COVENANTS AS JOINT OR SEVERAL.[1]

Section 8—Rules of Construction.

(1) The preceding review of authorities seems to justify the following propositions:—

A.—Where the enquiry is as to the nature, joint or several, of the burden assumed by two or more covenantors and (a) the covenant is in form clearly joint or clearly several, it will be construed to accord, as to its joint or several nature, with its language, although the interests of the covenantors in its subject matter may not coincide with the nature of their covenant obligations produced by such language; but (b) where the enquiry is the same and the covenant is in form not clearly joint or not clearly several it will be construed to accord, as to its joint or several nature, with the interests of the covenantors in its subject matter, unless other provable circumstances of greater import induce a contrary conclusion. *Sorsbie* v. *Park; White* v. *Tyndall.*[31].

B.—Where the enquiry is as to the nature, joint or several, of the benefit taken by two or more covenantees under the alternative circumstances mentioned in (a) and (b) of the immediately preceding proposition the construction will be the same as in that proposition suggested, substituting the interests of covenantees for those of covenantors, but the court will more readily adhere in case of ambiguity to a construction making nature of interest coincide with nature of subject matter. *Eccleston* v. *Clipsham* (supra); *Sorsbie* v. *Park* (*supra*); *Mills* v. *Ladbroke* (supra); *Bradburn* v. *Botfield* (supra); *Keightley* v. *Watson* (supra); *Beer* v. *Beer*; *Haddon* v. *Ayres* (supra); *Thompson* v. *Hakewill* (supra); *Palmer* v. *Mallet* (supra); *White* v. *Tyndall* (supra).

C.—Where the enquiry is as to the nature, joint or several, of the benefit taken by two or more covenantees, and the covenant is in form joint and several, it cannot in law be construed as other than joint or several. In deciding whether the construction shall be as joint or as several unless express and unequivocal language of the covenant otherwise provides it will be construed to accord, as to its joint or several nature, with the interest of the covenantees in its sub-

[1] This article was begun on page 243 and continued on page 289, *ante*.
[31] (1843) 12 M. & W. 146; (1888) 13 A. C. 269 (H. L.).

ject matter, so that where such interests are joint the covenant will be held to be joint and where they are several it will be held to be several. Such construction will be applied wherever the language of the covenant is capable of reconciliation with the nature of the interests of the covenantees in the subject matter, and the court, while not presuming to reject or to contradict express contrary language, will, where possible, mould the covenant so that its language shall conform to such interests. *Slingsby's Case* (supra); *Eccleston* v. *Clipsham* (supra); *Spencer* v. *Durant* (supra); *Anderson* v. *Martindale* (supra); *Bradburn* v. *Botfield* (supra); *White* v. *Tyndall* (supra).

D.—None of the preceding propositions can apply where, before the covenant is made, the covenantors or covenantees, as the case may be, are not jointly or severally interested at all in the subject matter of the covenant, e.g., where the obligation of the covenantors or the benefit of the covenantees originates under the covenant. *Sumner* v. *Powell*[32]; *Levy v. Sale* (supra); *Beresford* v. *Browning* (supra).

Section 9—Identification of Interest.

(1) It remains to identify what is considered to be an interest in the subject matter of the covenant. It is something different from an interest, beneficial or otherwise, in the consideration, or in the main subject matter of the document wherein the covenant appears. A joint covenant to pay money, made with multiple covenantees, one whereof has no beneficial interest in the money, raises a joint interest in all the covenantees. *Rolls* v. *Yate*[33]; *Anderson* v. *Martindale* (supra); *Hopkinson* v. *Lee* (supra). A lessee's covenant to repair, made to several lessors jointly, one whereof has no interest in the land, or where all the lessors are tenants in common, is taken to be joint with all the lessors. *Southcote* v. *Hoare, Wakefield* v. *Brown, Thompson* v. *Hakewill*[34]; *Foley* v. *Addenbrooke* (supra); *Bradburn* v. *Botfield* (supra). Though in the one case one of the lessors has no interest in the land, and in the other case each lessor has a several interest in the land, all their interests in the subject matter of the covenant, the repairs, are joint.

(2) It should be remembered, too, that any one of multiple covenantors, whatever be the nature of his interest, if any, in the subject matter of the covenant, may bind himself by clear language jointly or

[32] (1816) 2 Mer. 30.
[33] (1610) Yelv. 177.
[34] (1810) 3 Taunt. 87; (1846) 9 Q. B. 209; (1865) 19 C. B. N. S. at 726.

severally. It is as competent for each covenantor to covenant for the other as for a stranger to covenant for both. *Robinson* v. *Walker*, *Enys* v. *Donnithorne*, *Lilley* v. *Hodges*, *Tippens* v. *Coates*[35]; *Eccleston* v. *Clipsham* (supra).

Section 10—Tenants in Common.

(1) It is interesting to observe the application of the foregoing principles to such well-known relationships as tenancy in common and partnership.

(2) It is stated in *Eccleston* v. *Clipsham* (supra) and in the notes thereto that, though a covenant may be joint and several in its terms, yet, if the interest and cause of action be joint, the action must be brought by all the covenantees. This rule is, doubtless, subject to the exception that, though a covenant is in terms with a number of persons jointly, if the beneficial interest of each is several and there is no interest in any two, one may sue by reason of a breach. In *Midgeley* v. *Lovelace*[36] it is said that tenants in common may, at their election, join in an action of covenant, but, having several interests, they may likewise, as respects these, sue separately. In *Kitchen* v. *Buckley*[37] tenants in common joined in a suit upon a covenant to repair. It is obvious that their interest in the repairs was joint. In the case of a joint lease by two tenants in common reserving an entire rent the two may join in an action brought to recover the rent, but if there be separate reservations to each there must be separate actions. *Powis* v. *Smith*, *Wilkinson* v. *Hall*, *Lam* v. *Danforth*.[38] The benefit of a covenant by a lessee in what is clearly a joint demise by those who are in fact tenants in common runs with the entire reversion only. Therefore all the lessors of a lease so jointly made must join in suing for a breach of such covenant. *Thompson* v. *Hakewill* (supra). Even if one were dead his representatives would be necessary parties. But, under different circumstances it was held in *Roberts* v. *Holland*[39] that devise of a reversion of a lease to six tenants in common as such entitled each of them to sue alone as respected his own interest upon the covenants that ran with the reversion. Wills, J., said, at page 667, that "They are not seised *per mie et per tout*, but each has one undivided sixth part and the covenant becomes equivalent to six separate covenants on which separate actions

[35] (1703) 7 Mod. 154; (1761) 2 Burr. 1190; (1723) 1 Str. 553; (1853) 18 Beav. 401.
[36] (1701) Carth. 289.
[37] (1675) 1 Lev. 109.
[38] (1822) 5 B. & Ald. 850; (1835) 1 Scott 675; (1871) 59 Maine 322.
[39] (1893) 1 Q. B. 665.

can be brought." He quotes Platt on Covenants, page 130:—"Where there is no express contract with all and their legal interest is several the covenantees must sue separately, yet where the contract is entered into with the covenantees jointly and the estate taken by them is several, they may at their option sue jointly or severally; jointly in respect of the joint contract, severally in respect of the interest." Says Wills, J.:—"That shows that where the co-tenants have separate interests there are in effect separate covenants."

Section 11—Partners.

(1) Covenants by mercantile partners, presumptively joint at law, remain such during the lifetime of the covenantors, and continuance of the partnership, but, upon the death of any one partner covenantor the covenant is treated in equity (which holds that there is no survival of a partnership estate) and in some jurisdictions by statute, as so far joint and several that the covenantee, who may not administer the deceased's estate, may prove against it. *Re McRae, Forster* v. *Davis, Norden* v. *McRae, Clarke* v. *Bickers, Kendall* v. *Hamilton, Partnership Act, Re Hodgson, Beckett* v. *Ramsdale*[40]; *Beresford* v. *Browning* (supra). *Re Hodgson, Beckett* v. *Ramsdale, supra,* holds that the creditor of a partnership, although not strictly a joint and several creditor, has concurrent remedies against the estate of a deceased partner and the surviving partner and it is immaterial which remedy he pursues first; but the surviving partner must be represented at the taking of accounts of the estate of the deceased partner and the partnership creditor should not come into competition with the separate creditors of the deceased partner.

(2) Joint covenants by mercantile partners are treated as several where they concern pre-existing partnership liabilities. A covenant for payment of a partner's share being one for discharging a pre-existing joint and several liability, is regarded as if itself joint and several. *Beresford* v. *Browning* (supra). But in *Wilmer* v. *Curry*[41], seemingly a doubtful authority, a joint covenant of continuing partners to pay for the purchase of an outgoing partner's share was held to be not one concerning pre-existing liability, and not several. If the obligation of the partner is one that arises solely from the covenant the nature, joint or several, of the covenant will depend upon the terms thereof. *Sumner* v. *Powell* (supra); *Beresford* v. *Browning* (supra).

[40] (1883) 25 C. D. 16 (C.A.); (1845) 14 Sim. 639; (1879) 4 A. C. 504; (1890) 53 and 54 Vict. ch. 39, s. 9; (1885) 31 C. D. 177 (C. A.).
[41] (1848) 2 DeG. & Sm. 347.

Section 12—Effect of Bankruptcy.

(1) The various Bankruptcy Acts provide for the case of a joint covenantor bankrupt, so that his fellow covenantors may sue without joining him or his trustee, and so that creditors may with respect to bankrupt joint and several covenantors prove against the joint estate and also against the separate estate of each covenantor. *In Re Parkers, Ex-Parte Sheppard; Banco de Portugal* v. *Waddell; In re P. Macfadyen, Ex-Parte The Vizianagaram Mining Company, Ltd.; In re Kent County Gas Light and Coke Company.*[42]

Section 13—English Legislation.

(1) By the Conveyancing and Law of Property Act (Eng.) (1881), 44 & 45 Vict. ch. 41, sec. 60, a covenant and a contract under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act to them or for their benefit is deemed to include and by virtue of the Act implies an obligation to do the act to or for the benefit of the survivor or survivors of them and to or for the benefit of any other person to whom the right to sue on the covenant, contract, bond or obligation devolves. The section, which extends to a covenant implied by virtue of the Act, applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond or obligation, and has effect subject thereto and to the provisions thereof. The section is not retroactive. The effect of it, taken with Sections 58 and 59, is to enable effective covenants to be made in such simple forms as "A covenants with B that, &c.," or "A hereby covenants with B and C that, &c.," except in the case of covenants relating to land the burden whereof is to run with the land. In such covenants the obligation should expressly extend to assigns.

Section 14—Law of the United States.

(1) United States law as to joint and joint and several covenants does not differ in any material respect from that of England or of Canada.

(2) The doctrine of *Slingsby's Case* is upheld. It is a general rule that the effect of the covenant will correspond with the interest of the covenantees unless the language of the covenant compels a different construction. *Calvert* v. *Bradley, Buckner* v. *Hamilton, Comings* v. *Little, Westcott* v. *King.*[43]

[42] (1887) 19 Q. B. D. 84; (1880) 5 A. C. 161; (1908) 2 K. B. 817 (C.A.); (1913) 1 Ch. 92, 82 L. J. Ch. 28.

[43] (1853) 16 How. (U.S.) 580; (1855) 16 Illinois 487; (1837) 24 Pick. (Mass.) 266; (1852) 14 Barb. (N.Y.) 32.

(3) Covenantors may covenant jointly or severally, or jointly and severally. *Ernst* v. *Bartle*[44]. The presumption is that an obligation assumed by two or more is joint. *Donahoe* v. *Emery, Comings* v. *Little, Philadelphia* v. *Reeves*[45].

(4) One of the conclusions of *Smith* v. *Poclington*[46]—that the covenant in law for quiet enjoyment, implied from the word "demise" in a lease operates only against the actual demisor and not against one who joins with him merely for conformity—has been accepted and extended. There is quite a body of United States law as to the effect of joinder for conformity. *Agar et al.* v. *Streeter et al.*,[47] holds that when a wife joins in her husband's deed of his property, the covenants being in form joint they are usually not hers, but his only. Where, however, she, her husband so intending, receives the consideration, the covenants are treated as joint. The decision follows *Arthur* v. *Caverly*[48]. The theory of these cases is that the execution by the wife of her husband's deed is impliedly for the purpose of statutes requiring it to make the husband's deed fully effective, and that if the intention is to effect any independent interest of the wife it is reasonable to require some special provision indicating that her separate interests are to be affected. *Ketchell* v. *Mudgett*. See also *Edwards* v. *Davenport, Jackson* v. *Vanderheyden, Marvin* v. *Smith*.[49]

[44] (1800) 1 Johns. Cas. (N.Y.) 319.
[45] (1845) 9 Met. (Mass.) 63; (1857) 24 Pick. (Mass.) 266; (1865) 48 Pa. St. (Penn.) 472.
[46] (1831) 1 Cr. & J. 445.
[47] (1914) 183 Mich. 600; 150 N. W. 160.
[48] (1893) 98 Mich. 82; 56 N. W. 1102.
[49] (1877) 37 Mich. 81; (1883) 20 Fed. 756; (1819) 17 Johns. (N.Y.) 167; 8 Am. Dec. 378; (1871) 46 N.Y. 571.

Ottawa. W. F. O'Connor.