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Release of Claim for Personal Injury—Right in Action as Law to Avoid Release Based on Mutual Mistake of Fact

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action,¹³ the effect of which is to defeat the action as stated.¹⁴ Applying these principles to the phraseology of the code, it is evident that a demurrer to misjoinder of parties is improper.

The statute provides that whenever the misjoinder is made to appear by affidavit *or otherwise*, the misjoined parties shall be dropped. Because of this wording, the court might treat a demurrer as merely a notice of the misjoinder, abating the action as to improper parties, but proceeding to final judgment as to all parties properly in the case.

J. H. H.

RELEASE OF CLAIM FOR PERSONAL INJURY — RIGHT IN ACTION AT LAW TO AVOID RELEASE BASED ON MUTUAL MISTAKE OF FACT.— Through the negligence of *D*, *P*, brakeman for *D*, was injured February 25, 1935, while in discharge of his duties. On June 25, 1935, *P* for valuable consideration released *D* from all claims of every kind for damages and injuries sustained. *P* sues for injuries and seeks to avoid the effect of the release by alleging that at the time the release was executed he believed under advice of physicians, including physicians in employ of *D*, that his injuries were not serious, but merely temporary whereas it later developed that the injuries were serious and permanent. *Held*, that in the absence of fraud in procurement of a release of liability for personal injuries, such release, if for valuable consideration, may not be repudiated in an action at law by releasor for damages for the injury. *Janney v. Virginian Railway Co.*¹

As suggested by the court in its opinion, there is a square split of authority as to whether such a release may be repudiated in an action at law for damages for injuries for which the release was given. If you assume, as our court does, that there is an absolute right to relief in equity on these facts,² then we must con-

¹³ *Tyler v. Hand*, 7 How. 573, 12 L. Ed. 284 (U. S. 1849); *Furniss v. Ellis & Allen*, 2 Brock. 14 (1822).

¹⁴ *Davis Colliery Co. v. Westfall*, 78 W. Va. 735, 90 S. E. 329 (1916); *South Br. E. Co. v. Long*, 26 W. Va. 692 (1885); *Corrothers v. Sargent*, 20 W. Va. 351 (1882); Note (1921) 13 A. L. R. 1104.

¹ 193 S. E. 187 (W. Va. 1937).

² *Atlantic Greyhound Lines v. Metz*, 70 F. (2d) 166 (C. C. A. 4th, 1934); *Greer v. Fargason Grocer Co.*, 168 Tenn. 242, 77 S. W. (2d) 443, 96 A. L. R. 1141 (1935). For a general discussion of the right to relief assuming it is sought in the proper form see Notes (1907) 5 L. R. A. (N. S.) 663; (1908) 11 L. R. A. (N. S.) 201; (1914) 43 L. R. A. (N. S.) 449; (1914) 50 L. R. A. (N. S.) 1091; L. R. A. 1916B 776; L. R. A. 1916D 144; (1927) 48 A. L. R. 1462. See also Comments (1928) 26 MICH. L. REV. 828; (1935) 21 IOWA L. REV. 146; (1931) 15 MINN. L. REV. 805.

sider the problem as to whether it is necessary or expedient to require the inconvenience and expense of a separate suit in equity to set aside the release.³

Those courts which require a separate suit in equity⁴ state that since the law favors compromise of litigious matters a release should be disturbed only with great caution and that equity is better equipped to deal with matters of mistake than a court of law. This on the theory that the principles governing equitable procedure in such cases are better adapted to the ascertainment of truth and the accomplishment of substantial justice.⁵ It seems clear that to inject the question of the validity of settlement of plaintiff's claims for damages in an action at law where the liability of the defendant for the injuries and the amount of the damages sustained are also to be determined by the jury, would materially prejudice the defendant on the latter issues.⁶ The jury would naturally construe the settlement as an admission of liability in the first instance. Little reason is apparant, however, for a distinction between fraud and mistake in this connection. It would appear that further advancement of law into this equitable sphere has been halted, for the time being at least, though the trend of other courts seems to be towards allowing law more and more power in such situations.⁷ Latitude as to this matter in other jurisdictions may be accounted for in many cases by the fact that the law judge and not the jury decides the equitable issues raised.⁸

Generally no question of distinction between law and equity proceedings has been discussed and it has been expressly held in many cases that the release might be avoided at law for mistake.⁹ Ap-

³ See (1935) 96 A. L. R. 1144; (1927) 48 A. L. R. 1462, 1529; L. R. A. 1916B 776, 786; *McCLINTOCK, EQUITY* (1936) §§ 89, 90.

⁴ *Greer v. Fargason Grocer Co.*, 168 Tenn. 242, 77 S. W. (2d) 443 (1935); *McIsaac v. McMurray*, 77 N. H. 466, 93 Atl. 115, L. R. A. 1916B 769 (1915); *Holbrook, Cabot & Rollins Corp. v. Sperling*, 239 Fed. 715 (C. C. A. 2d, 1917); *Nielsen v. Portland Gas & Coke Co.*, 76 Ore. 505, 147 Pac. 554 (1915); *Chicago & A. E. Co. v. Jennings*, 114 Ill. App. 622 (1904).

⁵ *Greer v. Fargason Grocer Co.*; *McIsaac v. McMurray*, both *supra* n. 4.

⁶ Issue as to fraud determined by the jury in West Virginia. *Norvell v. Ry. Co.*, 67 W. Va. 467, 68 S. E. 238 (1910), 29 L. R. A. (N. S.) 325 (1911); *Wendell v. Payne*, 89 W. Va. 356, 109 S. E. 734 (1921).

⁷ 5 *WILLISTON, CONTRACTS* (1937) §§ 1551, 1599; *McCLINTOCK, EQUITY* §§ 89, 90. But see Comment (1931) 15 *MINN. L. REV.* 805.

⁸ *CLARK, CODE PLEADING* (1928) § 16; 1 *C. J. Actions* § 184; 1 *C. J. S. Actions* § 57.

⁹ *Shook v. Ill. Cent. Ry. Co.*, 52 C. C. A. 651, 115 Fed. 57 (1902); *Malloy v. Chicago, etc. Ry. Co.*, 185 Iowa 346, 170 N. W. 481 (1919); *Clark v. No. Pac. Ry. Co.*, 36 N. D. 503, 162 N. W. 406, L. R. A. 1917E 399 (1917); *Touhy v. Owl Drug Co.*, 6 Cal. App. (2d) 64, 44 P. (2d) 405 (1935); *St. Louis, etc.*

parently a minority of courts distinguish between fraud and mistake where the right to avoid a release at law is concerned. Our own court has in other instances placed fraud and mistake on the same footing as to concurrent jurisdiction of law and equity though never before considering the case of a release turning on the question of mutual mistake.¹⁰ The court is emphatic in reaffirming its former decisions holding that a release may be repudiated at law for fraud and misrepresentation¹¹ and to many it will no doubt seem that the court is drawing an unrealistic hair-line distinction between fraud and mutual mistake. Though it appears that the court is acting wisely in this instance, it is difficult to conceive of an argument which would apply in the case of mistake which would not apply equally in the case of fraud.

A. L. B.

TAXATION — PRIORITIES — LOSS OF FEDERAL TAX LIEN. — In a lien creditor's bill, the State of West Virginia and the government of the United States proved claims for taxes. The government's claim for income tax for the year 1921 became a lien upon assessment, and was recorded as such in 1923.¹ The state's claim arose from property taxes for the year 1924. The state had enforced its lien by a purchase of the property at a delinquent tax sale and the period for redemption had expired, but in disregard of this fact, the land was sold as that of the original delinquent taxpayer. Although the state actually held title, it is content to claim the proceeds of this sale in lieu of the property. The United States maintains that since it had a lien on the land, it may, at its option, follow the lien into those proceeds; and since its lien was perfected prior to the state's claim, it has prior rights in this money. *Held*,

By *Co. v. Cauthen*, 112 Okla. 256, 241 Pac. 188 (1924), 48 A. L. R. 1447 (1927); *Granger v. Chicago, M. & St. P. Ry.*, 194 Mis. 51, 215 N. W. 576 (1927); Note (1928) 26 MICH. L. REV. 828; *Sun Oil Co. v. Hedge*, 173 Ark. 729, 293 S. W. 9 (1927); *cf. Texas & Pac. Ry. Co. v. Dashiell*, 198 U. S. 521, 25 S. Ct. 737, 29 L. Ed. 1150 (1904). 5 WILLISTON, CONTRACTS §§ 1551, 1599. But see Note (1931) 15 MINN. L. REV. 805. *Contra*: note 5 *supra*.

¹⁰ *Harman & Crockett v. Maddy Bros.*, 57 W. Va. 66, 49 S. E. 1009 (1905) (distinguished by the court on the ground that the situation then merely involved the correction of mathematical calculation); *State v. Carfer*, 83 W. Va. 331, 97 S. E. 825 (1919); *McCary v. Traction Co.*, 97 W. Va. 306, 125 S. E. 92 (1924).

¹¹ *Workman v. Casualty Co.*, 115 W. Va. 255, 175 S. E. 63 (1934); *McCary v. Traction Co.*, 97 W. Va. 306, 125 S. E. 92 (1924); *Norvell v. K. & M. Ry. Co.*, 67 W. Va. 467, 68 S. E. 288 (1910), 29 L. R. A. (n. s.) 325 (1911).

¹ Recordation was in the office of the clerk of the Federal District Court for southern West Virginia.