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Insurance--Receipt on Back of Check Not Binding Unless Supported by Consideration

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bezzlement? The enforcing section of the statute provides that the defaulting taxpayer[4] ". . . shall, *in addition to all other penalties,* pay a penalty of six per cent of the amount of the tax collected during the period reported."[5] Therefore, the fact that the statute in and of itself provides a penalty does not preclude the further criminal action. The real question, then, is: is the retailer under the statute an agent of the state or is he, as any taxpayer, a mere debtor of the state?

The act calls itself a consumers tax and insures that the consumer shall pay it by providing a penalty against the retailer's absorbing it;[6] the tax is to be collected of the purchaser by the dealer.[7] The act provides, moreover, that the tax so collected shall be kept separate and apart from the proceeds of sale.[8] Such elements in the act as mentioned show an intent on the part of the legislature to constitute the consumer the taxpayer, the retailer a mere agent for collection of the funds of the state. But the act defines "taxpayer" as retailer,[9] and states that the "taxes levied hereunder shall be a personal obligation of the taxpayer."[10] One might infer from the legislature's designation of the retailer as taxpayer an intent to treat him as such. One must not overlook, however, the fact that no matter what the retailer is called in the act, by the substance thereof, the consumer pays the tax and the retailer is only a collector of it.[11] Therefore, should the case of a retailer's misappropriation of the sales tax arise in West Virginia, the court, using the technique of the Illinois and Wisconsin courts might well convict the retailer of embezzlement.

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INSURANCE — RECEIPT ON BACK OF CHECK NOT BINDING UNLESS SUPPORTED BY CONSIDERATION. — *A* insured *B*, providing for $10 weekly payments in case of disability. *A*'s liability was limited

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[3] W. Va. Acts 1935, c. 84, art. 2.
[4] "Taxpayer" defined as retailer, *id.* § 2.
[5] *Id.* § 14. Italics ours.
[6] *Id.* § 9.
[7] *Id.* §§ 3, 5.
[8] *Id.* § 3.
[9] *Id.* § 2.
[10] *Id.* § 14.
[11] "In the construction of a statute, its spirit, rather than its letter, is the guiding star, but contradiction and repugnance must be avoided, when it is possible to do so." Syl. 8, Wellsburg & State Line R. Co. v. Traction Company, 56 W. Va. 18, 48 S. E. 746 (1904).

to six weeks in case of "chronic or recurring disease". *B* was disabled for twenty-six weeks by pneumonia. *A* gave *B* a check for $60, denying further liability. On the back of the check was a full release of *A* from further liability under the policy. *B* indorsed and cashed the check, and now brings action for subsequent disability, claiming the release void. *Held,* that a release on the back of a check is not binding unless supported by consideration, and that the payment of a prior undisputed claim is not sufficient consideration for such a release. *White v. Inter-Ocean Casualty Co.*[1]

The underlying principle of this case is a familiar one in the law of contracts. A promise to do an act which one is already bound by contract to do is not sufficient consideration to support a return promise, or, here, a release. Neither is the doing of such an act. Where, as in the principal case, there is no dispute as to the insurer's duty to make the payment, then it is not sufficient consideration for the release.[2] Here there was a dispute, which for purposes of argument may be assumed to be *bona fide,* as to liability beyond the amount paid. The payment made therefore constituted sufficient consideration for the release of the entire existing claim, since it is treated as a single claim, disputed, on which part payment is made.[3] But the liability subsequently accruing must be treated as a separate claim, and since the insurer paid no more than was admittedly due, there was clearly not sufficient consideration for the release of such liability.

If the insurer had contested its liability for the entire claim, reasonably and in good faith, then the payment of any sum would have been sufficient consideration for a complete release, or if in the present case there had been payment of any amount greater than that admittedly due, the release would have been binding.[4] But the insurer neither did nor promised any act which it was not already under an admitted contractual duty to perform. It is

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[1] 185 S. E. 203 (W. Va. 1936). Comment (1936) 53 BANKING L. J. 741.

[2] RESTATEMENT, CONTRACTS (1932) § 76; WILLISTON, CONTRACTS (1931) §§ 130 *ff.*; Thomas v. Mott, 74 W. Va. 493, 82 S. E. 325 (1914); (1915) 22 THE BAR 41; Vance v. Ellison, 76 W. Va. 592, 85 S. E. 776 (1915). See also Dorr v. Camden, 55 W. Va. 226, 231, 46 S. E. 1014 (1905).

[3] WILLISTON, CONTRACTS § 129.

[4] RESTATEMENT, CONTRACTS § 76, cited n. 2, *supra*; WILLISTON, CONTRACTS § 128; Bennett v. Federal Coal & Coke Co., 70 W. Va. 456, 74 S. E. 418 (1911). See Rutherford v. Rutherford, 55 W. Va. 56, 60, 47 S. E. 240 (1905).

therefore submitted that as to this point of law the case was correctly decided.[5]

There have been many cases similar to this one, where a check was given, and on the back, just above the place for the indorser's signature, was a printed receipt in full. Such releases have universally been held invalid, unless supported by consideration.[6] Several similar cases have arisen under insurance policies, and it is interesting to note the distinctions made. Where there is a dispute in good faith, as to the cause of injury, as to its extent, as to the amount of time lost because of it, or as to the insurer's liability under the terms of the policy, the release has been held valid. Where the release is binding, it does not bar recovery for subsequent injuries from different causes, and there is a split of authority as to liability for a subsequent disability or death from the same cause, unforeseeable at the time of the release.[7]

Our court indicates that it regards this method of settlement with extreme disfavor because of the possibility which it affords of coercion of ignorant policy holders. In view of the fact that insurance companies will usually be more than fair in attempting to avoid litigation, it is submitted that this factor should not be given too much consideration.[8]

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[5] Wade v. Mutual Benefit Health & Acc. Ass'n, 115 W. Va. 694, 177 S. E. 611 (1934); Moore v. Md. Casualty Co., 150 N. C. 153, 63 S. E. 675 (1909), 24 L. R. A. (N. S.) 211 (1910); Woodall v. Pacific Mutual Life Ins. Co., 79 S. W. 1090 (Tex. Civ. App. 1904).

[6] Nixon v. Kiddy, 66 W. Va. 355, 66 S. E. 500 (1909).

[7] Graham v. Union Casualty & Surety Co., 120 Mo. App. 671, 97 S. W. 614 (1906); Woodmen Acc. Ass'n v. Hamilton, 70 Neb. 24, 96 N. W. 989 (1903), 70 Neb. 30, 97 N. W. 1017 (1904); Cunningham v. Union Casualty & Surety Co., 82 Mo. App. 607 (1899); Wood v. Mass. Mut. Acc. Ass'n, 174 Mass. 217, 54 N. E. 541 (1899).

[8] See for a discussion of related problems, Note (1927) 48 A. L. R. 1462.