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CONTRACTS-RELEASE-MISREPRESENTATION BY RELEASOR'S ATTORNEY- AVOIDANCE BY RELEASOR FOR UNILATERAL MISTAKE AS TO CONTENTS

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CONTRACTS—RELEASE—MISREPRESENTATION BY RELEASOR'S ATTORNEY—AVOIDANCE BY RELEASOR FOR UNILATERAL MISTAKE AS TO CONTENTS—Under the objective theory of mutual assent, which bases the imposition of contractual obligations on the expressed intent of the

parties, rather than on a subjective meeting of their minds,[1] the law has generally granted relief to the signer of a contract who is under a misapprehension as to its contents only where he can show that the mistake was made without negligence on his part.[2] The theory of affording relief in such a case apparently is that the instrument does not really represent the expression of the signer's intent, and the contract is, therefore, void at its inception.[3] In view of the usual catagorical statements of the general theory of objective assent, such as, "not assent, but what the other party is justified in regarding as assent, is essential,"[4] the logic of the cases allowing relief for unilateral mistake as to the contents of the writing seems somewhat strained, unless it is realized that a reasonable-man standard of objectivity is being used.[5] This is demonstrated by the emphasis in these cases on the negligence of the signer, which precludes him from obtaining relief.[6] Thus, in determining the standard of care to which a signer of a contract is to be held, it has been repeatedly decided that a literate person must read the contract himself,[7] and that a person who is illiterate must get someone to read or explain it to him.[8] Indeed, it has sometimes been held that such negligence will prevent the releasor from avoiding the release even where there has been fraud or misrepresentation on the part of the releasee.[9]

[1] 1 CONTRACTS RESTATEMENT, §§ 70, 71 (1932); 1 WILLISTON, CONTRACTS, rev. ed., §§ 66, 67 (1936); Williston, "Mutual Assent in the Formation of Contracts," 14 ILL. L. REV. 85 (1919).

[2] 1 WILLISTON, CONTRACTS, rev. ed., §§ 90A, 95A, and 1577 (1936); 1 PAGE, CONTRACTS, 2d ed., §§ 270, 271 and 272 (1920).

[3] 5 WILLISTON, CONTRACTS, rev. ed., § 1577 (1936): "Where the signer of a writing has made an innocent mistake as to the nature of his act without carelessness, whether induced by fraud or not, the writing is not his expression, and there is no contract." 1 PAGE, CONTRACTS, 2d ed., §270 (1920); Foster v. McKinnon, L.R. 4 C.P. 704 (1869).

[4] 1 WILLISTON, CONTRACTS, rev. ed. 89 (1936).

[5] 1 CONTRACTS RESTATEMENT, § 70 (1932): "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation."

[6] Professor Wigmore argues that the emphasis on negligence represents a compromise between the objective and subjective standards, avoiding the impracticalities of both. 9 WIGMORE, EVIDENCE, 3d ed., § 2413 (1940).

[7] 5 WILLISTON, CONTRACTS, rev. ed., § 1577 (1936); 1 PAGE, CONTRACTS, 2d ed., § 270 (1920); Upton v. Tribilcock, 91 U.S. 45 (1875); Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N.E. 782 (1920); Collier v. Stebbins, 236 Mich. 147, 210 N.W. 264 (1926).

[8] Shulman v. Moser, 284 Ill. 134, 119 N.E. 936 (1918); Leddy v. Barney, 139 Mass. 394, 2 N.E. 107 (1885); Morstad v. Atchison, Topeka & Santa Fe Ry. Co., 23 N.M. 663, 170 P. 886 (1918); Blossi v. Chicago & N. W. Ry. Co., 144 Iowa 697, 123 N.W. 360 (1909); 11 L.R.A. (N.S.) 182 note at 199 (1907).

[9] George E. Sebring Co. v. Skinner, 100 Fla. 315, 129 S. 759 (1930); Reid, Murdock & Co. v. Bradley, 105 Iowa 220, 74 N.W. 896 (1898); Dowagiac Mfg.

I

In the recent case of *Ricketts v. Pennsylvania Railroad Co.*,[10] this general problem was presented in a rather interesting way. The plaintiff, a waiter in one of the defendant's dining cars, sued the defendant for damages for personal injuries sustained in the course of his employment. When the defendant pleaded a general release by the plaintiff of all his claims against the defendant, the plaintiff sought to avoid it on the ground that he had signed the release without reading it, relying on representations made by an attorney, whom he had retained in connection with a claim against the defendant for back wages and tips. In holding the release invalid, Judge Learned Hand apparently treated the representations of the attorney as those of a third person, unrelated to the plaintiff by agency, because the attorney's authority did not extend to the settlement of the claim for damages from personal injuries. He held that the plaintiff was justified in not reading the release since he relied on the representations of an attorney as to its contents.

It is, however, difficult to determine the exact grounds upon which Judge Hand based his decision. Since the holding that the releasor was not negligent in failing to read the release runs contrary to a considerable array of authority, it seems regrettable that his opinion did not elaborate on his position in this regard. Discussion of this point is limited to the following statements:

> "... The release would still be invalid even though the plaintiff signed it without reading it, for he would have been justified in relying upon what his lawyer told him of its contents. The theory upon which a document binds one who signs it, but who does not read it, is that either he accepts it whatever may be its contents, or that he has been careless in choosing his informant."[11]

Authority in support of such a view is meager. The Canadian case of *Herchmer v. Elliott*[12] would seem to square very well with this decision, for there an assignment of a mortgage was avoided because it had been signed through misrepresentation by the signer's attorney. Strangely enough, in that case the court did not discuss, or even mention, the duty of the signer to read the instrument before signing it. Moreover, this seems to be the only case exactly in accord on this point. The New York case of *Pimpinello v. Swift & Co.*[13] and the often-cited

Co. v. Schroeder, 108 Wis. 109, 84 N.W. 14 (1900); Welsh v. Kelly-Springfield Tire Co., 213 Ind. 188, 12 N.E. (2d) 254 (1938). See also, 34 MICH. L. REV. 705 (1936).

[10] (C.C.A. 2d, 1946) 153 F. (2d) 757.

[11] Principal case at 760.

[12] 14 Ont. Rep. 714 (1887).

[13] 253 N.Y. 159, 170 N.E. 530 (1930).

Throughgood's Case[14] can both be distinguished on the ground that there the signers were unable to read.

To the contrary is the case of *Hand v. Allen*,[15] where the releasor sought to avoid the effect of the release by showing that he had not read it, but had signed it in reliance upon his attorney. The Illinois court held there that if the releasor ". . . did not know its contents, his negligence was inexcusable. . . ."[16] The holding in this case is in line with the familiar ruling that a literate signer will not be excused from carrying out the terms of a contract because he had not read it when he signed, unless the other party used fraud to prevent him from reading it.[17] This ruling has been followed so consistently by our courts that it would now seem basic in our law as to the formation of contracts. Furthermore, the very theory of objective mutual assent works to restrict the enlargement of any exceptions which allow a contract to be avoided on the basis of unilateral mistake.[18]

2

Judge Hand dwells at some length on the scope of the attorney's authority as the releasor's agent, concluding that there was sufficient evidence to justify the jury's finding that the attorney had authority only to collect back wages and tips. He states that the release would have been valid if the authority of the attorney had extended to settling all claims the releasor had against the release. Judge Swan, in his dissenting opinion, agrees with this statement, and dissents only on the ground that on the evidence presented the jury was not justified in finding that the attorney's authority was limited to collecting back wages and tips.

In supporting his position, Judge Hand starts with the accepted doctrine that if the attorney's authority had extended to settling all of the releasor's claims against the releasee, the releasor would have been held responsible for any deception practiced by his attorney on the releasee in reaching the settlement.[19] From this he concludes that the

[14] 2 COKE 5b (1581).

[15] 294 Ill. 35, 128 N.E. 305 (1920).

[16] Id. at 56.

[17] Notes 2, 6, 7 and 8, supra.

[18] McClintock, "Mistake and the Contractual Interests," 28 MINN. L. REV. 460, passim (1944).

[19] 1 AGENCY RESTATEMENT, § 261 (1933): "A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." And § 262: "A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him, under the rule stated in § 261, is not relieved from liability by the fact that the apparent agent acts entirely for his own purposes, unless the other has notice of this."

See also, Fifth Ave. Bank of N.Y. v. Forty-Second Street and Grand St. Ferry R.

releasor should likewise be held responsible, in such cases, for deception practiced by his attorney on the releasor himself, even where there is no deception of the releasee; and since, under this theory, the misrepresentation of the releasor's attorney is attributable to the releasor himself, he would not have been allowed to make use of it to avoid the release had the attorney's authority been general. Since, however, the reason for the basic doctrine from which Judge Hand starts is that a principal must assume responsibility for injury to others resulting from the apparent authority with which he clothed the agent, it is difficult to see why it should apply in a case where no third person has been deceived. In the principal case the releasee is relying upon a document which was executed by the releasor, not by an apparent agent; and the releasee was in no way misled by the misrepresentations of the attorney, nor was he in any way responsible for them. Instead, the misrepresentations were made only to the releasor. In view of these facts, the main question presented appears to be whether or not the releasor was negligent in making the mistake as to the contents, or in other words, whether or not a literate layman will be excused from reading a contract himself because it has been interpreted to him by a lawyer. It seems doubtful that the answer to this question should depend on the particular purpose for which the attorney has been retained. If a layman is not negligent in relying on his own attorney's representations as to the contents of a contract where the attorney has been retained to collect a claim for back wages and tips, it does not seem that there is any good reason to hold him negligent for the same sort of reliance where the attorney has been retained to settle claims for damages from personal injuries.[20]

3

Judge Frank in his concurring opinion agreed with the logic of Judge Hand's position,[21] but chose to place his decision on different grounds. He does not believe that the objective theory of mutual consent can bring about a just result in these cases. Being of the opinion that the courts, realizing this, have found indirect means of giving relief to releasors in hard and unjust situations, he would have courts openly

Co., 137 N.Y. 231, 33 N.E. 378 (1893); Ripon Knitting Works v. Railway Express Agency, Inc., 207 Wis. 452, 240 N.W. 840 (1932).

[20] Principal case at 760. The agency argument was considered and rejected by the court in Pimpinello v. Swift & Co., 253 N.Y. 159, 170 N.E. 530 (1930).

[21] In his concurring opinion Judge Frank stated his understanding of Judge Hand's opinion as follows: "Judge Hand says (and I entirely agree) that the evidence sufficiently shows that the lawyer acted beyond his authority. Accordingly, it is as if a non-lawyer, carefully selected by the plaintiff, had erroneously interpreted the release to him. The case thus comes within the category, described by Williston, of non-negligent unilateral mistakes preventing the formation of valid contracts."

acknowledge their "unexpressed rationale" [22] and afford special protection to employee-releasors where the liability released arises pursuant to the Federal Employers Liability Act. His basis for adopting such a doctrine is the economic inequality of the employee's bargaining power in dealing with his employer.[23] Under this doctrine the courts would look to the circumstances surrounding the execution of the release and to the consideration given the releasor, and enforce the release only if convinced that it had been fairly and justly agreed upon. This doctrine is generally recognized and accepted for the special protection of seamen.[24] It is concisely stated in the leading case of *Garrett v. Moore-McCormack Co.:*

> "A shipowner, who, in defense of an action by a seaman for personal injuries . . . is under the burden of proving that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding." [25]

It does seem to be true that the "unexpressed rationale" of many of the cases which afford relief to the releasor has been a recognition of his need for special protection from coercion and economic pressure by employers and large corporations. Williston has called it a "tenderness for injured plaintiffs," [26] while Wigmore describes it as follows:

[22] Principal case at 769, note 44.

[23] Patterson, "Equitable Relief for Unilateral Mistake," 28 COL. L. REV. 859 at 893 (1928): "The harshest applications of this legal doctrine (denying rescission) are found in cases of release of personal injury claims. Here there is frequently the grossest inequality between the negotiating individuals (the injured party and the claim-agent or other representative of the tort-feasor) in native intelligence, education and economic bargaining power. The release is prepared in technical language by a skillful lawyer, and is made broad enough to cover every future situation which his fertile imagination can conceive. On the other hand, the injured party (if he has no lawyer, at least) is stimulated by the immediate situation which presses upon him: his physical suffering, his need of money, his helplessness."

[24] Premeaux v. Socony-Vacum Oil Co., (Tex. 1946) 192 S.W. (2d) 138; Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S. Ct. 246 (1942); Hume v. Moore-McCormack Lines, Inc., (C.C.A. 2d, 1941) 121 F. (2d) 336; Sitchon v. American Export Lines, (C.C.A. 2d, 1940) 113 F. (2d) 830; Bonici v. Standard Oil Co. of New Jersey, (C.C.A. 2d, 1939) 103 F. (2d) 437.

Judge Frank found a broad hint by the Supreme Court that the doctrine as to seamen should be applied to non-maritime employees in the following language: "For somewhat comparable cases involving releases for personal injuries arising from non-maritime torts, see. . . ." Garrett v. Moore-McCormack Co., 317 U.S. 239 at 248, note 17, 63 S. Ct. 246 (1942).

[25] Syllabus 3, 317 U.S. 239, 63 S. Ct. 246 (1942).

[26] 5 WILLISTON, CONTRACTS, rev. ed., § 1551 at p. 4348 (1936).

"In general, the modern trend is to lay down no one or more rules of thumb, but to develop a special doctrine in each Court for that class of cases, liberally relieving the party who has signed the release."[27]

Modern cases would seem to bear these statements out, for many courts have not been reluctant to find fraud or misrepresentation present on the part of the releasee,[28] and some have complained pointedly of the over-reaching tactics of claim agents.[29] A few have even impliedly imposed on the releasee the obligation of seeing that the injured releasor fully understands all his legal rights in the matter.[30] Others have been quite willing to find that the releasor was in so shocked and unfit a mental condition that he was unaware of what he was doing.[31]

In all these cases, however, the courts have clung to the theory that a contract can be avoided because of the signer's mistake as to its contents only if the signer was not negligent in making that mistake.[32] Both the view of Judge Hand and that of Judge Frank thus mark a departure from this established rule as to the formation of contracts.

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[27] 9 WIGMORE, EVIDENCE, 3d ed., § 2416 at p. 55 (1940).

[28] Megee v. Fasulis, 57 Cal. App. (2d) 275, 134 P. (2d) 815 (1943); Lefebvre v. Autoist Mut. Ins. Co., 205 Wis. 115, 236 N.W. 684 (1931); Shus v. Powers-Simpson Co., 85 Minn. 447, 89 N.W. 68 (1902).

[29] 11 L.R.A. (N.S.) 182 note at 200 (1908); Tyner v. Axt, 113 Cal. App. 408, 298 P. 537 (1931); Carr v. Sacramento Clay Products Co., 35 Cal. App. 439, 170 P. 446 (1917).

[30] Jordan v. Guerra, 23 Cal. (2d) 469, 144 P.(2d) 349 (1943); Southern Pacific Co. v. Gastelum, 36 Ariz. 106, 283 P. 719 (1929); Miller v. Spokane International Ry. Co., 82 Wash. 170, 143 P. 981 (1914); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901).

[31] Airline Motor Coaches v. Parks, (Tex. Civ. App. 1945) 190 S.W. (2d) 142; Schnieder v. Raymond, 106 Conn. 72, 136 A. 874 (1927); Colorado City v. Liafe, 28 Colo. 468, 65 P. 630 (1901); Christianson v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 94, 69 N.W. 640 (1896); Union Pacific Railway Co. v. Harris, 158 U.S. 326, 15 S. Ct. 843 (1895).

[32] Patterson, "Equitable Relief for Unilateral Mistake," 28 COL. L. REV. 859 at 893 (1928): "The courts have been quite willing to find fraud, innocent misrepresentation, or mutual mistake in these cases. Where the facts cannot be fitted into one of these categories, relief is commonly denied, even though it be accepted as a fact that the injured party did not understand the language of the writing."