Civil Code, regarding errors as to anything which is "a principal consideration." The English doctrine as expounded in *Smith* v. *Hughes* calls for a searching examination into the mind of the vendor, while the question of rescission or no rescission depends in the French system on the state of mind of the purchaser. The results may be directly opposite.

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COVENANTS AS JOINT OR SEVERAL.[1]

SECTION 7. REVIEW OF AUTHORITIES.

A review of the authorities, including those cited in Halsbury's Laws of England, follows, wherefrom certain rules of construction are deduced and stated.

(1) In *Slingsby's Case*,[2] there were a number of grantees and a covenant "with each and every of them." The covenant, in terms clearly joint and several, was held to be joint. Being a covenant with multiple covenantees it could not operate jointly and severally, so it had to be joint or several. The covenant was for title. The interests of all the grantees were alike and joint, so the covenant was held to be joint, the words of severance being rejected. This is a clear case of moulding of covenant to conform with interest. But it appears from the case that if there had been different estates granted to the covenantees, with a covenant for title with them and each of them, the interests being several and the covenant purporting to be joint and several, which it could not be, the words "them and" should be rejected and the covenant should be held to be several. *Eccleston* v. *Clipsham*,[3] and *Spencer* v. *Durant*,[4] were like cases. In each the covenant was in terms joint and several. In the first, coadventurers with like interests covenanted, each with the other and others of them. The interests of the covenantees being joint the covenant was held joint, the words "the other" being rejected. In the second case a band

[1] See p. 243 for the beginning of this article.
[2] (1587) 5 Co. Rep. 18b, 19a.
[3] (1668) 1 Saunders Rep. 153; 1 Wms. Saund. 162.
[4] (1689) Comb. 115; 1 Show. 8.

of musicians having covenanted, jointly and severally, not to play otherwise than together, one of them sued another of them for a breach, but failed to recover. The interest of the covenantees being joint the words "and severally" were rejected, "for they ought all to have joined, the interest being joint, and it is repugnant and contradictory for four persons to bind themselves, the one to the other jointly and severally." A case of the same class was *Saunders* v. *Johnson*.[5] Certain painters covenanted among themselves that each would bring his work to a certain place for execution and that all the covenantors should divide amongst themselves, in set proportions as received, their earnings at that place. One of the painters having worked and earned otherwise than at the agreed place, the others sued for a breach. The defence was misjoinder, the covenant being claimed to be several. It was held, however, that the action being founded upon the work not having been brought to the agreed place, the covenant in that respect was joint, for all the plaintiffs had a right and interest jointly to have the work brought there. Though the words of the covenant were several the interest was joint and the covenant and cause of action must correspond. And see *Lilly* v. *Hodges*.[6]

(2) *Anderson* v. *Martindale*[7] was once a much cited case. The covenant was by M. and his heirs, &c., and the defendant as his surety, of the one part, jointly and severally, with A., his executors, &c., during the life of E. W. Lord Kenyon held the covenant to be joint, and, referring to *Slingsby's Case*, said (pp. 500, 501): "Here is a covenant to two to pay an annuity to one of them; shall both bring actions for the same interest where only one duty is to be paid? Which of them ought to recover for the non-performance of the covenant? The defendant is only bound to pay the annuity once. This is different from the case put by Lord Coke, where the covenant is to several for the performance of several duties to each; there the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends." Compare *Southcote* v. *Hoare*.[8]

(3) *James* v. *Emery*[9] involved a covenant to pay purchase money to a number of vendors and to each of them. The interest of each vendor was in a specific amount, so the interest of the covenantees being several, the covenant was properly construed to be several. But

[5] (1693) Skin. 401.
[6] 1723) 8 Mod. Rep. 166.
[7] (1801) 1 East 497
[8] (1810) 3 Taunt. 87.
[9] (1818) 8 Taunt. 245 (Ex. Ch.).

the case erroneously, according to modern thought, assumes that covenants must necessarily be construed as joint or several, according to the interests and regardless of the language of the covenant. *Withers* v. *Bircham, Servante* v. *James,* and *Palmer* v. *Sparshott*[10] afford further examples of construction of covenants as several in consonance with several interests. On the other hand *Hatsell* v. *Griffith, Lane* v. *Drinkwater, and Foley* v. *Addenbrooke*[11] afford examples of construction as joint, the interest being joint.

(4) Until the publication of Preston's Notes to Sheppard's Touchstone, necessary coincidence of covenant and interest resulted as matter of law. Preston, citing *Robinson* v. *Walker*[12], stated the law to be that: "By express words clearly indicative of the intention, a covenant may be joint or joint and several to or with the covenantors or covenantees, notwithstanding the interests are several; so they may be several, although the interests are joint. But the implication or construction of law where the words are ambiguous, or are left to the interpretation of the law, will be that the words have an import corresponding with the interest, so as to be joint when the interest is joint, and several when the interest is several." Preston's statement of the main proposition conforms to the law as it now is, but is inaccurate, as to an incidental matter, where he states, perhaps unintentionally, that a covenant can be made both jointly and severally to or with *covenantees. Slingsby's Case* and *Bradburn* v. *Botfield.*[13]

(5) The present-day law is as expressed by Parke, B., in *Sorsbie* v. *Park*[14], "that a covenant will be construed to be joint or several, according to the interest of the parties appearing upon the face of the deed if the words are capable of that construction; not that it will be construed to be several by reason of several interests if it be expressly joint. Suppose there were a covenant with A and B *jointly* that a certain thing should be done by the covenantor; both of those persons must sue. But where it appears upon the face of the deed that A and B have several interests they must sue separately, for though the words be *prima facie* joint they will be construed to be several if the interest of either party appearing on the face of the deed shall require that construction." Thus in *Mills* v. *Ladbroke*[15], where there was a covenant which in point of form was not one with all the covenantees jointly, but a several covenant with each, the interests being several, each covenantee was held entitled to sue separately with respect to his

[10] (1824) 3 B. & C. 254; (1829) 10 B. & C. 410; (1842) 4 Sc. N. R. 743.
[11] (1834) 2 Cr. & M. 679; (1834) 1 Cr. M. & R. 599; (1843) 4 Q. B. 197.
[12] (1703) 1 Salk. 393; 2 Rolle Abr. 149.
[13] (1845) 14 M. & W. 573.
[14] (1843) 12 M. & W. at 158.
[15] (1844) 7 M. & G. 218.

separate interest. The covenantees were fifteen purchasers under the one instrument of equal interests in a colliery. Each had paid £1,000 for his shares. The covenantees were not partners at the time the covenant was made but "shareholders of a certain company about to be formed."

(6) *Hopkinson* v. *Lee*[16] marks the turn of a tide whereafter what had been a rule of law, that character of covenant and interest of covenantee should coincide, became, not because of, but in spite of, the case, a rule of construction. L and the defendants of the one part and H and the plaintiff of the other part were parties to an indenture which recited an application to the defendant to lend money of H, and by the indenture the defendants, in consideration of the advance, covenanted (*a*) with the plaintiff and (*b*) by a separate covenant with H to pay interest to the plaintiff on the part of the money remaining unpaid. It was held following *Anderson* v. *Martindale* (*supra*), that the covenant was joint and that the plaintiff could not sue without joining H. Lord Denman, C.J., after stating the rule as to correspondence of character of covenant and interest of covenantee, and its history, proceeded to say—"The same rule is laid down by Sheppard in the Touchstone, 166. But the last very learned editor, Mr. Preston, has there originated a doubt whether it is not expressed too generally. He refers to several cases, none of which impugn or qualify the rule, and (which is truly remarkable) does not even name *Anderson* v. *Martindale*. Mr. Preston introduces an exception not grounded on any judicial authority, viz., that the covenant must be ambiguous before that which is *prima facie* either joint or several can be properly construed as several or joint according to the interest of the covenantees. He cites *Robinson* v. *Walker* (supra) (which gives no countenance to the exception, but relates to a wholly different matter. . . . Mr. Preston thus concludes his observations—'The general rule proposed by Sir Vicary Gibbs, and to be found in several books, would establish that there was a rule of law too powerful to be controlled by any intention, however express.' But we think there is no ground for Mr. Preston's apprehension that words perfectly plain and unambiguous confining the contract expressly to one person and excluding all others from its operation, will be strained by the law so as to comprehend those whom it took pains to exclude. The true explanation of the rule is rather this: that the whole covenant taken together binds to both covenantees and not to either of them alone, though separately named in some of its words, by reason of the joint interest in the subject matter of the action, appearing on the face of

[16] (1845) 6 Q.B. 964.

the deed itself." Lord Denman further observed that "In *Slingsby's Case* the covenant was with certain persons named and *ad et cum quolibet et qualibet eorum*. No words can be stronger to give the plaintiff an option to sue all jointly or each separately. Yet in both the Court held that by reason of the joint interest in the subject matter of the suit, as disclosed in the deed itself, the action must be joint."

(7) The foregoing remarks were noticed by Parke, B., in *Bradburn* v. *Botfield*[17], where on the construction of a lease the covenants were held to be joint. Referring to *Sorsbie* v. *Park*, he stated that in that case Lord Abinger and himself had approved of Mr. Preston's qualification and explanation of the rule as laid down by Gibbs, C.J., in *James* v. *Emery* (supra) to read so that if the language of the covenant was capable of being so construed it would be held to be joint or several according to the interest of the parties. "Mr. Preston adds," proceeded Parke, B., "that the general rule proposed by Sir Vicary Gibbs and to be found in several books would establish that there was a rule of law too powerful to be controlled by any intention, however express; and I consider such qualification to be perfectly correct, and at variance with no decided case, as it is surely as competent for a person by express joint words, strong enough to make a joint covenant, to do one thing for the benefit of one of the covenantees and another for the benefit of another, as it is to make a joint demise where it is for the benefit of one. I mention this because the Court of Queen's Bench in the case of *Hopkinson* v. *Lee*[18] have supposed that Lord Abinger and myself had sanctioned some doctrine at variance with the case of *Anderson* v. *Martindale* (supra) and *Slingsby's Case* (supra), which it was far from my intention, and, I have no doubt, from Lord Abinger's, to do, it being fully established, I conceive, by these cases, that one and the *same* covenant cannot be made both joint and several with the covenantees. It may be fit to observe that a part of Mr. Preston's explanation that by express words a covenant may be joint *and* several with the covenantors or *covenantees*, notwithstanding the interests are several, is inaccurately expressed; it is true only of covenantors, and the case cited, *Robinson* v. *Walker* (supra) relates to them; probably Mr. Preston intended no more, and I never meant to assent to the doctrine that the *same* covenant might be made, by any words, however strong, joint and several, where the interest was joint, and it is this part, I apprehend, of Mr. Preston's doctrine to which the Court of Queen's Bench ob-

[17] (1845) 14 M. & W. 559.
[18] (1845) 6 Q. B. 964; 14 L. J. N. S. Q. B. 104.

jects. I think it right to give this explanation, that it may not be supposed that there is any difference on this point with the Court of Queen's Bench." This case was expressly followed in *Harrold* v. *Whittaker*[19] and in *Keightley* v. *Watson*[20]. Baron Parke seized another opportunity of expounding his views upon coincidence of covenant and interest. "The rule," he said, "that covenants are to be construed according to the interest of the parties is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as would prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words capable of two constructions we must look to the interest of the parties which they intended to protect, and construe the words according to the interest." These observations as to the application of the rule in cases of ambiguity are paralleled in *Beer* v. *Beer*[21], where Maule, J., deciding that although the words of a demise were joint the reversions were several and rent claimed followed the reversions, said that "several cases were cited for the purpose of showing that, whatever the nature of the subject of contract, if the instrument does, in terms, necessarily import that the promise or the covenant is made jointly with two, then the two covenantees or the survivor must *bring the action.* That is, I think, very sound law; and it is beside the class of cases where the covenant, which, from its language, might be *either* joint or several, has been held to be joint or several according to the interests of the covenantees. You are not to impose upon the instrument a meaning contrary to the true sense of the words, but choose between two senses of both of which the words are susceptible, and accept that which is most conducive to the interests of the covenantees. But where the covenant is not capable of being so construed, however severable the interests of the covenantees may be, if the language they have used evinces an intention that the covenant shall be joint all must join in an action upon it, or the right passes to the survivor."

(8) *Haddon* v. *Ayres*[22] was an action brought by one shareholder in a company to recover indemnification in respect of sums that he was individually bound to pay and did pay. Therein Lord Campbell

[19] (1846) 11 Q. B. at 160.
[20] (1849) 3 Exch. 716.
[21] (1852) 12 C. B. at 78.
[22] (1858) 1 El. & El. 149.

regarded it as established that "where there are separate interests, though many covenantees, there the covenants are several unless the words unequivocally show the meaning to be that the covenants should be joint." And in *Thompson* v. *Hakewill*[23], where tenants in common demised "according to their several estates" and the lessee covenanted with them and their respective heirs and assigns to repair, it was held that the benefit of the covenant was joint and not several.

(9) The facts of *Palmer* v. *Mallet*[24] were unusual. The defendant, who had been an employee of a dissolved partnership of two surgeons, had agreed, as a condition of his being employed by the former partnership, not to practise thereafter as a surgeon within ten miles of the place of his employment, whether on his own behalf, or in partnership with, or as assistant of another. After the dissolution both partners continued to practise in the same place and one of them employed the defendant as assistant. The other partner sued to restrain the defendant from practising. The defendant contended that his obligation was joint, but it was held in effect that the agreement, read in the light of the circumstances, contemplated not merely a joint interest in the covenantees during the partnership, but also several interests after dissolution, hence the plaintiff could sue alone. Said Cotton, L. J. (p. 420)—"We must look at the position of the parties with whom this agreement was entered into. They were carrying on business as partners. Although they were partners for life, that partnership might be put an end to, and in fact it has been put an end to, so that they had a joint interest as partners in the business which they carried on as surgeons, accoucheurs and apothecaries, and they had several interests in it in the event of a dissolution. That being so, the proper construction of this imperfectly recited agreement is that it is an agreement entered into by the appellant (Mallet) with the partners, jointly and severally. I think that in this I am only following the rule laid down by Mr. Baron Parke in *Sorsbie* v. *Park*." It may be well to note, in passing, that this case seems to, but does not, infringe the doctrine that by no conceivable language may a covenant to a number of covenantees be caused to operate both jointly and severally. That doctrine relates only to covenants concerning *the same subject matter*. The defendant had made *two engagements*, one joint and the other several. He had doubly agreed (1) with the partnership, to serve and not to compete while the partnership should endure, and (2) with each partner, not to compete, after dissolution, against him.

[23] (1865) 19 C. B. N. S. 713; 35 L. J. C. P. 18.
[24] (1887) 36 C. D. 411 (C. A.)

(10) *White* v. *Tyndall*[25] is the most illuminative and authoritative of the various judicial pronouncements undergoing review. Premises had been demised to two lessees, their executors, administrators and assigns, as tenants in common, and not as joint tenants. The lessees covenanted for themselves, their executors, administrators and assigns, that the lessees or some one of them, their executors, administrators or assigns, would pay the rent and keep the premises in repair. One of the lessees died during the term. After his death the lessor sued the surviving lessee and the executors of the deceased lessee for breaches of covenant. The Court of Appeal in Ireland[26] held that the language of the covenant was ambiguous, that the plural words might make it *prima facie* joint, but it must be construed as several if the interests were several and the words of the covenant ambiguous or capable of construction as several. The House of Lords reversed this decision, ruling (*a*) that the covenant was unambiguous and expressly joint, (*b*) that, as indicated in *Slingsby's Case,* where the interests of covenantees are several, as where the covenant is to several for the performance of several duties to each of them, a covenant in form joint may be moulded, according to the several interests, (*c*) that the interests, joint or several, of covenantors as well as those of covenantees may be considered to resolve an ambiguity in the language of the covenant as to the nature, joint or several, of the obligations assumed, but that if the language of the covenant is clearly joint or clearly several it will prevail (subject to *Slingsby's Case* touching joint and several covenants to covenantees) over a contrary interest of either covenantees or covenantors.

(11) Because the full effect and extent of the decision under review does not seem to have been exactly appreciated, it is necessary to reinforce the just preceding deductions (one or more whereof may not experience universal acceptance) by somewhat extensive reference to and citation of the actual text. Says Lord Herschell at page 276—"Where several persons covenant with *another* in terms which import without ambiguity a joint and not a several obligation, the covenant must be held to be a joint one. Where the terms are ambiguous and may import either a joint or a several obligation, you may, no doubt, look at the other parts of the deed, the interests of the *covenantors,* and, indeed, any other circumstances appearing on the face of the instrument which will aid in the determination of the intention of the parties." As to the lack of ambiguity in the case, "It is true," said Lord Halsbury (page 270), "that the parties to whom

[25] (1888) 13 A. C. 263 (H. L.)
[26] 20 L. R. Ir. at 523.

the demise is made are to hold it as tenants in common, but *what they covenant to do* is to pay one rent, not two rents, and not each to pay half a rent, but one rent." As to the moulding of covenants, the process seems to be confined within the lines of *Slingsby's Case.* The legally *necessary* moulding of joint and several covenants to *multiple covenantees,* even to the rejection of surplus words, is confirmed. Since in such cases the covenants cannot, in law, be construed to be both joint and several, they will be construed as either joint or several, being *prima facie* joint. In other cases where the language of the covenants permits and the nature of the interests of covenantees is several the covenants will be construed as several. Where the language of the convenant forbids several as against joint construction the latter construction will prevail. Says Lord Herschell (page 277):—"It has, no doubt, been held that where the interests of covenantees are several a covenant which in form is joint may be moulded according to those several interests; but that, I take it, is only in the case where, to use the language of Lord Coke, the covenant is to several for the performance of several duties to each of them." He knew of no instance of the extension of this principle to covenantors. Lord Fitzgerald said (page 275):—"The argument was that we should mould the covenant of the lessees because of their separate interests in the subject matter of the grant, but no decision has been cited going so far. The passage cited from Platt (p. 123) is expressed 'shall be measured and moulded according to the interests of the covenantees.' No decision to which we were referred goes beyond that. *Slingsby's Case*[27] dealt with the several interests of the covenantees, and the illustration put by the Court to some extent shows the reason of the rule in the case of covenantees; and so the rule in *Eccleston* v. *Clipsham* (supra) is confined to the interest of the covenantees; and the paragraph in *Touchstone*[28], founded on *Slingsby's Case,* is to the same effect. There are reasons for the rule applicable to separate interests in the covenantees, as regulating the right and form of the suit on the covenant, but no authority has been brought under our notice that the rule was applicable to the case of separate interests in the covenantors." Reference to *Slingsby's Case* for the observations as to the "right and form of the suit" will show that these relate to joint and several covenants to multiple covenantees.

(12) The principle that in case of ambiguity the nature of the covenant will coincide with the interest being one designed to assist

[27] 5 Rep. 18a.
[28] Chap. VII. p. 166, Atherley's Edition.

in the determination, as between possibly joint *or* several covenants, as to what class of covenant was intended, the intent in a proper case being measured by the joint or several interest in the subject matter of the covenant, where a covenantee has had neither a joint nor a several interest in the subject matter of the covenant, but his interest for the first time arises out of the covenant itself, or where his interest set up is in a different subject matter, the principle cannot apply. As it is put by Sir Wm. Grant in *Sumner* v. *Powell*[29]:—"Where the obligation exists only by virtue of the covenant its extent can be measured only by the words in which it is conceived." To the same effect are *Beresford* v. *Browning* and *Levy* v. *Sale*[30].

(*To be continued.*)

Ottawa. W. F. O'Connor.

LE JUGE FOURNIER.[1]

Messieurs,

Je ne sais si je pourrai vous faire comprendre toute la satisfaction que j'éprouve à me trouver aujourd'hui au milieu des membres du Jeune Barreau de Québec.

Lorsque votre président, M. Valmore Bienvenue, m'a transmis votre invitation, j'en fus extrémement flatté, et je l'ai acceptée avec empressement. Je vous en fais tout de suite la confidence: la jeunesse et le Barreau sont deux choses que je sens encore très près de moi.

Je priai alors M. Bienvenue de m'indiquer un sujet de causerie, Il m'écrivit:

"Si vous me permettez une modeste suggestion, je dois vous dire que les sujets qui sont particulièrement goûtés, à l'occasion du lunch, sont les études biographiques de juges ou d'hommes de loi célèbres tant canadiens qu'étrangers."

C'est donc lui qui m'a inspiré l'idée de vous parler de l'honorable Télesphore Fournier, le premier juge canadien-français de la Cour

[29] (1816) 2 Mer. at 36.
[30] (1875) L. R. 20 Eq. 564; 1 C. D. 30 (C.A. (1877) 37 L. T. R. 709.

[1] An Address delivered before the Junior Bar of Quebec on the 2nd day of April, 1925, by the Honourable Mr. Justice Rinfret, of the Supreme Court of Canada.