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Release—Restoration of Consideration as Condition Precedent to Releasor's Action for Damages.—Suit in equity to set aside a release of a personal injury claim executed to the defendant's indemnity company, on the ground of mental incompetence. A full two months following the accident, the adjuster approached the plaintiff and after informing this man of limited intelligence of the nature and effect of a release, secured the release of the claim for $625. The plaintiff did not return the consideration before bringing the suit, nor did he offer to do so in his bill of complaint. Held, that the plaintiff, in the absence of fraud, is not entitled to avoid a release of liability for personal injuries where he did not offer to return the consideration for the release. Evidence was insufficient to justify setting aside a release on the ground of mental incompetence. Crawford v. Ridgely, 100 S.E.2d 665 (W. Va. 1957).

In Janney v. Virginian Ry., 119 W. Va. 249, 193 S.E. 187 (1937), our court held that, in the absence of fraud in the procurement of a release of liability, such release, if for valuable consideration, may not be repudiated by the releasor in an action at law for damages. As suggested by the court in that opinion, there are two lines of cases concerning whether the releasor should be required to suffer the expense of a separate suit in equity to vitiate the release. See also, McClintock, Equity §§ 89, 90 (1936). At all events, since fraud in the procurement of the release is not alleged, the plaintiff in the principal case has properly instituted a suit in equity to set aside the release executed to defendant's insurance adjuster; however, his failure to tender a return of the $625 proved fatal to his suit.

In cases where a contract is void by virtue of fraud in its execution, or fraud in factum, there is near unanimity of opinion that restoration of the consideration is unnecessary. Carroll v. Fetty, 121 W. Va. 215, 2 S.E.2d 521 (1939); Norvell v. Kanawha & M. Ry., 67 W. Va. 467, 68 S.E. 288 (1910); Pacific Greyhound Lines v. Zane, 160 F.2d 730 (9th Cir. 1947); Restatement, Contracts § 480 (1932). Since there is no contract, there is nothing to rescind; therefore, a requirement for the restoration of the consideration is unnecessary to effect a return to the status quo. In the situation where the release is merely voidable, however, a return of the consideration is a condition precedent to a suit to avoid the release. Carroll v. Fetty, supra; Janney v. Virginian Ry., supra; McCary v. Monongahela Valley Traction Co., 97 W. Va. 306, 125 S.E. 92
(1924). The moral culpability of the defendant seems determinative of whether retention of the consideration would unjustly enrich the plaintiff. The Pennsylvania court has indicated that where the defendant is guilty of fraud: "In such case, the money is retained, not as a part of the consideration of a contract he denies, but as a part indemnity for the fraud perpetrated on him." Gordon v. Great Atlantic and Pacific Tea Co., 243 Pa. 330, 90 Atl. 161 (1916).

In the principal case, the release was sought to be set aside on the ground of mental incompetence. The court affirmed its prior decision in the McCary case, supra, holding the releasor's mental limitations to be a circumstance making the contract voidable rather than void. However, a minority of courts hold that because of the mental incapacity of the releasor, there is no contract, its being void per se, and that, since the question of rescission does not arise, there is no requirement of restoration prior to the action for damages by the releasor. Smallwood v. St. Louis Ry., 17 Mo. App. 208, 263 S.W. 550 (1924); Michalsky v. Centennial Brewing Co., 48 Mont. 1, 134 Pac. 307 (1913); Jones v. Alabama & V. Ry., 72 Miss. 22, 16 So. 379 (1894).

Still other courts hold that the defendant's awareness of the plaintiff's mental incapacity at the time of the signing of the release is the critical issue for determination in such cases. Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E.2d 266 (1951); Carey v. Levy, 329 Mich. 459, 45 N.W.2d 352 (1951). One can easily conceive of a situation where the actions of an insurance adjuster might approach fraudulent conduct in dealing with the incompetent releasor, but the facts of the principal case indicate a responsible course of conduct on the part of the defendant's insurance adjuster; indeed, the plaintiff did not allege fraud in the procurement of the release.

A third element to be considered in mental incompetence cases is whether the funds received for the release were exhausted during the period of incompetence. To require a return of the consideration could work a hardship upon the releasor in such cases. Ipock v. Atlantic & N.C.R.R., 158 N.C. 445, 74 S.E. 352 (1912); Strodder v. Southern Granite Co., 19 Ga. 595, 27 S.E. 174 (1896).

Some courts, proceeding upon the theory that the law will not compel a person to perform a useless act, hold that the releasor should be excused from tendering a return of the consideration
because the defendant would no doubt refuse to accept the tender. *Carruth v. Fritch*, 210 P.2d 290 (Cal. App. 1949), rev'd, 36 Cal. 2d 426, 222 P.2d 702 (1950); *Merril v. Pike*, 94 Minn. 186, 102 N.W. 393 (1905). This view ignores the rationale of the requirement of restoration of consideration which is to prevent an unjust enrichment to the plaintiff, consequently, the defendant's probable refusal to accept such a tender is immaterial. These courts take a position tantamount to saying that there can be no unjust enrichment to the plaintiff whenever the defendant refuses to rescind his contract. Immel, *The Requirement of Restoration*, 29 NOTRE DAME LAW. 629 (1955).

The test of moral culpability of the defendant is the most desirable criterion to employ in making a determination of what steps are advisable to protect the defendant. In the absence of fraud, the compelling necessity of preserving the stability of contracts and the anticipation and obstruction of any unjust enrichment to the plaintiff, outweigh the reasons advanced to permit the releasor to retain the consideration while granting him relief from a release which, in justice, should not bar his action for damages. The principal case indicates a commendable and continuing desire on the part of the West Virginia court to maintain and apply this concept to restoration of consideration cases.

New York, a jurisdiction which has enforced the requirement of restoration more rigorously than many, *e.g.*, *Gilbert v. Rothschild*, 280 N.Y. 66, 19 N.E.2d 785 (1939), has passed an amendment to the New York Civil Practice Act which grants the court discretion to require restoration as a condition of rendering judgment, but does not expressly authorize the court to require restoration prior to the trial. N.Y. CIV. PRAC. ACT § 112-g. There is no apparent reason for legislative abrogation of this well-grounded requirement of restoration of consideration as a condition precedent to a suit to set aside a release. One may hope that the West Virginia Legislature never feels similarly disposed.

R. G. P.