BOZEMAN *vs.* STATE BANK.

A release of one of several obligors is a release of all, but a covenant "not to sue and to indemnify one" is no release, nor can any one take advantage of such covenant but the obligor to whom it is given, and he only to avoid circuity of action.

Writ of Error to the Circuit Court of Pulaski County.

DEBT, by the Bank of the State of Arkansas against Michael Bozeman, determined in the Pulaski circuit court, Nov. term 1845, before the HON. J. J. CLENDENIN, judge.

The action was founded on a writing obligatory for $3,500 executed to the bank, by Simeon Buckner as principal, the defendant and Lambert J. Reardon as securities, dated Nov. 22, 1840, and due at six months.

The defendant filed a plea substantially as follows:

"Defendant comes, &c. and says *action non,* because he says that the bond in said declaration mentioned was entered into by Simeon Buckner as principal and Lambert J. Reardon and this defendant as securities for him, for money loaned by the said bank to said Buckner, and for the sole use and benefit of said Buckner, and the same was discounted by said bank, and the proceeds paid to said Buckner: and because he says that on the 30th day of August 1842, it was agreed by said bank, acting through her proper officers, and the said Lambert J. that if the said Lambert J. would pay to said bank the sum of $4000, he should be released and

discharged from all and every his liability to said bank on and by reason of his security-ship on two writings obligatory to said bank, for said Buckner, one of which is the writing obligatory above mentioned: in pursuance of which agreement, the said Lambert J., on the 9th day of September, 1842, paid to said bank the sum of $4000 aforesaid: and the said Lambert J. was then and there forever released and discharged from the payment of said sum of money and interest thereon by a deed of release then and there made and executed and delivered to him by said bank, sealed with her seal, and here now to the court shown, the date whereof is the day and year last aforesaid; all of which was done without the knowledge or consent of this defendant or by his authority; and this he is ready to verify," &c.

Plaintiff craved oyer of the deed referred to in the plea, which was granted, and she demurred, setting out the deed in the demurrer, which follows:—"This article of covenant made by the Bank of the State of Arkansas to and with Lambert J. Reardon, this 9th day of September 1842, witnesseth: whereas the said Lambert J. is one of the securities of Simeon Buckner, on two certain writings obligatory, payable to the Bank of the State of Arkansas at Little Rock, one bearing date January 14th 1840, for six thousand dollars, and payable on or before the 1st day of July thereafter; the other bearing date Nov. 22d 1840, for three thousand five hundred dollars, payable six months after the date thereof. And whereas the said Lambert J. has paid into the Bank of the State of Arkansas four thousand dollars in Arkansas money, in respect of the said security-ship, and to be applied to both or either of said notes or writings obligatory as the said bank shall think fit and proper: now in consideration of the payment of the said sum of four thousand dollars in Arkansas money, the receipt whereof is hereby acknowledged, the Bank of the State of Arkansas, by S. M. Rutherford the President thereof, hereby covenants to and with the said Lambert J. Reardon that he shall not at any time hereafter be sued, or moved against by the said Bank of the State of Arkansas, on either of said writings obligatory in respect of his said security-ship on said writings obligatory, or either of them, and

furthermore that if the said Lambert J. Reardon be sued or moved against by any or all of his co-securities on said notes or writings obligatory, or either of them, the Bank of the State of Arkansas shall and will, and is hereby bound to, indemnify and save him harmless in respect thereof. In testimony whereof," &c., &c. The plaintiff assigned for cause of demurrer, 1st, that the legal effect of said instrument was misdescribed in the plea—that it was described as a release, when it was only a covenant not to sue: 2d, that the instrument purported on its face to be, and was in fact a covenant not to sue Reardon, of which defendant could not avail himself: and 3d, that a covenant not to sue one, does not release another obligor.

The court sustained the demurrer, and defendant brought error.

RINGO & TRAPNALL for the plaintiff. The covenant made to Reardon admits the payment of $4000, paid by him on the note sued on in this case and another, and thereupon, in consideration of the receipt of the money, covenants, 1st, Not to sue him: 2d, To indemnify him against any suit by his co-securities. This, it is contended by the plaintiff, is a release to all.

A release to one co-obligor is a release to all. *Rowly vs. Stoddard,* 7 *John Rep.* 207.

A release must be under seal. *Gibson vs. Wier & Anderson,* 1 *J. J. Marsh.* 446. *Crawford vs. Mellsbaugh,* 13 *John.* 87: and must purport to be founded on a sufficient legal consideration. *Coke Litt. Crawford vs. Mellsbaugh ubi sup.:* but no particular terms or forms of words are necessary to a release. *Coke Litt.* 445. 264 *b.* 1 *Ver.* 778. 1 *Sid.* 452. *Raym.* 187. 9 *Coke,* 52, 6. If a man covenant never to sue for a debt, this is a release. *Cro. Eliz.* 352. *Show.* 47. A covenant by the obligee not to sue one obligor operates as a release to him. *Garnet vs. Mayor,* 2 *Brock.* 185. *Ayler vs. Ayler,* 2 *John.* 186. *Jackson vs. Stackhenge* 1 *Cow.* 122. *Chandler vs. Herrick* 19 *John.* 129. This construction is given to avoid circuity of action. 8 *Term. Rep.* 168. *Jackson vs. Stackhenge ubi sup.* But a covenant not to sue one obligor is not a release as to the others. *Ting*

vs. Baily, 9 *Wen.* 336. *Catskill Bank vs. Messenger,* 9 *Con.* 37.

Any covenant that has the legal character and effect of a release, is construed to be a release. 1 *Ld. Raym.* 420, 690. So a bond by a creditor to indemnify and save harmless the debtor against the debt, operates as a release of the debt. *Clark vs. Bush,* 3 *Con.* 151.

A and B gave a sealed note to C, and A afterwards gave a bond and mortgage to C for the amount due on the note and C covenanted to procure and cancel the note: held that the covenant was an extinguishment of the note as to both and with the bond and mortgage amounted to a release. *Phelps vs. Johnson,* 8 *John.* 54.

The covenant not to sue Reardon, whilst it in itself operates as a release as to him, it is not contended, releases Bozeman, but the character of the case is manifest. Reardon had a large sum of money which the bank was anxious to receive and he was willing to pay; but only in consideration of an unconditional acquittance from the debts; and the bank grasping the money releases him from all liability to it and gives him a bond of indemnity against all claims to contribution on the part of the co-securities. This in law amounts to an extinguishment of the debt and an absolute release as to all. Such would have been the effect of a general release, and this in fact the result of the covenant in this case.

LINCOLN, Bank Attorney, contra. The demurrer in this case was properly sustained to the plea of Bozeman by the circuit court. The instrument relied on in the plea is a covenant not to sue, and not a release.

The payment made by Reardon was, according to the covenant, to be applied to either or both of the notes upon which Reardon was security, at the option of the bank. If applied to one it could not be set up in the plea of Bozeman, because he had no interest in it, and if applied to the other, it only applied so far as Reardon was a co-security, and was for the benefit of Bozeman in reducing his responsibility and could not be taken advantage of by him in his plea.

If there be several debts due, the party who pays can designate

the one to which it shall be applied. If he does not make a specific appropriation, then the party to whom it is paid may apply it as he pleases. If neither party makes any appropriation, then the presumption is, that the first debts in point of time are thereby discharged. *Story on Contracts,* 363, 364.

It will not be any discharge of a joint maker or a joint endorser, that the other maker or endorser has paid his share of the note. *Story on Prom. Notes,* 505.

A covenant not to sue the maker of a note will operate as an extinguishment of the debt as to the maker: yet it is not a satisfaction thereof as to other parties on the note, and will not operate as a discharge or a release to a joint maker. *Story on Prom. Notes,* 504, 505.

A covenant not to sue a sole debtor or obligor, is held to operate as a release to avoid circuity of action, not that such a covenant is technically or in fact a release, but that it may be pleaded in bar, as between these parties it is a *quasi* release: for if in such case the party should sue contrary to his covenant, the other party would recover precisely the same damages which he sustained by the other suing. But where there are two obligors, a covenant not to sue one of them, so far from releasing the demand has been repeatedly held not to protect the other obligor from liability, nor can it be pleaded in bar.

Covenant not to sue is a discharge where there is only one debtor or obligor. 2 *J. R.* 449, *id.* 186.

A covenant not to sue if given to a sole debtor, has the same effect as a release and may be pleaded in bar to any action for the enforcement of the original obligation. *Hurl. on Bonds. Theobold on P. & S.* 164. *Law Lib.* 1. *Lacy vs. Riniston,* 1 *L. Raym.* 688. 3 *Salk.* 298.

Such a covenant to one of several joint debtors will not operate as a release, or by way of discharge of the rent, and cannot be pleaded in bar. *Lacy vs. Riniston,* 12 *Mod.* 548. *S. C.* 2 *L. Raym.* 688. *Hutton vs. Eyre,* 6 *Taunt.* 288. *Mooly vs. Friar,* 6 *Beng.* 547. *Hurl. on Bond. Theo. on Prin. & Sec.* 146. 1 *Law Lib. Hawkins vs. Perkins,* 3 *Taunt.* 550. 2 *Saunders* 48, *note*

1. *Dean vs. Newhall* 8 *Term R.* 168. *Clayton vs. Rynaston,* 2 *Salk.* 574. *Aloff vs. Screwerhaw,* 1 *Shower* 46. *Dean vs. Jeffries, Cro. Eliz.* 352. *Cawell vs. Edwards,* 1 *Shower* 330. *Halls Rep.* 178. 1 *Ld. Raym.* 419. 3 *Lev.* 275. 1 *Shower* 46, 131. 2 *Lov.* 214. 3 *Salk.* 298. 2 *Salk.* 575. 20 *J. R.* 462. 2 *J. R.* 449. 21 *Wend.* 424. 6 *J. C. R.* 249.—309. 17 *Mass. R.* 584.

CONWAY B, J. It is contended by plaintiff's counsel that the agreement of the bank with Reardon is a release of him, and therefore also a release of Bozeman. It is true, if the bank had formally released Reardon, she would thereby have also released Bozeman. For it is well settled that a release of one of several obligors is a discharge of all. And on this point the authorities referred to by learned counsel are conclusive. But we cannot consider the bank's agreement with Reardon a release; it is a covenant not to sue and to indemnify, which in its nature is not a release. If Reardon himself had been sued by the bank, he could not have pleaded that the bank had released him, though he might have pleaded the covenant in bar; but even that would only be permitted to avoid circuity of action. Much less then could Bozeman plead a release or acquittance. In truth, the covenant with Reardon neither releases nor protects him, and cannot avail him in his defence. It is unavailing to all except Reardon himself. *Deane vs. Newall,* 8 *Term. R.* 168. *Lacy vs. Kinnaston,* 3 *Salk. R.* 298. *Cuyler vs. Cuyler,* 2 *John. R.* 186. *Harrison vs. Close & Wilcox,* 2 *John. R.* 448. The judgment is therefore affirmed.