ....Mont....., 160 P. (2d) 492.