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Requirement of Restoration in the Avoidance of Releases of Tort Claims

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THE REQUIREMENT OF RESTORATION IN THE AVOIDANCE OF RELEASES OF TORT CLAIMS

I

INTRODUCTION

It is a well established principle that a release of a cause of action for a tort discharges that cause of action.[1] However, such a release is ineffective where it was procured as a result of fraud, mistake, duress, or while the releasor was incompetent.[2] If the releasor is given a cause of action for damages for personal injuries, justice would seem to demand that he restore whatever consideration he has received for his release. The time and nature of this restoration is what concerns us here.

The real question is the extent of the plaintiff's right to sue for the damages for his personal injuries and not the avoidance of the release. However, it is usually stated that before the action can be brought the ineffective release must be avoided.[3] And it is usually said that restoration of the consideration is an element of that avoidance.[4] Thus we have such statements as:

> [A] return of the money, or an offer to return, received by the plaintiff from the defendant is part of the act of rescission, and so long as the contract remains unrescinded it binds both parties; and the defrauded party has no cause of action for the property or consideration

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1 RESTATEMENT, TORTS § 900 (1939).

2 RESTATEMENT, TORTS § 900, comment b (1939).

3 East Tennessee, V. & G. Ry. v. Hayes, 83 Ga. 558, 10 S.E. 350 (1889); Randall v. Port Huron, St. C. & M. C. Ry., 215 Mich. 413, 184 N.W. 435 (1921); Levister v. Southern Ry., 56 S.C. 508, 35 S.E. 207 (1900).

4 RESTATEMENT, CONTRACTS § 480 (1932), avoidance for fraud.

> parted with or released under the fraudulent contract until the contract has been rescinded.[5]

Comparable statements have been made where the release was sought to be avoided because of duress.[6] Because of this attitude of the courts a short look at the treatment given to the requirement of restoration as an element of rescission is in order.

The distinction between rescission at law and in equity is a classical one. In an action at law the plaintiff proceeds on the theory that there has been a rescission, while in equity he asks the court to grant him the rescission.[7] The courts have said that there could be no completed rescission so long as the plaintiff retained some of the proceeds of the contract.[8] Thus, if in an action at law the plaintiff is proceeding on the theory that there has been a rescission, and restoration of what he has received is necessary to that rescission, the restoration is said to be a condition precedent to the bringing of the action.[9] On the other hand if the plaintiff is asking a court of equity to do the rescinding for him, he may keep what he has received and allow the court to restore the *status quo* by its decree.[10]

Usually assigned as a reason for these results is that the courts of law, unlike the courts of equity, had no power to render a conditional decree.[11] If restoration were not required of the plaintiff, a judgment in his favor would leave him in possession of the consideration he had already received and would require the defendant to maintain an

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5 East Tennessee, V. & G. Ry. v. Hayes, 83 Ga. 558, 10 S.E. 350, 351 (1889).

6 Gilbert v. Wilson, 237 Ala. 645, 188 So. 260 (1939).

7 *E.g.*, Gould v. Cayuga County Nat'l Bank, 86 N.Y. 75, 82-83 (1881); RESTATEMENT, CONTRACTS § 481 (1932).

8 Levister v. Southern Ry., 56 S.C. 508, 35 S.E. 207 (1900).

9 RESTATEMENT, CONTRACTS § 481, comment *a* (1932); RESTATEMENT, RESTITUTION § 65, comment *d* (1937).

10 *Ibid.*

11 *Ibid.*

action to recover it.[12]

Another reason assigned for this difference is that in a law action the plaintiff would be acting inconsistently, if, while contending that there is no contract, he were allowed to retain the fruits of that contract.[13] In the equitable action where he alleges a willingness to restore what he has received if the court should rescind the contract, there is no inconsistency in allowing him to retain the consideration until the court decrees the rescission.

There has been no marked change in this distinction between actions at law and in equity since the adoption of the procedure codes. In fact, in at least one case, by classifying the defect in the release as a legal defense, the requirements were made even stricter as a result of the code.[14] There are, of course, some instances where as a result of the codes, the courts have adopted the more lenient procedures of the courts of equity.[15] Originally, actions for rescission of releases were exclusively equitable,[16] and in some instances the question of avoidance of the releases arises in the courts of equity today.[17] Before the present Federal Rules of Civil Procedure, federal decisions held that a plaintiff must first go into equity to have the release rescinded before he could maintain his action for damages for personal injuries.[18] Today, however, by far the majority of the cases in which the question arises are in the courts of law. Hence, we are confronted with the usual

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12 Monnier v. Central Greyhound Lines, Inc., 129 N.E.2d 800 (Ind. App. 1955).

13 Rabitte v. Alabama Great So. R.R., 158 Ala. 431, 47 So. 573 (1908).

14 Carroll v. United Rys., 157 Mo. App. 247, 137 S.W. 303 (1911).

15 *In re* Meiselman, 105 F.2d 995 (2d Cir. 1939); Plews v. Burrage, 274 Fed. 881 (1st Cir. 1921); Sanford v. Royal Ins. Co., 11 Wash. 653, 40 Pac. 609 (1895).

16 5 WILLISTON, CONTRACTS § 1525 (Rev. ed. 1937).

17 Early v. Martin, 331 Ill. App. 55, 72 N.E.2d 562 (1947). *Accord,* Union Pac. R.R. v. Syas, 246 Fed. 561 (8th Cir. 1917), indicates that the action must be tried in equity.

18 Vandervelden v. Chicago & N. W. Ry., 61 Fed. 54 (C.C.N.D. Iowa 1894).

statement that a restoration of what has been received under the release is a condition to the bringing of an action for damages for personal injuries.

An additional reason for requiring restoration is a fear on the part of the courts that an unprincipled releasor would take advantage of the defendant if difficult hurdles are not placed in his path toward avoiding the release.[19] Thus, in a recent case it was said that if the court did not require restoration:

> . . . settlements of unliquidated claims, particularly in tort actions for personal injuries, would be frequently but an idle ceremony, for he who would part with his money to avoid litigation and mutually adjust claims of an unascertained amount would have no assurance that thereafter, when the memory of honest witnesses is beclouded by the lapse of time or they are no longer available, an unprincipled releasor might assert fraud, and with nothing to lose and a possibility of gain, harass the foolish settlor with claims, demands and expensive litigation.
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> The established policy of the law to encourage compromise and amicable settlement of conflicting claims would be set at naught by a general rule such as appellant contends for. The unscrupulous releasor being under no duty to restore the consideration he received and being subject only to the possibility of having it set off against any judgment he might recover, could use the very money he received in compromise to prosecute subsequent actions and, if unsuccessful therein, force the releasee to further, and probably vain, protracted and expensive legal action for the attempted recovery thereof.[20]

While this statement may be true where the amount received for the release is a substantial sum, one wonders if it is valid in those frequent cases where the amount which

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19 Monnier v. Central Greyhound Lines, Inc., 129 N.E.2d 800 (Ind. App. 1955); Doyle v. New York, O. & W. Ry., 66 App. Div. 398, 72 N.Y. Supp. 936 (4th Dep't 1901).

20 Monnier v. Central Greyhound Lines, Inc., 129 N.E.2d 800, 805 (Ind. App. 1955).

has been received for the release is as little as ten dollars.

The true rationale for this requirement is that restoration is required to avoid the unjust enrichment which will result if the plaintiff is allowed to retain what he has received under the contract.[21] The distinction between the legal and the equitable actions could be explained on that ground. The courts of law could not by their judgment prevent the unjust enrichment whereas the courts of equity could do so by the use of a conditional decree. Unfortunately the tendency has been for the courts to apply the rule without considering its purpose. As a result it has become a mere technical requirement. At times its application has operated to protect a fraudulent defendant rather than to prevent the unjust enrichment of the plaintiff. One court has gone so far as to say that the reason for requiring restoration "is not a question of damage to the defendant but of the right of the plaintiff to proceed."[22]

The requirement of restoration as a condition to rescission has been embodied in the statutes of some of the states.[23] These statutes have been applied to the rescission of releases of causes of action for torts.[24] They have been interpreted, however, as being only codifications of the common law rule.[25] Since there is no apparent difference in the way courts operating under the statutes have treated the rule from the way in which it has been treated where there are no such statutes, no distinction will be made in this paper as to whether the source of the rule is common

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21 Kercher v. Brown, 72 N.E.2d 588 (Ohio App. 1947); RESTATEMENT, RESTITUTION § 65, comment *e* (1937).

22 Memphis St. Ry. v. Giardino, 116 Tenn. 368, 92 S.W. 855, 858 (1906).

23 CAL. CIV. CODE, § 1691 (Deering 1949); GA. CODE ANN. § 37-104 (1936); MONT. REV. CODES ANN. § 17-907 (1947); N. D. REV. CODE, § 9-0904 (1943); OKLA. STAT. ANN. tit. 15, § 235 (1937); S. D. CODE, § 37.0703 (1939).

24 Weddle v. Heath, 211 Cal. 445, 295 Pac. 832 (1931); Garcia v. California Truck Co., 183 Cal. 767, 192 Pac. 708 (1920); Gilmore v. Western Elec. Co., 42 N.D. 206, 172 N.W. 111 (1919); Swan v. Great Northern Ry., 40 N.D. 258, 168 N.W. 657 (1918).

25 *Swan v. Great Northern Ry., supra* note 24.

law or statutory.

Closely akin to the question of the requirement of restoration is the problem of the election of remedies: has the plaintiff by accepting benefits under the release thereby elected to "affirm" or "ratify" the transaction?[26] It is not possible in all cases to determine whether the court is refusing its relief on this ground or because the plaintiff has failed to restore the consideration.[27] It may be that the two are but facets of the same problem. However, a discussion of that possibility is beyond the scope of this paper.

Another closely related problem is the requirement that a person desiring to rescind must indicate his intention to do so and must return the consideration he has received within a reasonable time after the discovery of the defect.[28] It is also difficult in many cases to determine whether the court is refusing relief because the plaintiff has not returned the consideration before suit and therefore cannot maintain his action, or whether the plaintiff has not acted within a reasonable time after the discovery of the defect and therefore is not entitled to rescind.[29] Again, this question is outside the scope of our present inquiry.

In requiring the restoration as an element of avoiding a contract the courts have not drawn a distinction between the kinds of contracts involved, nor between the grounds for the avoidance of the contracts.[30] Substantially the same rules have been stated whether the contract is sought to be avoided for fraud, duress, breach, incompetency, or mis-

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26 RESTATEMENT, CONTRACTS § 484 (1932).

27 *E.g.*, Johnson v. Shreveport Water-Works Co., 109 La. 268, 33 So. 309 (1903).

28 RESTATEMENT, CONTRACTS § 483 (1) (1932); RESTATEMENT, RESTITUTION § 64 (1937).

29 *E.g.*, Birmingham Ry., Light & Power Co. v. Jordan, 170 Ala. 530, 54 So. 280 (1911); Harrison v. Alabama Midland Ry., 144 Ala. 246, 40 So. 394 (1906); Randall v. Port Huron St. C. & M. C. Ry., 215 Mich. 413, 184 N.W. 435 (1921); Brown v. Walker Lumber Co., 128 S.C. 161, 122 S.E. 670 (1924).

30 See Note, 29 COLUM. L. REV. 791 (1929), where the author investigates the requirement in suits for rescission for fraud.

take.[31] In the field of release of causes of action for tort, however, there has been more confusion, and the courts have been in more disagreement than elsewhere about the extent of the requirement and the exceptions to it.[32] For this reason we will focus our attention upon the requirement as it applies to the avoidance of releases of causes of action for torts.

Some courts have stated that there is no requirement of restoration where releases of this kind are sought to be avoided,[33] but generally the courts have not relied upon such a distinction as a basis for an exception to the rule. There are reasons, however, why such an exception might be made. In some instances, consideration for the release has been the giving up of a lien,[34] the loss of a set-off,[35] or the value of room, board, or medical treatment which have been furnished for the benefit of the plaintiff.[36] But in most of the cases the consideration has consisted solely of money. Thus, these releases fall within the exception that restoration is not required where the consideration consists solely of money.[37] However, with a few exceptions,[38] the courts have not used this as a reason for excusing the requirement of restoration.

In most other contract cases, the plaintiff is seeking

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31 *Compare* RESTATEMENT, CONTRACTS § 349 (1932), breach of contract, *with* § 480, fraud, 499, duress; RESTATEMENT, RESTITUTION § 65 (1937); and 5 CORBIN, CONTRACTS § 1114 (1951).

32 5 WILLISTON, CONTRACTS § 1530 (Rev. ed. 1937).

33 Koshka v. Missouri Pac. R.R., 114 Kan. 126, 217 Pac. 293 (1923); Texas Employers Ins. Ass'n v. Kennedy, 135 Tex. 486, 143 S.W.2d 583 (1940). *Contra:* Baker's Adm'x v. Louisville & N. R.R., 287 Ky. 13, 152 S.W.2d 276 (1941); Picklesimer v. Baltimore & O. R.R., 151 Ohio St. 1, 84 N.E.2d 214 (1949). The cases are collected in Annot., 134 A.L.R. 6 (1941).

34 Davis v. Zoban Storage Co., 59 Ga. App. 474, 1 S.E.2d 473 (1939).

35 Hardware Mut. Cas. Co. v. Dooley, 68 Ga. App. 230, 22 S.E.2d 625 (1942).

36 The Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S.W. 117 (1897).

37 RESTATEMENT, CONTRACTS § 480 (2) (c) (1932); RESTATEMENT, RESTITUTION § 65(f) (1937).

38 *E.g.*, Collins v. Hughes & Riddle, 134 Neb. 380, 278 N.W. 888 (1938).

restitution of the property or the value of the services he has given under the contract. In the case of a release he is interested in having his original cause of action for damages returned to him. Other factors to be weighed in release cases are the kind of misrepresentation which may be present, the physical and mental condition of the releasor, the attitude of the courts and juries toward the release of a tort, as compared with other contracts, and the fact that insurance or insurance companies may be involved. These differences suggest the advisability of limiting our inquiry to the requirement of restoration as a condition to the avoidance of a release of a cause of action for tort.[39]

II

THE APPLICATION OF THE RULE

Where a contract is said to be "void" or where it is found that there is no contract, the usual rule has been that restoration of what had been received was not necessary.[40] Since there is no contract, there is nothing to rescind and hence there is no requirement for the restoration of the consideration. Thus, when a contract is said to be void because of fraud in its execution, or fraud in the factum, the courts have generally said that restoration is not required.[41] The result is otherwise where the contract is

39 Problems similar to those encountered in releases of tort claims are also present where there has been a release of a contract claim for unliquidated damages, or where there has been a release of an unliquidated claim upon an insurance policy. No attempt will be made to compare or contrast these cases. Nor will any effort be made to collect or analyze such cases as Smith v. Humphreys, 266 S.W. 487 (Mo. App. 1924), where the release was sought to be avoided because of breach of contract.

40 RESTATEMENT, CONTRACTS § 480 (1932).

41 Pacific Greyhound Lines v. Zane, 160 F.2d 731 (9th Cir. 1947); *In re* Clark's Estate, 318 Mich. 92, 27 N.W.2d 509 (1947); Paul v. Flannery, 128 N.J.L. 438, 26 A.2d 553 (1942); Stanford v. Zemel, 12 N.J. Misc. 133, 170 Atl. 53 (N.J. Super. 1934); Hayes v. Atlanta & C. Air-Line R.R., 143 N.C. 125, 55 S.E. 437 (1906); Ulrich v. McDonough, 89 Ohio App. 178, 101 N.E.2d 163 (1950).

merely "voidable" because of fraud in the inducement, or fraud in the treaty. Similarly, where duress renders the contract voidable, restoration is not required, but where the duress renders the contract void, restoration is necessary.[42] If the purpose of the requirement of restoration is to prevent the unjust enrichment of the plaintiff, it would seem to make no difference whether or not he has received the consideration under a contract. The nature of the fraud might be a factor in determining whether restoration should be required, but the effect of the fraud upon the contract would seem to have no such connection. Nevertheless, this same distinction—between the nature and effect of fraud—will be found running through other situations where the courts have held that restoration is not a requirement. It is doubtful if the distinction is either workable or desirable.

In Illinois the courts have reached the conclusion that restoration is not required in any case where the release has been procured by fraud regardless of the nature of the fraud.[43] These courts have held that such releases are absolutely void and need not be rescinded. Other courts have reached the same result without calling the releases void.[44] These latter cases have merit if the moral culpability of the defendant is a factor in determining whether the re-

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42 Schoeler v. Roth, 51 F. Supp. 518 (S.D.N.Y. 1942); Taylor v. Russell, 258 App. Div. 305, 16 N.Y.S.2d 388 (4th Dep't 1939); Carroll v. Fetty, 121 W. Va. 215, 2 S.E.2d 521, *cert. denied,* 308 U.S. 571 (1939).

43 McDaniels v. Terminal R. Ass'n, 302 Ill. App. 332, 23 N.E.2d 785 (1939); Spring Valley Coal Co. v. Buzis, 213 Ill. 341, 72 N.E. 1060 (1904); Indiana, D. & W. R.R. v. Fowler, 201 Ill. 152, 66 N.E. 394 (1903); Chicago, Rock Island & Pac. Ry. v. Lewis, 109 Ill. 120 (1884).

44 Wangen v. Upper Iowa Power Co., 185 Iowa 110, 169 N.W. 668 (1918); Great American Life Ins. Co. v. Love, 169 Okla. 35, 35 P.2d 948 (1934); St. Louis & S. F. R.R. v. Richards, 23 Okla. 256, 102 Pac. 92 (1909); Vanormer v. Osborn Mach. Co., 255 Pa. 47, 99 Atl. 161 (1916); Gordon v. Great Atlantic & Pacific Tea Co., 243 Pa. 330, 90 Atl. 78 (1914); Hedlun v. Holy Terror Min. Co., 16 S.D. 261, 92 N.W. 31 (1902); Indemnity Ins. Co. v. Sterling, 51 S.W.2d 788 (Tex. Civ. App. 1932). *Contra:* Thornton v. Puget Sound Power & Light Co., 49 F.2d 347 (W.D. Wash. 1930); The Thomas P. Beal, 298 Fed. 121 (W.D. Wash. 1924).

tention of the consideration would unjustly enrich the plaintiff. And this would seem to be an important factor, particularly in those cases where the question before the court is whether to protect a defendant guilty of fraud or a plaintiff who is financially unable to return what he has received. One of the cases expresses this idea: "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."[45] The same idea is present when it is held that a return of the consideration is required where the release was entered into as a result of a mistake, but that it is not necessary where it was procured by fraud.[46]

Similar to those cases which hold that restoration is not necessary where the release is "void," are those which say that it is not required because there is no contract.[47] Such a situation is present where it is contended that someone other than the releasor has signed the release,[48] or where the release provisions are added after the releasor has signed the paper.[49] To the same effect are a few cases in which the releasor pleads in the alternative. For example, he may say that he did not sign the release, or if he did sign it, he was unaware of it because he was in a dazed condition.[50] Likewise he may contend that he did not sign it, or if he did, his signature was procured as a result of the defendant's fraud or misrepresentations.[51] Another comparable situation is where the court holds that the agree-

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45 *Gordon v. Great Atlantic & Pacific Tea Co., supra* note 44, at 80.

46 Seymour v. Chicago & N. W. Ry., 18 Iowa 218, 164 N.W. 352 (1917).

47 Watson v. Coxe Bros. Lumber Co., 203 S.C. 125, 26 S.E.2d 401 (1943).

48 Rice v. Merrill, 223 Mass. 279, 111 N.E. 860 (1916); Chalmers v. United Rys. Co., 153 Mo. App. 55, 131 S.W. 903 (1910).

49 Ingram v. Covington, F. & A. Ry., 28 Ky. L. R. 508, 89 S.W. 541 (1905); Lucas v. Gibson, 341 Pa. 427, 19 A.2d 395 (1941).

50 McKittrick v. Greenville Traction Co., 84 S.C. 275, 66 S.E. 289 (1909).

51 Southern Pac. Co. v. Gastelum, 26 Ariz. 106, 283 Pac. 719 (1929).

ment was not a settlement of the dispute.[52] There are also the cases which have held that there was no contract because the releasor was drunk[53] or incompetent[54] at the time he signed the release. It is possible that some of these cases can be distinguished from those cases which hold that restoration is necessary where the releasor's incapacity is alleged as the ground for avoiding the release.[55] In the former cases the releasor is contending that he did not sign the release whereas in the latter cases he is admitting in his pleadings that he is now aware of the fact that he had signed such a paper. Some cases may also be explained on the ground that the plaintiff had spent the money prior to the time he became aware of the fact that he had signed a release.[56]

Whether the plaintiff had knowledge of receiving the consideration is of importance in determining if or when restoration should be required. It is a factor in determining whether the enrichment is unjust. However, it does not seem that the courts are justified in creating an exception to the rule solely on the ground that in these cases there was no contract. Even where there clearly was no intention to contract, namely, where there has been a misrepresentation of the nature of the paper which was being signed,[57] the non-existence of a contract should not be the only

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52 Harvey v. Aceves, 115 Cal. App. 333, 1 P.2d 1043 (1931), where a fine was not imposed on condition that the tort-feasor pay a sum to the injured party.

53 Roy v. Kirn, 208 Mich. 571, 175 N.W. 475 (1919).

54 Martin v. Sentker, 12 Ohio App. 46 (1918); Charron v. Northwestern Fuel Co., 149 Wis. 240, 134 N.W. 1048 (1912).

55 Cases cited in notes 109, 112, and 114, *infra*.

56 McKittrick v. Greenville Traction Co., 84 S.C. 275, 66 S.E. 289 (1909); Charron v. Northwestern Fuel Co., 149 Wis. 240, 134 N.W. 1048 (1912).

57 Georgia S. & F. Ry. v. Adeeb, 15 Ga. App. 831, 84 S.E. 323 (1915), to show a doctor how to spell her name; Ross v. Oliver Bros. & Honeycutt, 152 Ky. 437, 153 S.W. 756 (1913), statement as to the nature of his injury; Rau v. Robertson, 260 S.W. 751 (Mo. 1924), a paper to allow her release from the hospital.

consideration in determining whether restoration is necessary.

By far the greatest number of cases indicating an exception to the rule, fall within a category in which the releasor contends that he received the consideration believing it to be for something other than a general release. In some of these cases he further contends that he believed, or was led to believe, that the instrument he was signing was a receipt or an acknowledgment.[58] In some of these transactions the courts have said that the contracts were void or that there was no contract.[59] And again they have placed the requirement of restoration on a conclusion of "voidness" of the release rather than on the question of unjust enrichment. Since to determine whether the enrichment is unjust depends upon the circumstances surrounding the making of the release, we will direct our attention to the nature of the transaction and the contentions made by the parties and not upon the classification of the release as voidable or void.

One group of such cases is that in which the releasor contends that he was given the money as a gift or donation and that he was led to believe that the paper he signed was not a release but was a receipt for the money.[60] Im-

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58 *E.g.*, Yelloway, Inc. v. Garretson, 89 Colo. 375, 3 P.2d 292 (1931); Chicago, Rock Island & Pac. R.R. v. Doyle, 18 Kan. 58 (1877); Hogarth v. William H. Grundy & Co., 256 Pa. 451, 100 Atl. 1001 (1917).

59 *E.g.*, Meyer v. Haas, 126 Cal. 560, 58 Pac. 1042 (1899); Mullen v. Old Colony R.R., 127 Mass. 86 (1879); Farrington v. Harlem Sav. Bank, 280 N.Y. 1, 19 N.E.2d 657 (1939).

60 Illinois Cent. R.R. v. Johnston, 205 Ala. 1, 87 So. 866, *cert. denied*, 254 U.S. 654 (1921); Western Ry. v. Arnett, 137 Ala. 414, 34 So. 997 (1903); Yelloway, Inc. v. Garretson, 89 Colo. 375, 3 P.2d 292 (1931); Roberts v. Colorado Springs & I. Ry., 45 Colo. 188, 101 Pac. 59 (1909); Mackle Constr. Co. v. Wyatt, 29 Ga. App. 617, 116 S.E. 877 (1923); Jaques v. Sioux City Traction Co., 124 Iowa 257, 99 N.W. 1069 (1904); Lervick v. White Top Cabs, Inc., 10 So. 2d 67 (La. App. 1942); Malkmus v. St. Louis Portland Cement Co., 150 Mo. App. 446, 131 S.W. 148 (1910); Shaw v. Webber, 29 N.Y. Supp. (79 Hun.) 437 (Sup. Ct. 1894); Jones v. Pickle, 7 Ohio App. 33 (1916); Bissett v. Portland Ry., Light & Power Co., 72 Ore. 441, 143 Pac. 991 (1914); Hogarth v. William H. Grundy & Co., 256 Pa. 451, 100 Atl. 1001 (1917). *Contra:* Mathis

plicit in these cases is the suggestion that restoration is not necessary since there is no agreement of the parties to rescind. It has been held that even where there was no misrepresentation, if the money was received without any intention of there being a settlement, a tender was not necessary. This was true even though no gratuity was intended and the amount received was required to be deducted from the judgment.[61] If the courts should find that the money received in these cases actually was given to the plaintiff as a gratuity, as he contends, then he would be entitled to retain it. Under such circumstances the court would find that there was no consideration for the release and it could be avoided on that ground. However, it is not seriously contended that the amount was given as a gratuity but only that it was represented to be one. In avoiding the release the court not only determines that the release was fraudulently procured but also that the amount paid was not paid as a gift. Consequently, it would seem proper that the amount received should be deducted from any judgment the plaintiff might recover.[62] Thus we are confronted with the same problem that exists in any other area of fraud or mistake, and no good reason can be seen for reaching a different result because of the nature of the misrepresentation found in these cases.

It may be that in addition to a cause of action for his injuries the plaintiff also has a right to insurance payments. Where he has received the proceeds from the insurance policy and has signed a general release believing it to be a release only of the insurance claim, it has been held that he need not return the consideration before maintaining

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Adm'r v. West Kentucky Coal Co., 287 Ky. 843, 155 S.W.2d 441 (1941) (the payment of $2,500 was held to be a settlement and not a gift); Harrison v. Southern Ry., 131 S.C. 12, 127 S.E. 270 (1925).

61 Miller v. Spokane Int'l Ry., 82 Wash. 170, 143 Pac. 981 (1914).

62 Roberts v. Colorado Springs & I. Ry., 45 Colo. 188, 101 Pac. 59 (1909).

an action for the injuries.[63] It is interesting to observe that the Kentucky court which has reached this conclusion required restoration in the case where the plaintiff contended that he thought he had received the money as a gift.[64] Of course in that case the court did indicate that the instrument "unambiguously" showed that the amount was paid in settlement of the claim. The Alabama courts have also reached opposite results in these two situations but in the reverse order.[65] A difference in the requirement of restoration between a misrepresentation that the amount was paid as a gift and the misrepresentation that it was paid as an insurance claim is difficult to justify.

Where a release was signed in the belief that it was a receipt for the amount which had been paid for doctor, nurse, or hospital bills, courts have also held that a return of the amount received was unnecessary.[66] Some courts have reached this result on the basis that the plaintiff is not seeking a rescission, but, as in the previous situations, is contending only that there was no contract and that therefore rescission and its concomitant, restoration, is not required.[67] Also where there was a voluntary payment

[63] Hooks v. Cornett Lewis Coal Co., 260 Ky. 778, 86 S.W.2d 697 (1935); Brambell v. Cincinnati, F. & S. E. R.R., 132 Ky. 547, 116 S.W. 742 (1909). *Contra:* United States Cast Iron & Foundry Co. v. Marler, 17 Ala. App. 358, 86 So. 103, *cert. denied, Ex parte* Marler, 204 Ala. 342, 86 So. 108 (1920); Conrad v. Keller Brick Co., 31 Ohio C.C. Dec. 700 (1907), *aff'd.*, 79 Ohio St. 461, 87 N.E. 1134 (1909).

[64] Mathis' Adm'r v. West Kentucky Coal Co., 287 Ky. 843, 155 S.W.2d 441 (1941).

[65] *Compare* Illinois Cent. R.R. v. Johnston, 205 Ala. 1, 87 So. 866, *cert. denied,* 254 U.S. 654 (1921), and Western Ry. v. Arnett, 137 Ala. 414, 34 So. 997 (1903), *with* United States Cast Iron & Foundry Co. v. Marler, 17 Ala. App. 358, 86 So. 103, *cert. denied, Ex parte* Marler, 204 Ala. 342, 86 So. 108 (1920).

[66] Reneman v. Clover Splint Coal Co., 281 Ky. 57, 134 S.W.2d 978 (1939); Barriger v. Ziegler, 241 Mich. 83, 216 N.W. 417 (1927); Green v. Chicago, B. & Q. R.R., 213 Mo. App. 583, 251 S.W. 931 (1923); Scully v. Brooklyn Heights R.R., 155 App. Div. 382, 140 N.Y. Supp. 260 (2d Dep't 1913); Mensforth v. Chicago Brass Co., 142 Wis. 546, 126 N.W. 41 (1910). *Contra,* Davis v. Whatley, 175 So. 422 (La. App. 1937), where it was mistake rather than fraud which was involved.

[67] Wetzstein v. Thomasson, 34 Cal. App. 2d 554, 93 P.2d 1028 (1939); Ty-

prior to the signing of the release, it was held that the voluntary payment was not consideration for the release and therefore need not be returned.[68] In cases of this kind we are confronted with the fact that even if the plaintiff's understanding of the transaction is correct, the consideration was paid to discharge at least a portion of the defendant's liability for his tort. It thus becomes more difficult in these cases to accept the court's findings that simply because there is no contract, restoration is not a prerequisite to rescission.

Many courts have permitted the plaintiff to maintain an action for damages without requiring a tender of the consideration paid for the release if he signed the release believing it to be a receipt for the payment of wages. If, as some cases indicate, this amount has been paid as back wages and not as wages which were lost as a result of the injury,[69] it would seem that there is no connection between the amount paid and the action for damages. These wages would fall within the frequently stated exception that the plaintiff need not restore that which under any circumstances he is entitled to retain.[70] However, the same result has been reached in those cases where it is contended that the payment which has been made is for wages lost as a result of the injury.[71] The courts might properly distin-

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ner v. Axt, 113 Cal. App. 408, 298 Pac. 537 (1931); Farrington v. Harlem Sav. Bank, 280 N.Y. 1, 19 N.E.2d 657 (1939).

[68] Simeoli v. Derby Rubber Co., 81 Conn. 423, 71 Atl. 546 (1908).

[69] Tweeten v. Tacoma Ry. & Power Co., 210 Fed. 828 (9th Cir. 1914); Butler v. Richmond & D. R.R., 88 Ga. 594, 15 S.E. 668 (1891); Soeder Sons Milk Co. v. Salaciensky, 32 Ohio Law Rep. 161 (1930); Robinson v. Easton, 33 Ohio C.C. Dec. 451 (1911); Howard v. Union Buffalo Mills Co., 122 S.C. 518, 115 S.E. 899 (1922).

[70] RESTATEMENT, RESTITUTION § 65(a) (1937).

[71] Panama Agencies Co. v. Franco, 111 F.2d 263 (5th Cir. 1940); City of Prescott v. Sumid, 30 Ariz. 347, 247 Pac. 122 (1926); Meyer v. Haas, 126 Cal. 560, 58 Pac. 1042 (1899); Atlanta & W. P. R.R. v. Robinson, 49 Ga. App. 712, 176 S.E. 550 (1934); Gable v. Central Ry., 39 Ga. App. 350, 147 S.E. 135 (1929); Stewart v. Chicago & E. I. R.R., 141 Ind. 55, 40 N.E. 67 (1895); Jeez v. A. Y. McDonald Mfg. Co., 179 Iowa 193, 161 N.W. 62 (1917); Chicago, R.I. & Pac. R.R. v. Doyle, 18 Kan. 58 (1877); Illinois Cent. R.R. v. Vaughn,

guish between these two situations, holding restoration not necessary in the first instance but requiring it in the latter. Such a distinction has been made.[72] It has also been indicated that the amount received in these cases should be deducted from the judgment awarded to the plaintiff.[73] Again, in most of these cases the thing for which the plaintiff believed the release was signed is but an element of the damages for the tort itself. Therefore, in this instance it is difficult to justify an exception to the rule on the ground that there is no contract.

The requirement of restoration of consideration has been excused where the plaintiff received the consideration and signed the release believing it to cover only injuries to personal property.[74] In a couple of these cases the objection was raised that, since there was but one cause of action for the injuries to the person and to the property, an agreement intended to be a settlement of only one would bar the action for the other.[75] In both cases the courts held that such a limitation in the rules of pleading did not ap-

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[71] *continued*

33 Ky. L. Rep. 906, 111 S.W. 707 (1908); McGill v. Louisville & N. R.R., 114 Ky. 358, 70 S.W. 1048 (1902); Houghtaling v. Banfield, 8 S.W.2d 1023 (Mo. App. 1928); Loveless v. Cunard Mining Co., 201 S.W. 375 (Mo. App. 1918); Lassell v. Mellon, 219 App. Div. 589, 220 N.Y. Supp. 235 (2d Dep't 1927); Herman v. P. H. Fitzgibbons Boiler Co., 136 App. Div. 286, 120 N.Y. Supp. 1074 (4th Dep't 1910); Cleary v. Municipal Elec. Light Co., 19 N.Y. Supp. (65 Hun.) 951 (Sup. Ct. 1892), *aff'd* 139 N.Y. 643, 35 N.E. 206 (1893); Whitehead v. Montgomery Ward & Co., 194 Ore. 106, 239 P.2d 226 (1951). *Contra:* Bailey v. Indianapolis Abattoir Co., 66 Ind. App. 465, 118 N.E. 374 (1918); South Bend & Mishawaka Gas Co. v. Jensen, 182 Ind. 557, 105 N.E. 774 (1914), where only a portion of the amount received was intended to cover wages.

[72] Western & A. R.R. v. Burke, 97 Ga. 560, 25 S.E. 498 (1895); Howard v. Union Buffalo Mills Co., 122 S.C. 518, 115 S.E. 899 (1922).

[73] Chicago, R.I. & Pac. R.R. v. Doyle, 18 Kan. 58 (1877); Illinois Cent. R.R. v. Vaughn, 33 Ky. L. Rep. 906, 111 S.W. 707 (1908).

[74] Raynale v. Yellow Cab Co., 115 Cal. App. 90, 300 Pac. 991 (1931); Bliss v. New York Cent. & H. R.R., 160 Mass. 447, 36 N.E. 65 (1894); Hoban v. Ryder, 257 Mich. 188, 241 N.W. 241 (1932); Merkel v. Consumers' Power Co., 220 Mich. 128, 189 N.W. 997 (1922); Yaple v. New York, O. & W. Ry., 57 App. Div. 265, 68 N.Y. Supp. 292 (3d Dep't 1901).

[75] *Bliss v. New York Cent. & H. R.R.*, *supra* note 74; *Yaple v. New York, O. & W. Ry.*, *supra* note 74.

ply to the signing of releases, and that it was possible for a person to release only a portion of his claim. On the other hand, in holding that there must be a return of the consideration under these circumstances, a court has said:

> To permit her [the plaintiff] to retain the money that she got under the release, and to also repudiate same, would allow her to retain the benefits and reject the burdens. It would allow her to divide or separate the transaction by accepting the favorable part and rejecting what was unfavorable to her.[76]

It has also been held that the plaintiff could not "seriously contend that the settlement and payments referred to in the instrument . . . had reference to anything other than her claim for personal injuries. . . ."[77] There the plaintiff contended that she had been led to believe she had been paid to compensate for the injuries to her husband's automobile.

Restoration has been held unnecessary where the plaintiff contends that the release was intended to cover only a portion of his injuries,[78] or where it is alleged that the release was intended to cover only the funeral expenses and not the damages for the wrongful death of the plaintiff's son.[79] The wording in the latter case was as follows:

> . . . [S]uch a release because of the deception practiced upon the claimant must be construed as a settlement of those matters only as to which the minds of the parties met, and may not be considered to be in satisfaction of anything not consented to by the plaintiff.[80]

It would seem to be broad enough to cover any case of

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[76] Birmingham Ry., Light & Power Co. v. Jordan, 170 Ala. 530, 54 So. 280, 282 (1911).

[77] Drew v. Lyle, 88 Ga. App. 121, 76 S.E.2d 142, 145 (1953).

[78] Porth v. Cadillac Motor Car Co., 198 Mich. 501, 165 N.W. 698 (1917). *Contra:* McCommons v. Greene County, 53 Ga. App. 171, 184 S.E. 897 (1936); Wells v. Royer Wheel Co., 114 S.W. 737 (Ky. 1908).

[79] Jordan v. Guerra, 23 Cal. 2d 469, 144 P.2d 349 (1944). *Contra,* Atlanta & West Point R.R. v. Wise, 54 Ga. App. 666, 188 S.E. 915 (1936).

[80] Jordan v. Guerra, 23 Cal. 2d 469, 144 P.2d 349, 352 (1944).

fraud. Such an analysis would compare with those described above, where the courts have said that there was no contract.

Where the releasor was unaware of the extent of his injuries when he signed the release, some of the courts have held that a return of the consideration is not a necessary prerequisite to the action for damages for the remainder of the injury. These cases are decided on the ground that the release did not cover the remaining injuries and that therefore no rescission was necessary.[81] On the other hand, where the defendant or his agent fraudulently misrepresented the extent of the plaintiff's injuries, other courts have required restoration.[82] In Minnesota it is held that since a release covers only known injuries it can be set aside on the ground of mistake and no return is necessary.[83] Similarly, the Iowa courts have decided that, since the question is one of mistake, the action is for reformation of the release rather than rescission and that consequently, restoration is not necessary.[84] In California, Section 1542 of the Civil Code has been interpreted to mean that the release does not extend to those injuries which were unknown to the releasor at the time the release was signed and that therefore neither rescission nor restoration of the amount received for the release is required.[85] In each of these situations the courts seem to

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81 Cleary v. Brooklyn Bus Corp. 262 App. Div. 896, 28 N.Y.S.2d 908 (2d Dep't 1941); McCarty v. Houston & T. C. R.R., 21 Tex. Civ. App. 568, 54 S.W. 421 (1899). *Contra:* Norwood v. Erie R.R., 114 Ind. App. 526, 53 N.E.2d 189 (1944); Indianapolis Abattoir Co. v. Bailey, 54 Ind. App. 370, 102 N.E. 970 (1913).

82 Och v. Missouri, K. & T. Ry., 130 Mo. 27, 31 S.W. 962 (1895); Gilbert v. Rothschild, 280 N.Y. 66, 19 N.E.2d 785 (1939); Casualty Reciprocal Exchange v. Bryan, 101 S.W.2d 895 (Tex. Civ. App. 1937). *Contra,* St. Louis & S. F. R.R. v. Ault, 101 Miss. 341, 58 So. 102 (1912).

83 Serr v. Biwabik Concrete Aggregate Co., 202 Minn. 165, 278 N.W. 355 (1938).

84 Malloy v. Chicago Great Western R.R., 185 Iowa 346, 170 N.W. 481 (1919); Reddington v. Blue & Raferty, 168 Iowa 34, 149 N.W. 933 (1914).

85 Backus v. Sessions, 17 Cal. 2d 380, 110 P.2d 51 (1941); O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334 (1928). Section 1542 of the CAL. CIV.

proceed on the ground that since the amount demanded is not covered by the contract, no rescission with its element of restoration is necessary.

If the basis for requiring restoration is to avoid the unjust enrichment of the plaintiff, it is difficult to see why such a requirement should be imposed on a plaintiff in those cases where the defendant has been guilty of fraud, and not in those cases where there has been a mistake as to the extent of the plaintiff's injuries. But even if such a distinction is warranted it is not certain in these cases that there has been mistake rather than fraud.

Frequently the consideration for the release is paid directly to a hospital where the releasor was treated, or to the doctor who has cared for him. Under these circumstances if the release does not mention the amount which has been paid for his benefit, the releasor may not know the amount of the consideration. As a result he has not been compelled to return the consideration prior to his action, even by those courts which have held that he must return what has been paid for his benefit when he was aware of the amount.[86] This result has been reached where the releasor, though unaware of the exact amount, did know that something was being paid to the doctor or to the hospital for his benefit.[87] Apparently in these cases it is immaterial that the plaintiff has not attempted to discover what amount was paid for his benefit. The fact that

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CODE (Deering 1949), provides that: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

86 Glisson v. Paduca Ry. & Light Co., 27 Ky. L. Rep. 965, 87 S.W. 305 (1905); State *ex rel.* Order of United Commercial Travelers v. Shain, 339 Mo. 903, 98 S.W.2d 597 (1936); McCoy v. James T. McMahon Constr. Co., 216 S.W. 770 (Mo. 1919); Lucas v. Gibson, 341 Pa. 427, 19 A.2d 395 (1941); Scanlon v. Pittsburgh Rys., 319 Pa. 477, 181 Atl. 565 (1935); Treadway v. Union-Buffalo Mills Co., 84 S.C. 41, 65 S.E. 934 (1909). Compare these cases with those cited in note 118 *infra*.

87 Peterson v. A. Guthrie & Co., 3 F. Supp. 136 (W.D. Wash. 1933); Colorado City v. Liafe, 28 Colo. 468, 65 Pac. 630 (1901).

he was unaware that anything had been expended for his benefit would seem to be a valid reason for not requiring a tender, as would an allegation that he was unable to find out the amount. Under those circumstances his enrichment would not seem to be unjust. However, a distinction would not seem to be warranted solely on the basis that the plaintiff does not know what has been paid.

Some courts have said that, since the defendant would refuse to accept the consideration even if it were tendered to him, the plaintiff is excused from making such a tender.[88] The argument is that the courts will not compel a person to perform a useless act. It would seem obvious that in most of these cases the defendant would refuse to accept such a tender. To accept it would deprive him of the defense of the release in the action for damages. This exception, then, would eat up the rule. As an exception it is valid only if the purpose of the rule is to enable the defendant to avoid a suit by agreeing to the rescission of the contract out of court, or if tender, or offer of tender, is a mere technical element of a rescission. But if the purpose of the requirement is to prevent unjust enrichment, the willingness of the defendant to accept a tender would seem to be immaterial. It would be tantamount to saying that there can be no unjust enrichment to the plaintiff whenever the defendant refuses to rescind his contract.

The mere fact that the defendant has compromised the claim is not a concession on his part that the amount is due, although such statements do sometimes find themselves in the reported decisions.[89] Nevertheless it has been success-

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[88] Carruth v. Fritch, 210 P.2d 290 (Cal. App. 1949), *rev'd*, 36 Cal. 2d 426, 224 P.2d 702 (1950); Merril v. Pike, 94 Minn. 186, 102 N.W. 393 (1905); Franklin v. Webber, 93 Ore. 151, 182 Pac. 819 (1919); Woods v. Wikstrom, 67 Ore. 581, 135 Pac. 192 (1913); Smith v. Atchison, T. & S. F. Ry., 232 S.W. 290 (Tex. Com. App. 1921). *Contra*, Swan v. Great Northern Ry., 40 N.D. 258, 168 N.W. 657 (1918).

[89] Missouri Pac. Ry. v. Goodholm, 61 Kan. 758, 60 Pac. 1066 (1900); Trokey v. United States Cartridge Co., 222 S.W.2d 496 (Mo. App. 1949).

fully contended that a restoration of the consideration received is not required, since it could be credited to whatever amount the plaintiff will be entitled on final judgment.[90] Such decisions are based upon the frequently mentioned exception to the rule that the plaintiff need not restore that, which under any circumstances, he is entitled to retain.[91] The reasoning is that if the plaintiff does not succeed in his action to have the release set aside, then he is entitled to retain what he received under it since it is still a valid contract. On the other hand, if he is successful in having the release set aside, he will be entitled to damages for the tort which has been perpetrated upon him, and what he has already received can be credited against such judgment.[92] The fallacy of this approach has been pointed out in several decisions.[93] There is no certainty that the plaintiff, even though successful in having the release set aside, will be successful in obtaining a judgment in his tort action, or, that even if he is successful, that such judgment will be in excess of the amount which he has already received under the release. The defendant may have paid the consideration for the release even though he was confident that he was not liable. Wisdom may have dictated that he do this rather than litigate the question of his liability. The difference between these courts points up that one group is overly concerned with

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90 Estes v. Magee, 62 Idaho 82, 109 P.2d 631 (1940); O'Brien v. Chicago, M. & St. P. Ry., 89 Iowa 644, 57 N.W. 425 (1894); Koshka v. Missouri Pac. Ry., 114 Kan. 126, 217 Pac. 293 (1923); Whitehead v. Montgomery Ward & Co., 194 Ore. 106, 239 P.2d 226 (1951); Pattison v. Highway Ins. Underwriters, 278 S.W.2d 207 (Tex. Civ. App. 1955).

91 RESTATEMENT, RESTITUTION § 65(a) (1936).

92 Carruth v. Fritch, 210 P.2d 290 (Cal. App. 1949), *rev'd.*, 36 Cal. 2d 426, 224 P.2d 702 (1950); O'Brien v. Chicago, M. & St. P. Ry., 89 Iowa 644, 57 N.W. 425 (1894).

93 Price v. Connors, 146 Fed. 503 (9th Cir. 1906); Hill v. Northern Pac. Ry., 113 Fed. 914 (9th Cir. 1902); Louisville & N. R.R. v. McElroy, 100 Ky. 153, 37 S.W. 844 (1896); Smith v. St. Louis & S. F. R.R., 112 Miss. 878, 73 So. 801 (1917); Watson v. Bugg, 280 S.W.2d 67 (Mo. 1955); Lomax v. Southwest Missouri Elec. R.R., 119 Mo. App. 192, 95 S.W. 945 (1906).

the protection of the plaintiff while the other proclaims the same solicitude for the defendant. Might not the proper approach be somewhere between?

Even if restoration before suit were required, should it be required when a jury has already decided that the plaintiff is entitled to damages in excess of the consideration? Such a decision would obviate the objection that the plaintiff might be unjustly enriched. Although there may have been error in the trial court's failure to require restoration under these circumstances, the error would not be prejudicial.[94] Under these circumstances the plaintiff would in any event be entitled to retain that which had been paid to him.[95] If the question of restoration had been raised earlier in the proceedings, apparently the courts which have reached this decision would have required that restoration be made.[96]

The principle of these cases is well expressed in *Marple v. Minneapolis & St. L. Ry.*,[97] where it is said:

> It is not strictly logical to say that plaintiff was entitled to retain the money paid because it was due him by virtue of the original liability, because the question of defendant's liability was not then determined. But we are of the opinion, and so hold, that it was not necessary for plaintiff to do a useless act, that all that is required by equity is that substantial justice be done, that this is done when the amount received on the settlement is credited on the verdict, and that it would be a profitless proceeding to send this case back for a new trial in order that defendant may have an opportunity to refuse an offer of plaintiff to return the money received. The offer is nothing. It is the actual return of the money

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94 Lion Oil Refining Co. v. Albritton, 21 F.2d 280 (8th Cir. 1927); Bjorklund v. Seattle Elec. Co., 35 Wash. 439, 77 Pac. 727 (1904); Malmstrom v. Northern Pac. Ry., 20 Wash. 195, 55 Pac. 38 (1898).

95 Atchison, T. & S. F. Ry. v. Peterson, 34 Ariz. 292, 271 Pac. 406 (1928).

96 Lion Oil Refining Co. v. Albritton, 21 F.2d 280 (8th Cir. 1927). The court suggests that if the defendant had raised the question by a demurrer he would have succeeded.

97 115 Minn. 262, 132 N.W. 333 (1911).

> received that is the material thing. This has been done by the verdict. The only contingency that might change the result would be in case the offer was accepted and plaintiff failed to recover on his cause of action. But we cannot conceive of such a result in this case. The question, therefore, is only a technicality.[98]

The same result has been reached where no money had been paid to the plaintiff but where the consideration for the release was the value of board, lodging, nursing, and medical attention.[99] The court felt that it would be able to protect the defendant by having the amount of such expenditures deducted from the verdict.

It is familiar law that an infant who has received property under a contract entered into during his infancy, may disaffirm the contract without returning the property in those cases where he is unable to return the property.[100] At least one court has used this as an analogy in the case where the releasor has spent the consideration in the belief that it was a gift.[101] Other cases have reached the same result where the release was procured through the defendant's fraud and the money had been spent before the releasor learned of the fraud and was therefore unable to return the money at the time of the suit.[102] These cases, for the most part, emphasize that the money had been spent for necessities. A court came to this conclusion in a recent case where it was alleged that $12,500 had been expended for such necessaries as medical and hospital

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98 *Id.* at 334.

99 The Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S.W. 117 (1897).

100 MADDEN, DOMESTIC RELATIONS § 215 (1931).

101 Hubbard v. Lusk, 181 S.W. 1028 (Mo. App. 1916).

102 Johnson v. Chicago, M. & St. P. Ry., 224 Fed. 196 (W.D. Wash. 1915); Traders & General Ins. Co. v. Towns, 130 S.W.2d 445 (Tex. Civ. App. 1939); New Amsterdam Cas. Co. v. Harrington, 11 S.W.2d 533 (Tex. Civ. App. 1928); Texas & P. Ry. v. Jowers, 110 S.W. 946 (Tex. Civ. App. 1908); Allison v. Wm. Doerflinger Co., 208 Wis. 206, 242 N.W. 558 (1932). *Contra:* Bailey v. Indianapolis Abbatoir Co., 66 Ind. App. 465, 118 N.E. 374 (1918); Meisel v. Mueller, 261 S.W.2d 526 (Mo. 1953).

bills, and attorney's fees.[103] The court stated that the amount received could be deducted from the judgment which would be rendered against the defendant in the damage action. The same result has been reached where the release was signed at a time when the releasor was incapable of understanding the nature and effect of his agreement.[104]

Probably the most significant of these cases is *Rase v. Minneapolis, S. P. & S. S. M. Ry.*[105] Here as a result of the defendant's fraud the plaintiff signed a release in exchange for the payment of $2,000, which, with the knowledge of the defendant, he used for the purpose of securing passage to Norway. Apparently part of the fraudulent intent of the defendant was to encourage him to leave the country, so that he could not later raise the question of fraud. When the releasor did return to the United States and began his action for damages he was unable to return all of the money he had received. The court rested its decision squarely on the proposition that to require the tender of the money here would be to deny the plaintiff relief from a deliberately planned fraud. To the objection that the plaintiff might not succeed in his action for damages the court said,

> . . . if there is no valid claim, but the defendant was merely buying peace, or doing an act of humanity for one injured in its service, or the trial court is mistaken in the finding that the settlement was inadequate, then, of course, in such a contingency the expense of the trial will fall on defendant unjustly. But it appears to us that this expense to the one found guilty of a deception is not of sufficient consequence to warrant a court of equity in denying the defrauded one his day in court.[106]

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103 Pattison v. Highway Ins. Underwriters, 278 S.W.2d 207 (Tex. Civ. App. 1955).

104 Indemnity Ins. Co. v. Kelley, 44 S.W.2d 756 (Tex. Civ. App. 1931). See also Ipock v. Atlantic & N.C. R.R., 158 N.C. 445, 74 S.E. 352, 354 (1912).

105 118 Minn. 437, 137 N.W. 176 (1912).

106 *Id.* at 178.

This would seem to be one of the few cases which indicate that the problem is to determine the equities of the parties and that some consideration should be given to each of them. The court does say that if the judgment in the action for damages for personal injuries should be in favor of the defendant, it should require the plaintiff to return to the defendant as much of what he had received as possible. In this case the defendant had encouraged the spending of the consideration; however, it would not seem that this was the determining factor. Rather, the court is concerned with balancing the possibility of depriving the plaintiff of his cause of action, against the loss the defendant might incur if the plaintiff should not succeed in his damage action. This is really a determination by the court that in this case the retention of the consideration was not "unjust."

On the other hand, *Smith v. St. Louis & S. F. R.R.*[107] might be cited as a case where the court has found the equities in favor of the defendant. This was a case of fraud rather than a case in which the plaintiff was under the influence of opiates or of pain from his injuries. The amount of the consideration paid was a large sum ($6,000) as compared with the relatively small sums paid in many of the cases where restoration was held not to be necessary. There was no breach of a fiduciary relationship and the plaintiff had a year in which to think over what had happened. He also had the opportunity to consult with friends, relatives and legal counsel before he entered into the release. The court found that, under these circumstances, it would not be unfair to require the plaintiff to return what he had received even though it would operate to deprive him of his action for damages. It was more important for the court to insure against the defendant's possible loss rather than give the plaintiff his cause of action. The

[107] 112 Miss. 878, 73 So. 801 (1917).

court's interpretation of the facts and its application of the law to those facts might be disputed, but the principle of law adopted would seem to be in harmony with that of the *Rase* case.

In determining whether or not restoration ought to be required, the courts appear to have given more thought to the surrounding circumstances in cases where the release is sought to be avoided because of the releasor's incompetence at the time of signing. Consequently, they have come up with more consistent results here, than they have in cases where the releases have been fraudulently procured. Of course, even here there are examples where the courts have required restoration simply because it was a rule or because the release was "voidable" only, and not "void."[108] Where the property was still in the possession of the plaintiff at the time of the action or where there was no allegation or proof that it had not been spent, the courts have required the restoration as a condition precedent to the maintaining of the action.[109] Such a result squares itself with the usual approach in handling the disaffirmance of an infant's contract,[110] and the cause of justice would not seem to be furthered in allowing the plaintiff to retain the property under these circumstances.

There are decisions holding that, where the plaintiff did not know what he was signing, because of his incapacity, there was no contract, and that, since the question of rescission did not arise, there was no requirement of restoration prior to the action.[111]

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108 Mahr v. Union Pac. Ry., 170 Fed. 699 (9th Cir. 1909); Johnson v. Merry Mount Granite Co., 53 Fed. 569 (C.C.D. Mass. 1892); Birmingham Ry., Light & Power Co. v. Hinton, 158 Ala. 470, 48 So. 546 (1908); McCary v. Monongahela Valley Traction Co., 97 W. Va. 306, 125 S.E. 92 (1924).

109 Georgia Power Co. v. Moody, 55 Ga. App. 621, 190 S.E. 926 (1937); Lane v. Dayton Coal & Iron Co., 101 Tenn. 581, 48 S.W. 1094 (1899). The latter case involved the question of infancy.

110 MADDEN, DOMESTIC RELATIONS § 215 (1931).

111 Devoe v. Best Motor Co., 27 Ga. App. 619, 109 S.E. 689 (1921), where the releasor was unable to read or write. Forsythe v. Horspool, 49 S.W.2d

Courts have held that the requirement of restoration was dependent upon whether the defendant was aware of the plaintiff's incapacity at the time the release was signed.[112] Again, such a consideration squares with the usual distinction made in the disaffirmance of the contracts of incompetents.[113] In those cases where the releasee was unaware of the incompetence, there is greater reason for the court's concern with the protection of the defendant, than in those cases where, knowing of the incompetence, the releasee still attempts to enter into the release. It might be suggested that the courts could consider as an element in this determination not only whether the releasee was aware of the incompetence, but also whether he should have been aware of it. The equities of his position where the release is acquired in a hospital room, while the plaintiff is still under opiates, would not be nearly as strong as in the case where it is alleged that the plaintiff was insane. Such action approaches fraudulent conduct, and the culpability of the defendant does seem to be an element to be considered in determining whether it would be fair to allow the plaintiff to retain the consideration during trial.

A third element the courts have considered in these cases has been whether the funds received for the release

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687 (Mo. App. 1932); Edwards v. Morehouse Stave & Mfg. Co., 221 S.W. 744 (Mo. App. 1920), where the releasor was mentally incapacitated. Jones v. Alabama & V. Ry., 72 Miss. 22, 16 So. 379 (1894); Smallwood v. St. Louis-San Francisco Ry., 217 Mo. App. 208, 263 S.W. 550 (1924); Michalsky v. Centennial Brewing Co., 48 Mont. 1, 134 Pac. 307 (1913), where the releasor was under the influence of drugs and opiates. Genest v. Odell Mfg. Co., 75 N.H. 365, 74 Atl. 593 (1909), where the releasor was suffering from insane delusions. Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 Atl. 442 (1901), where the releasor was unacquainted with the language.

112 Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E.2d 226 (1947); Smallwood v. Kentucky & West Virginia Power Co., 297 Ky. 202, 179 S.W.2d 877 (1944); Carey v. Levy, 329 Mich. 458, 45 N.W.2d 352 (1951); Morris v. Great Northern Ry., 67 Minn. 74, 69 N.W. 628 (1896); West v. Seaboard Air Line Ry., 151 N.C. 231, 65 S.E. 979 (1909).

113 MADDEN, DOMESTIC RELATIONS § 235 (1931).

were spent during the period of incompetence.[114] In the cases where the plaintiff has spent the consideration after he has regained his competence, unless he did so without being aware of the release, there would seem to be little reason for not requiring restoration. In fact, in most cases it would seem that by spending the money after regaining his competence, the plaintiff has affirmed the release. The courts might well dispose of these cases on that basis, rather than on the ground that the releasor has not restored that which was received as consideration.

Where the defense to the release is that the releasor was intoxicated when the release was signed, most of the above comments would seem to be applicable.[115] However, another factor may be present. If the defendant has been instrumental in procuring the plaintiff's intoxication for the purpose of taking advantage of him, the courts should not be too concerned with the protection of the defendant.[116] This is especially true if the plaintiff's loss might be very great if he is compelled to make restoration before suit.

In some cases part or all of the consideration paid for a release may have been paid to someone other than the releasor. The necessity of the tender of this consideration or its value presents an additional problem. It would seem that the enrichment to the plaintiff would be the same whether he has received the money or the benefits derived from the money. Factually it would seem to make little

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114 Strodder v. Southern Granite Co., 99 Ga. 595, 27 S.E. 174 (1896); Strodder v. Stone Mountain Granite Co., 94 Ga. 626, 19 S.E. 1022 (1894); See v. Carbon Block Coal Co., 159 Iowa 413, 138 N.W. 825 (1912); Ipock v. Atlantic & N. C. R.R., 158 N.C. 445, 74 S.E. 352 (1912); Walker v. Harbison, 283 Pa. 111, 128 Atl. 732 (1925); Arthurs v. Bridgewater Gas Co., 171 Pa. 532, 33 Atl. 88 (1895); Indemnity Ins. Co. v. Kelley, 44 S.W.2d 756 (Tex. Civ. App. 1931).

115 Shaw v. Delaware, L. & W. R.R., 126 App. Div. 210, 110 N.Y. Supp. 362 (4th Dep't 1908); Stewart v. H. & T. C. Ry., 62 Tex. 246 (1884). In both cases the money was spent after the releasor became sober.

116 Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N.E. 621 (1900).

difference whether he received the money from the defendant and used it to pay his doctor and hospital bills, or whether the defendant paid them directly. Nor would the fact that a check had been made out to the releasor and his doctor, as joint payees, seem to be of any importance.[117] However, some courts have held that under these circumstances, the tender is not required.[118] Where the defendant has taken the initiative and has placed the plaintiff in the hospital at the defendant's expense, and has hired doctors to care for the plaintiff, prior to the signing of the release, there may be a reason for creating an exception to the rule requiring restoration. As one court has pointed out under these circumstances, ". . . if appellee had not asserted a claim for damages on account of his injuries, appellant would have made no claim against him for the expense it incurred on his account."[119]

A similar problem arises where the release has been signed by one administrator and a successor attempts to have it set aside. One court has held that the second administrator is not required to make a tender where the money which was paid for the release has not been turned over to him.[120] The court said that he would have to restore the money only if he could obtain it from his predecessor; if he maintained an action against such predecessor to recover this money, he would in effect be ratifying the release which he is seeking to avoid.

Another problem arises where the consideration for the

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117 Monnier v. Central Greyhound Lines, Inc., 129 N.E.2d 800 (Ind. App. 1955).

118 Tweeten v. Tacoma Ry. & Power Co., 210 Fed. 828 (9th Cir. 1914); Colorado City v. Liafe, 28 Colo. 468, 65 Pac. 630 (1901); Fraser v. Glass, 311 Ill. App. 336, 35 N.E.2d 953 (1941). *Contra:* Louisville & N. R.R. v. Turner, 290 Ky. 602, 162 S.W.2d 219 (1942); Poteete v. Moore, 277 Ky. 233, 126 S.W.2d 161 (1939).

119 Louisville & N. R.R. v. Helm, 121 Ky. 645, 89 S.W. 709, 712 (1905).

120 Alabama Co. v. Brown, 207 Ala. 18, 92 So. 490 (1921). *Contra:* Doten v. Southern Ry., 32 F. Supp. 901 (W.D. Tenn. 1940); Landrum v. Louisville & N. R.R., 290 Ky. 724, 162 S.W.2d 543 (1942).

release has been paid by someone other than the defendant. In those cases where the consideration has been paid by an insurance company, the courts seem to assume that there should be no reason to reach a result different from that where the consideration has been paid by the tortfeasor. At least one court has said that it reached this result because the insurance company was acting for the defendant.[121] Since, eventually, it will be the insurance company which will have to pay, or be entitled to the return of the consideration paid for the release, there would seem to be little basis for distinguishing these cases.

Where the consideration has been paid from a mutual benefit fund to an employee the courts have differed in their results. It has been held that it would be "inequitable to permit her (the plaintiff) to retain the money which the constitution and by-laws of the beneficial society provided should be forfeited if she brought suit against the defendant, or, if received, should be full satisfaction of all claims and at the same time permit her to maintain this action."[122] On the other hand, where the employer pays the consideration from a mutual benefit fund, he pays it as a trustee of the fund. Since the suit for the tort is brought against him in his individual capacity, and not as a trustee of the fund, it has been held that the amount received from the fund need not be returned as a condition precedent to the action against the employer.[123] Although the plaintiff was not required to tender a return to the defendant prior to the bringing of the suit, the consideration must be credited on whatever judgment the plaintiff might recover.[124] If the consideration has been paid from the fund as an independent obligation, and not

121 Brown v. Walker Lumber Co., 128 S.C. 161, 122 S.E. 670 (1924). *Contra,* Reed v. John Gill & Sons Co., 201 Mo. App. 457, 212 S.W. 43 (1918).

122 Drobney v. Lukens Iron & Steel Co., 204 Fed. 11, 14-15 (2d Cir. 1913).

123 O'Neil v. Lake Superior Iron Co., 63 Mich. 690, 30 N.W. 688 (1886).

124 King v. Atlantic Coast Line R.R., 157 N.C. 44, 72 S.E. 801 (1911).

as a discharge of the employer's liability for the tort, a return of the consideration should not be required under any circumstances. The plaintiff would not be unjustly enriched by retaining the money. If this is the situation, however, there is no reason for crediting the amount received to the judgment against the employer. On the other hand, if the amount is received from those funds as a discharge of the employer's tort liability, there would seem to be no basis for distinguishing this situation from that where the consideration has been paid by an insurance company.

A similar problem arises where the money has been paid by one person and it becomes necessary to avoid the release in order to sue his joint tortfeasor. One court has held that, under such circumstances, a tender is not required, since the person who contributed the consideration is not a party to the suit and there is no intention to sue such person.[125] Such a reason would be sound if the purpose of requiring the tender is to prevent the unjust enrichment of the plaintiff at the expense of the defendant to the action. However, if we are concerned with fairness of his retention under all circumstances, the fact that the consideration had been paid by another would be only another factor to take into consideration. It has also been held that a tender is required in these cases,[126] but that a tender into court where the releasee was not a party to the action would not be effective.[127] The court there relied upon the fact that an action could not be brought until the release was avoided and that the release remained in effect until there was a rescission, one of whose elements was the return of the consideration. Where the releasee is not a party to the action, an offer to credit the judgment

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125 Yellow Cab Co. v. Bradin, 172 Md. 388, 191 Atl. 717 (1937).

126 Morris v. Great Northern Ry., 67 Minn. 74, 69 N.W. 628 (1896).

127 McNamara v. Eastman Kodak Co., 232 N.Y. 18, 133 N.E. 113 (1921).

with the amount received is likewise ineffective.[128] In one case the defendant misrepresented to the plaintiff that he was being paid what was due him from a burial fund.[129] In spite of the fact that this amount was owed by a third party, the court held that its repayment was a condition precedent to an action against the tortfeasor.

In almost every case it is the releasor who is challenging the validity of the release. However, it is possible for the releasee to wish to avoid the release. In one such case, an insurance company sought to use the fraud of the releasor as a defense to an action on the release.[130] The court was of the opinion that before the insurance company could use the defense, it must have restored the injured party to the position he occupied prior to the release. In this case that meant the insurance company would have had to return to the releasor his cause of action for personal injuries. This the insurance company was unable to do. Here too, then, the defrauded party was denied relief, unless a deceit action would have been available and practical under these circumstances.

The usual statement is that the party relying on the release must in some way raise the question of the lack of tender.[131] This usually has been done by answer, demurrer, reply, and motion. One case has held that a general denial to the plea of a release cannot be attacked for its failure to allege a restoration of the consideration received.[132] The court said that under the general denial the plaintiff might

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128 Meisel v. Mueller, 261 S.W.2d 526 (Mo. App. 1953).

129 Hubbard's Adm'x v. Louisville & N. R.R., 267 Ky. 435, 102 S.W.2d 343 (1937).

130 Hardware Mut. Casualty Co. v. Dooley, 68 Ga. App. 230, 22 S.E.2d 625 (1942).

131 Mandeville v. Jacobson, 122 Conn. 429, 189 Atl. 596 (1937); Robertson v. George A. Fuller Constr. Co., 115 Mo. App. 465, 92 S.W. 130 (1905); Ambellan v. Barcalo Mfg. Co., 118 App. Div. 547, 102 N.Y. Supp. 993 (4th Dep't 1907); McDowell v. Southern Ry., 113 S.C. 399, 102 S.E. 639 (1920); Doyle v. Teasdale, 263 Wis. 328, 57 N.W.2d 381 (1953).

132 Baird v. Pacific Elec. Ry., 39 Cal. App. 512, 179 Pac. 449 (1919).

be able to show facts which would indicate that the return of the consideration was not necessary in his case. Such result would seem proper where the releasor denies having executed a release, but it is doubtful if it would be applicable in those cases where he admits having signed the release but denies its validity. It has also been held that where there is no request for an instruction to that effect, the defendant cannot complain that the jury did not deduct the amount of the release from the verdict.[133] The court presumed that the jury had made the deduction.

Where the courts require the tender of the money received, the time of that tender tells much of the court's attitude toward such a requirement and something of the reasons for the requirement. If it is required as an element of a rescission, it would seem that in most of the cases the tender should be made prior to the bringing of the suit.[134] However, the decisions do not bear this out. In some of the cases where the court says that there must be a tender before the commencement of the suit, the reason seems to be that if there is not a tender within a reasonable time after the discovery of the fraud, then there has been an affirmance of the release.[135]

It has been held that a tender, concurrent with the filing of the petition[136] or prior to the defendant's filing his plea,[137] is sufficient, and that the tender is in time if it is made when the defendant first raises the release as a defense.[138] On the other hand, it has been held that the tender

133 Robinson v. Missouri Pac. Transp. Co., 192 Ark. 593, 93 S.W.2d 311 (1936).

134 Gilbert v. Rothschild, 280 N.Y. 66, 19 N.E.2d 785 (1939).

135 Roberts v. Southern Ry., 73 Ga. App. 759, 38 S.E.2d 48 (1946); Butler v. Gleason, 214 Mass. 248, 101 N.E. 371 (1913); Brown v. Walker Lumber Co., 128 S.C. 161, 122 S.E. 670 (1924).

136 Gattis v. Louisville & N. R.R., 182 Ga. 686, 186 S.E. 730 (1936).

137 Weiser v. Welch, 112 Mich. 134, 70 N.W. 438 (1897).

138 McGregor v. Mills, 280 S.W.2d 161 (Ky. 1955), in the reply; Toppass v. Perkins' Adm'x, 268 Ky. 186, 104 S.W.2d 423 (1937), in the reply; Broad-

must be made when the releasor or his attorney first becomes aware of the release.[139] This may be prior to the time of beginning the suit, as it was in *Harrison v. Southern Ry.*[140] Or, they may first become aware of the release at the time of the answer, in which case the tender must be pleaded in reply. It would seem possible that the awareness of the issue could also come at some later time. If the plaintiff may begin an action at law upon the supposition that there has been a rescission, he should not be required to anticipate that the defendant will raise the release as a defense. It has been said:

> The settlement may be offered as a defense or it may not. If a party believes it to have been obtained by fraud or there is other vice inherent in the contract, and, therefore, is of no effect, it seems unnecessary that he should anticipate that the other party will rely on it. The initiative should come from him.[141]

This is only another way of stating what has been said above, that restoration of what has been received is a requirement but that its absence must be pleaded by the defendant. However, if the rescission must have been accomplished before the suit is brought, it would seem too late to do the rescinding when the question is first raised after the suit has begun. Of course, if the action were in a

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way Coal-Mining Co. v. Ortkies, 200 Ky. 8, 254 S.W. 434 (1923), in the reply; Watson v. Bugg, 280 S.W.2d 67 (Mo. 1955), prior to the amended petition after the plea; Gibson County Elec. Membership Corp. v. Hall, 32 Tenn. App. 394, 222 S.W.2d 689 (1947), in the reply; Memphis St. Ry. v. Giardino, 116 Tenn. 368, 92 S.W. 855 (1906), at the time of the introduction of the evidence was too late where the question was raised in the answer; Carroll v. Fetty, 121 W. Va. 215, 2 S.E.2d 521, *cert. denied*, 308 U.S. 571 (1939), in a reply which was filed with the consent of counsel after impanelling the jury—the parties had not consented to a tender at that time.

139 Birmingham Ry., Light & Power Co. v. Jordan, 170 Ala. 530, 54 So. 280 (1911); Harrison v. Southern Ry., 131 S.C. 12, 127 S.E. 270 (1925).

140 131 S.C. 12, 127 S.E. 270 (1925).

141 Toppass v. Perkins' Adm'x, 268 Ky. 186, 104 S.W.2d 423, 427, 428 (1937).

court of equity, an allegation that the plaintiff was willing to restore the defendant to his proper position may be timely when the question is first raised by the defendant. But, under these circumstances, a tender of the consideration received usually is not required.[142] The requirement of the tender at various times in the pleadings is consistent with the approach that the purpose is to prevent the plaintiff's unjust enrichment. The plaintiff should be required to act when it becomes apparent that he will be unjustly enriched. This analysis would be especially applicable where the tender of the consideration has been permitted during trial.[143] The unjust enrichment of the plaintiff could be prevented even as late as the closing argument.[144]

Courts have held that tender during the suit has been too late because there has been a ratification of the contract.[145] Others have said that the plaintiff should not be allowed to sit by and speculate on the result of the action.[146] They have also used the standard statement that since rescission must be accomplished before the suit, tender of restoration is too late when it is attempted during the trial.[147] To require a tender before suit in a personal injury action, places an exceptionally great burden upon the counsel for the plaintiff. He could never be certain that his client had not released his cause of action. If he first learned of the release after the action had been brought, it would be

142 See note 10 *supra*.

143 Hollinquest v. Kansas City Southern Ry., 88 F. Supp. 905 (W.D. La. 1950), after overruling his contention that a tender was not necessary, the court permitted the plaintiff to amend during the trial; Smith v. Inhabitants of Holyoke, 112 Mass. 517 (1873), tender during defendant's argument to the jury was timely; Roberts v. Central Lead Co., 95 Mo. App. 581, 69 S.W. 630 (1902), after overruling the demurrer to the amended petition, the court ordered the plaintiff to pay the amount into court.

144 *Smith v. Inhabitants of Holyoke, supra* note 143.

145 Roggenkamp v. Marks, 299 Ill. App. 209, 19 N.E.2d 828 (1939).

146 Kelly v. Louisville & N. R.R., 154 Ala. 573, 45 So. 906 (1908).

147 Western & A. R.R. v. Atkins, 141 Ga. 743, 82 S.E. 139 (1914); Randall v. Port Huron, St. C. & M. C. Ry., 215 Mich. 413, 184 N.W. 435 (1921).

too late for him to avoid it even if it were otherwise possible. In those cases where he is aware of the release, he may not be able to determine its extent or effect prior to trial. And such elements may be important in determining the necessity of tender, especially in those cases where the courts distinguish between "void" and "voidable" releases.

While the courts have talked much about the necessity of restoration in these cases it is surprising how seldom the question has arisen as to just what act satisfies the requirement. In some cases it seems to be assumed that it is sufficient for the releasor to state his willingness to restore what he has received.[148] According to the American Law Institute it is an "offer" to restore which is required.[149] On the other hand, the decisions of some of the courts seem to require a technical tender of the amount.[150] Or, a tender into court may satisfy the requirement.[151] The equity requirement of a statement of willingness to allow the amount to be credited against the judgment has been held to satisfy the rule.[152]

The question also arises as to what the releasor must do after a tender has been made and has been refused. If the purpose of the requirement is to prevent unjust enrichment of the releasor and to protect the releasee, it would seem that, after such a refusal, the releasor still could not use the money for his own purposes. Such an attitude has been expressed by the statement that the tender must be continuous during the trial and that the releasor must con-

148 St. Louis & S. F. R.R. v. McCrory, 2 Ala. App. 531, 56 So. 822 (1911).

149 RESTATEMENT, CONTRACTS § 480 (1932); RESTATEMENT, RESTITUTION § 65 (1937).

150 Niederhauser v. Detroit Citizens' St. Ry., 131 Mich. 550, 91 N.W. 1028 (1902); Reid v. St. Louis & S. F. R.R., 187 S.W. 15 (Mo. 1916); Gilbert v. Rothschild, 280 N.Y. 66, 19 N.E.2d 785 (1939); McNamara v. Eastman Kodak Co., 232 N.Y. 18, 133 N.E. 113 (1921).

151 Interstate Coal Co. v. Trivett, 155 Ky. 825, 160 S.W. 728 (1913).

152 Poe v. Texas & P. Ry., 95 S.W.2d 505 (Tex. Civ. App. 1936), *rev'd on other grounds*, 131 Tex. 337, 115 S.W.2d 591 (1938); Galveston, H. & S. A. Ry. v. Cade, 93 S.W. 124 (Tex. Civ. App. 1906).

tinually hold himself open to make a tender, if the releasee chooses to rescind.[153] He may not spend the money as though it were his own,[154] or refuse to return the money during trial, if the releasee signifies his desire to have it at that time.[155] It would seem to follow that the reasonable thing to do under these circumstances would be to require a tender of the money, or a substitute, into court. However, it has been indicated that this is not necessary and that the court can protect the defendant by crediting the judgment with the amount received.[156] Indeed, one court has gone so far as to suggest that after a refusal of tender by the defendant, the plaintiff is at liberty to use the money for his own purposes.[157] And this result is reached even though the plaintiff has admitted that he had received it as consideration for the release which he is trying to avoid. Such results are valid only if the requirement of tender is merely technical. If the actual purpose is to prevent the unjust enrichment of the plaintiff, something more than a mere tender or offer to tender should be required. Seldom will the defendant accept the tender, and, unless the refusal makes the retention of possession less unjust, the court would still have the problem of preventing the enrichment.

III

THE IMPACT OF STATUTES ON THE RULE

Section five of the Federal Employers' Liability Act[158] provides that:

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153 RESTATEMENT, RESTITUTION § 67(2) (1937).

154 Glover v. Louisville & N. R.R., 163 Tenn. 85, 40 S.W.2d 1031 (1931).

155 Aurand v. Toledo & O. C. Ry., 21 Ohio App. 390, 153 N.E. 212 (1926).

156 Vandervelden v. Chicago & N. W. Ry., 61 Fed. 54 (C.C.N.D. Iowa 1894); Beatty v. Palmer, 196 Ala. 67, 71 So. 422 (1916); International & G. N. R.R. v. Shuford, 36 Tex. Civ. App. 251, 81 S.W. 1189 (1904).

157 The Michigan Cent. R.R. v. Dunham, 30 Mich. 128 (1874).

158 35 STAT. 66 (1908), 45 U.S.C. § 55 (1952).

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which such action was brought.

In *Duncan v. Thompson,*[159] $600 was paid to the plaintiff for living and other expenses pending negotiations for the settlement of whatever claim he may have had. In return for the $600 the plaintiff promised:

> . . . I agree with said Trustee that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return the said sum of $600 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit.[160]

The Court held that this was not a compromise and settlement and that the agreement to return the $600 prior to the bringing of the suit was void under the provisions of section five of the Federal Employers' Liability Act. The creation of the condition of returning the consideration was a device to enable the carrier to relieve itself from liability under the act. The Court did not determine what effect a valid compromise and settlement would have had under the statute.

In *Irish v. Central Vermont Ry., Inc.,*[161] the Circuit Court of Appeals for the Second Circuit was faced with a fraudulently acquired release of a claim which was cognizable

159 315 U.S. 1 (1942).

160 *Id.* at 3.

161 164 F.2d 837 (2d Cir. 1947).

under the act. The court held that the release was void and that, because of section five of the act, there could be no requirement of restoration as a condition to the bringing of an action under the act.

> . . . [I]f this release were obtained fraudulently by the appellee, it was within the broad scope of the phrase "any . . . device whatsoever," in Sec. 5 and consequently void. It follows that the plaintiff was free to attack its validity without restitution.[162]

The Illinois court has reached this same result under the proviso of the act.[163] Since the statute provides that where the consideration had been paid, the carrier may reduce the amount of the verdict by the sum which already had been paid, there is the implication that the plaintiff need not return the consideration as a condition to his bringing an action under the act.

Neither the *Irish* case nor the *Duncan* case decided that every release was a violation of the act as an attempt by the carrier to "exempt itself from any liability." That issue was decided in 1948 when the Supreme Court in *Callen v. Pennslyvania R.R.*,[164] said that a release was not a device whereby the carrier exempted itself from liability but was a method of recognizing the possibility of its liability. In *Collett v. Louisville & N. R.R.*,[165] a district court suggested that a different result would have been reached in the *Irish* case had it been decided after the Supreme Court's pronouncement in the *Callen* case. However, in the *Irish* case the court expressly stated that it was not concerned with the question of a valid release.

The court in the *Collett* case was also of the opinion that since the fraud was denied by the carrier, the decision in the *Irish* case was wrong in holding that the requirement

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162 *Id.* at 840.

163 Johnson v. Elgin, J. & E. Ry., 338 Ill. App. 316, 87 N.E.2d 567 (1949).

164 332 U.S. 625 (1948).

165 81 F.Supp. 428 (E.D. Ill. 1948).

for the return of the consideration was a "device" to limit the liability of the carrier. The court said:

> It compels the court, upon the bare allegation of fraud by plaintiff, to ignore the denial of fraud by the carrier and to assume such fraud in the release as will constitute it a device by the carrier to exempt itself from liability.[166]

The *Irish* case would seem to have merit in that a carrier by procuring a release through fraud could escape the provisions of the act in those cases where it would be difficult or impossible for the releasor to return the money. To this extent then it would seem that the *Irish* case is in conformity with the spirit of the act.

In the *Collett* case the court also tried to make the further distinction, that the consideration ($1,500) paid for the release in the *Irish* case was only nominal, whereas the payment of $8,000 in the *Collet* case was a substantial one. Although the contention may be made that the inadequacy of the consideration paid is evidence of an attempt by the carrier to exempt itself from liability, such an argument does not seem valid in either of the two cases.

In two cases arising under the act, it has been held that the consideration received for the release must be returned before the action can be brought on the original claim.[167] However, the decision in the *Irish* case has been followed in two other cases.[168] It has also been held that the restoration of consideration is unnecessary under the Arizona Employers' Liability Act which has a section identical with that of section five of the Federal Employers' Liability Act.[169]

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166 *Id.* at 431-432.

167 Graham v. Atchison T. & S. F. Ry., 176 F.2d 819 (9th Cir. 1949); Collett v. Louisville & N. R.R., 81 F. Supp. 428 (E.D. Ill. 1948).

168 Marshall v. New York Cent. R.R., 218 F.2d 900 (7th Cir. 1955); Humphrey v. Erie R.R., 116 F. Supp. 660 (S.D.N.Y. 1953).

169 ARIZ. CODE ANN. § 56-806 (1939); Miles v. Lavender, 10 F.2d 450 (9th Cir. 1926).

But whether the federal courts follow the *Irish* case or not, their decisions on the requirement of restoration in cases arising under the act may also be important in the state courts. It had been held that it was a question of state law whether restoration was necessary in order to set aside a release of a claim covered by the act.[170] Other courts have assumed it to be a question of state law.[171] This was the decision of the Ohio court in 1951 when it held that the effect of such a release should be determined by Ohio courts according to Ohio law.[172] This decision was reversed by the United States Supreme Court in a memorandum decision in 1952.[173] In reaching this conclusion the Supreme Court relied upon *Dice v. Akron, C. & Y. R.R.*,[174] which held that federal law should be used to determine the validity of a release of a claim covered by the Federal Employers' Liability Act. It is interesting to note that the effect of the Supreme Court's reversal was to reinstate the decision of the Ohio Court of Appeals. This court had applied the "more lenient" rule of the federal courts and had cited the *Irish* case with approval.[175] Thus, federal law, whatever it may be, controls the requirement of restoration in actions brought under the Federal Employers' Liability Act.

The Workmen's Compensation Acts also have had an impact upon the doctrine. Elsewhere in this discussion cases have been cited which involved the releases of claims under such acts.[176] In none of them, however, did it ap-

170 Central of Georgia Ry. v. Hoban, 24 Ga. App. 686, 102 S.E. 46 (1920).

171 Graham v. Atchison T. & S. F. Ry., 176 F.2d 819 (9th Cir. 1949); Allison v. Chicago Great Western Ry., 240 Minn. 547, 62 N.W.2d 374 (1954).

172 Squire v. Wheeling & Lake Erie Ry., 155 Ohio St. 201, 98 N.E.2d 313 (1951).

173 Squire v. Wheeling & Lake Erie Ry., 342 U.S. 935 (1952).

174 342 U.S. 359 (1952).

175 Squire v. Wheeling & Lake Erie Ry., 91 Ohio App. 507, 108 N.E.2d 846 (1950).

176 *E.g.*, Trokey v. United States Cartridge Co., 222 S.W.2d 496 (Mo. App. 1949); Traders & General Ins. Co. v. Towns, 130 S.W.2d 445 (Tex. Civ.

pear that the court reached its conclusion because of the statute. There are some decisions, however, whose results have been determined by the statutes. Since each determination depends upon the interpretation of the statute involved, no detailed analysis will be attempted here. However, several decisions will be cited to show what effect these statutes might have on the doctrine.

Frequently the Workmen's Compensation Acts have provisions which require that before a settlement of a claim will be recognized it must be approved by a court or by a board. The Kentucky courts have said that, under such provisions, any settlement which had not been approved by the board was void. As a result, repayment of the consideration received was not a condition to an action under the act.[177] And a Louisiana court has held that repayment need not be made under such circumstances since to require it would thwart the purpose of the act.[178] Since the money received under such an agreement is likely to have been spent by the workman or his family for hospital or medical bills or for living expenses, to require the return of the money would deny him the relief the act sought to secure for him. In interpreting its statute the New Hampshire court has said that the rule requiring an infant to restore what he has received, as a condition to his rescission of a contract, did not apply to benefits he had received as a result of his mother's unauthorized compensation agreement.[179] Insofar as the payment discharged

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[176] *continued*

App. 1939); Casualty Reciprocal Exchange v. Bryan, 101 S.W.2d 895 (Tex. Civ. App. 1937); Indemnity Ins. Co. v. Sterling, 51 S.W.2d 788 (Tex. Civ. App. 1932); New Amsterdam Cas. Co. v. Harrington, 11 S.W.2d 533 (Tex. Civ. App. 1928).

[177] KY. REV. STAT. ANN. §§ 342.050, 342.265 (Baldwin 1955); Hatfield v. Billiter & Wiley, 231 Ky. 736, 22 S.W.2d 129 (1929); Stewart v. Model Coal Co., 216 Ky. 742, 288 S.W. 696 (1926).

[178] LA. REV. STAT. § 23:1033 (1950); Neyland v. Maryland Cas. Co., 28 So. 2d 351 (La. App. 1946).

[179] Roberts v. Hillsborough Mills, 85 N.H. 517, 161 At' 29 (1932).

the defendant's common law liability, it was a statutory and not a contractual bar. Therefore, the infant had no contract to rescind and the rule requiring restoration did not apply.

A New York statute makes it a misdemeanor to enter a hospital for the purpose of procuring a release within fifteen days of the time the injuries had been sustained.[180] A court has held that although the violation of this statute does not render the release void, a tender of the amount received is not a condition precedent to the plaintiff's right to sue for his injuries.[181] However, it is not certain whether the result was reached because of the statute or because of the precedent of other New York cases.[182]

These few statutes would seem to indicate a willingness on the part of the courts to abandon the strict requirement of restoration where the statutes offer them the slightest opportunity to do so. The reason assigned may be that the contract is void or that rescission is not necessary. However, the fact that a continuance of the rule might thwart the purpose of the statute, or that its application is not needed to protect the defendant, would seem to be the better basis for such decisions.

One legislature has taken steps to abandon the requirement of restoration as a condition precedent to the rescission of a contract. A 1952 amendment to the New York Civil Practice Act provides that:

> A party who has received benefits by reason of a transaction that is void or voidable because of fraud,

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180 N. Y. PEN. LAW § 270-b.

181 Thorne v. Columbia Cab Corp., 167 Misc. 72, 3 N.Y.S.2d 537 (City Ct. 1938), *rev'd on other grounds*, 168 Misc. 255, 5 N.Y.S.2d 775 (Sup. Ct. 1938), the latter case affirmed in 256 App. Div. 906, 10 N.Y.S.2d 239 (1st Dep't 1939).

182 The court cites with approval Scully v. Brooklyn Heights R. Co., 155 App. Div. 382, 140 N.Y. Supp. 260 (2d Dep't 1913); Herman v. P. H. Fitzgibbons Boiler Co., 136 App. Div. 286, 120 N.Y. Supp. 1074 (4th Dep't 1910); Yaple v. New York, O. & W. Ry., 57 App. Div. 265, 68 N.Y. Supp. 292 (3d Dep't 1901).

> misrepresentation, mistake, duress, infancy or incompetency, and who, in an action or proceeding or by way of defense or counterclaim, seeks rescission, restitution . . . or other relief, whether formerly denominated legal or equitable, dependent upon a determination that such transaction was void or voidable, shall not be denied relief because of a failure to tender before judgment restoration of such benefits; but the court may make a tender of restoration a condition of its judgment. . . .[183]

This statute has been applied to the release cases.[184] And this is in a state which had applied the requirement of restoration more rigorously than most.[185]

Under the statute, it is left to the court's discretion whether or not restoration is made a condition to judgment. An example of the exercise of this discretion can be found in the following order of an inferior New York court:

> As a condition of setting aside the waiver, the Court directs petitioner to restore to the estate any and all the benefits already paid to her. . . . In the event that she is presently unable to restore the payments already made to her under said policies, petitioner will file a duly acknowledged consent authorizing the executors to charge her distributive share with such sums.[186]

It should be noted that the statute, as it was originally enacted in 1946, retained the distinction between "void" and "voidable" contracts. Prior to the enactment of the statute the New York courts held that restoration was not re-

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183 N.Y. CIV. PRAC. ACT § 112-g.

184 Ciletti v. Union Pac. R.R., 196 F.2d 50 (2d Cir. 1952); Shontell v. Glens Falls Ins. Co., 282 App. Div. 965, 125 N.Y.S.2d 911 (2d Dep't 1953); Ploof v. Somers, 282 App. Div. 798, 123 N.Y.S.2d 5 (3d Dep't 1953).

185 *E.g.*, Gilbert v. Rothschild, 280 N.Y. 66, 19 N.E.2d 785 (1939). For a comprehensive treatment of the New York cases see the study made by Professor Patterson for the New York Law Revision Commission. LAW REVISION COMMISSION, LEGISLATIVE DOCUMENT No. 65(B) (1946).

186 *In re* Lieberman's Will, 206 Misc. 263, 132 N.Y.S.2d 558, 559 (Surr. Ct. 1954). The case did not involve the release of a tort claim.

quired where the contract was "void."[187] Thus, it was felt that it was not necessary to provide for "void" contracts in the statute.[188] Such a distinction carried into the statute was likely to encourage other differences in the handling of these cases. For example, where the contract was "void" there was no express provision for the court's discretionary power to require restoration as a condition to a judgment. Thus, the courts were invited to distinguish between the cases on that ground. There was no good reason for not making the statute applicable to both "void" and "voidable" contracts, even though the former were already covered by judicial decisions. It is fortunate that this distinction was removed by the 1952 amendment.

It should also be noted that the statute does not expressly authorize the court to require restoration prior to or during the trial if it should deem it necessary. Although the need for it may arise in very few cases, it would seem desirable that the courts also be given discretionary power in this area. The fact that the statute is applicable to the avoiding of contracts of all kinds is even more reason for expressly giving the courts more discretion.

IV

DAMAGES FOR DECEIT AS AN ALTERNATIVE REMEDY

In those cases, where the release was procured by fraud, it has usually been asserted without opposition, that, instead of an action involving a rescission of the release and

187 Cleary v. Brooklyn Bus Corp. 262 App. Div. 896, 28 N.Y.S.2d 908 (2d Dep't 1941); Scully v. Brooklyn Heights R.R., 155 App. Div. 382, 140 N.Y. Supp. 260 (2d Dep't 1913); Herman v. P. H. Fitzgibbons Boiler Co., 136 App. Div. 286, 120 N.Y. Supp. 1074 (4th Dep't 1910).

188 NEW YORK LAW REVISION COMMISSION, LEGISLATIVE DOCUMENT No. 65(B) 7 (1946).

a suit on the original cause of action, the releasor has the option of affirming the release and bringing suit for the damages he has sustained because of the fraud.[189] In such event he is not required to restore what he has received under the release.[190] The existence of such a remedy is frequently given as a reason for the strict application of the rule requiring restoration where the action is based upon rescission.[191] Therefore, it behooves us to look to the appropriateness of the deceit action in these cases.

The major question confronting us in a deceit action is the proof and measure of damages. It has been said that there are two rules which have been adopted in measuring damages for deceit:

> (1) The federal rule, followed in a few states, allows the person defrauded to recover the difference between the value of what the plaintiff has parted with and the value of what he has received in the transaction; (2) the majority rule, following the analogy of the measure in actions in contract for breach of warranty, allows recovery of the difference between the actual value of what the plaintiff received and the value which it would have had if it had been as represented. The first may be termed the "out-of-pocket loss" rule, and the second, the "loss of bargain" rule.[192]

However applicable these rules may be in sales contracts, it would seem that the "majority" or "loss of bargain" rule would be difficult to apply in the release cases. And in the application of the "out-of-pocket loss" rule we are confronted with the problem of determining "the value of what the plaintiff has parted with."

In *Gould v. Cayuga County Nat'l Bank*,[193] the court was

189 *E.g.*, Gould v. Cayuga County Nat'l Bank, 86 N.Y. 75 (1881), a case which does not involve the release of a tort claim but is frequently cited as authority in such cases; Swan v. Great Northern Ry., 40 N.D. 258, 168 N.W. 657 (1918).

190 5 WILLISTON, CONTRACTS § 1524 (Rev. ed. 1937).

191 *E.g.*, Gould v. Cayuga County Nat'l Bank, 86 N.Y. 75 (1881).

192 MCCORMICK, DAMAGES § 121 (1935).

193 86 N.Y. 75 (1881).

concerned with the release of a contract claim. However, the case is frequently cited as authority for the proposition that a restoration of the consideration received for a release is a condition precedent to an action at law for damages for personal injuries. In that case the court suggests a deceit action as an alternative to rescission. The court then points out that, in an action for deceit, the damages would be measured by the difference between what the plaintiff settled for and what he would have been willing to settle for had there been no misrepresentation. The court expressly excludes the damages which might have been recovered for the released claim as an element in the proof of the damages for the deceit. In a second action,[194] arising out of this dispute, the plaintiff did sue for damages for the deceit. There it was said:

> . . . [A]ssuming that the parties meant to avoid litigation and compromise their dispute, and that nothing but facts were disclosed, how much could Gould have reasonably demanded and the defendants have reasonably allowed as a final compromise above and beyond the $25,000 in fact allowed and received? That is the question of damages for the jury. It respects the fair value of the disputed claim as the subject of a reasonable and just compromise, or of a reasonable sale by the creditor to the debtor. It is the excess of that value upon the true state of facts as known, or honestly believed, over the value fixed upon a false state of facts fraudulently asserted, which constitutes the plaintiff's actual loss from the fraud.[195]

It would seem at once that the measure of such damages would be difficult to prove. In fact it has been said that in such a case the damages are too speculative and will not be recognized.[196] In *Whitman v. Seaboard Air Line Ry.*,[197]

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194 Gould v. Cayuga Co. Bank, 99 N.Y. 333, 2 N.E. 16 (1885).

195 *Id.* at 19.

196 Taylor v. Hopper, 207 Cal. 102, 276 Pac. 990 (1929); Whitman v. Seaboard Air Line Ry., 107 S.C. 200, 92 S.E. 861 (1917). *Contra:* Kordis v. Auto Owners Ins. Co., 311 Mich. 247, 18 N.W.2d 811 (1945); Desmaris v.

the lower court instructed the jury that they were to use their own estimate of what damages the plaintiff would have recovered in an action for the injuries. The appellate court felt that this allowed the jury a "substitution of their independent judgment for that of an unknown and unknowable jury" and that therefore, the damages were too speculative.[198] In this case, it was proof of the prospective damages for personal injuries which made the damages in the deceit action speculative. It would seem that the damages in a deceit action would be even more speculative if the court refuses to permit proof of the elements of the action for personal injuries. A ruling that the damages are too speculative in these cases precludes any action for deceit and the plaintiff is left with only his action for rescission of the release.

If the measure of damages as outlined in the *Gould* cases is followed, there is still the problem of the admissibility of evidence of the defendant's liability for the personal injuries. It has been pointed out that it is not necessary for the plaintiff to establish that he had a valid claim for personal injuries.[199] All that is necessary is to establish that he had a disputed claim which would be

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196 *continued*

People's Gaslight Co., 79 N.H. 195, 107 Atl. 491 (1919). In both the *Whitman* and the *Desmaris* cases, the action was brought in deceit in order to avoid the statute of limitations which barred the action on the original tort.

197 107 S.C. 200, 92 S.E. 861 (1917).

198 *Id.* at 862.

199 Urtz v. New York Cent. & H. R. R.R., 137 App. Div. 404, 121 N.Y. Supp. 879 (4th Dep't 1910). Compare the dissenting opinion in Inman v. Merchants Mut. Cas. Co., 274 App. Div. 320, 83 N.Y.S.2d 801, 805 (3d Dep't 1948):

> "Fraud will not sustain a recovery unless accompanied by damage or injury. . . .
>
> "The disposition of this litigation requires a separate trial as to the . . . loss in advance of the trial for fraud. . . . Until a judgment for damages on account of the negligence . . . has been obtained, no cause of action exists for fraud, as there is no proof of damage.
>
> "A trial of the negligence issue against the insurer will violate rules of evidence of long standing, as proof that a claimed negligent driver is insured has led to the reversal of many judgments."

the subject of a compromise. However, it follows that the stronger his claim, the more valuable would be the consideration he surrendered when he signed the release. The greater the damages he could have recovered, the more the plaintiff would have demanded as consideration for his release. Consequently, his damages in the deceit action would be greater. Thus, it would seem that proof of the damages, which he might have obtained in an action on the original tort, should be admissible as an element of the plaintiff's proof of the value of the claim which he had released.

In a recent Ohio case the plaintiff refused to tender the consideration received for the release and contended in his amended petition that he was asking only for damages for the fraud.[200] The court refused to accept that contention, saying:

> . . . [a] study of his amended petition discloses specifications of negligence and allegations as to personal injuries, pain, suffering and loss of wages resulting therefrom. Hence, although the plaintiff has injected the matter of fraud, the original basic elements of his case—negligence, injury and proximate cause—remain unchanged, and there seems to be no persuasive reason for the application of a different rule. The simple addition of the claim of fraud cannot be regarded as a bit of legerdemain by which the plaintiff somehow has eliminated any of the original elements of negligence, injury and proximate cause. Should he fail in his proof as to either negligence or proximate cause, he obviously cannot recover even though there may have been misrepresentation as to the nature and extent of his injuries.[201]

This statement discloses the court's misconception of the action of deceit and the purpose of alleging and proving the elements of the original cause of action. But it is indicative of the fact that there may be no alternative to the ac-

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[200] Picklesimer v. Baltimore & O. R.R., 151 Ohio St. 1, 84 N.E.2d 214 (1949).

[201] *Id.* at 217.

tion of rescission in the case of a fraudulently acquired release. In pleading the original action, there is a danger of confusing the damages of that action with the damages which should be recoverable in the action for deceit. It is as a result of this error that some courts have said that the pleadings and instructions given were appropriate in an action for personal injuries but not in an action for deceit.[202] Thus, the plaintiff's case was "based upon rescission" and he failed since he had not alleged a tender of the consideration he had received. On the other hand, there are cases, where for all practical purposes the courts have allowed the plaintiff to recover in an action for deceit the same amount he would have recovered in an action for personal injuries.[203] While these decisions may not be correct in theory, they may nevertheless be desirable, insofar as they permit an action for personal injuries without compelling the plaintiff to return the consideration he had received for the fraudulently procured release.

Interesting because of their bearing upon this problem, are the decisions of the Indiana court. In *Rochester Bridge Co. v. McNeill,*[204] the trial court was reversed for having given instructions which led the jury in a deceit action to allow as damages the amount by which the plaintiff had

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202 Urtz v. New York Cent. & H. R. R.R., 137 App. Div. 404, 121 N.Y. Supp. 879 (4th Dep't 1910); Wichita Falls & S. R.R. v. Durham, 132 Tex. 143, 120 S.W.2d 803 (1938).

203 Graham v. Morgan, 129 F. Supp. 199 (N.D. Okla. 1955), was an action to recover damages incurred because of the defendant's perjury. The court said at 202: "The plaintiff is entitled to judgment against the defendant for that amount which the plaintiff would have recovered had the defendant not been guilty of such deceit." Russo v. Sofia Bros., Inc., 44 F. Supp. 779 (S.D.N.Y. 1942) was an action for deceit for damages sustained because the defendant had fraudulently acquired a release of a judgment for a wrongful death action. Hutchings v. Takens, 287 Mich. 96, 282 N.W. 915 (1938) was an action for deceit to obtain a release of a contract claim. Wessels v. Carr, 15 App. Div. 360, 44 N.Y. Supp. 114 (1st Dep't 1897), *appeal dismissed,* 156 N.Y. 683, 50 N.E. 1123 (1898), was an action for deceit in obtaining a release of a judgment.

The cases involving the release of judgments might be distinguished on the ground that the amounts involved were liquidated.

204 188 Ind. 432, 122 N.E. 662 (1919).

been injured by the original tort. The court reasoned that the measure of damages should be the amount which the injured party reasonably could have demanded and which the defendant would reasonably have allowed as a final compromise above and beyond the sum in fact allowed and received.[205]

It has been held that it is proper for the trial court to instruct the jury to take into consideration, in fixing the amount of damages, the negligence of the defendant,[206] and ". . . such evidence as had been produced upon the trial showing his suffering both of body and mind, if any, which he would undergo in the future on account of his injuries . . . ."[207] The court has gone the farthest in *Automobile Underwriters, Inc. v. Rich*,[208] where it is said:

> The charge ought to inform the jury that they should endeavor to discover what that probable amount would be after considering all of the known or foreseeable facts and circumstances which in any way affected the value of the claim on the date of settlement, and having once arrived at that figure, they should then deduct the amount already allowed and paid and insert the balance, if any, in the verdict as the true measure of the damage suffered. The ultimate fact to be ascertained is the actual damage caused by the fraudulent representations and not the damage for the original injury.[209]

This case purports to restate the rule of *Rochester Bridge Co. v. McNeill*. However, the court admits that it may be enlarging that rule. That this is true would seem to be apparent when one considers that the court in this case dwells on the dispute by the doctors about the extent of the injury to the plaintiff's knee. Such a dispute may have been important in determining the amount for which the plaintiff would have been willing to settle. However, one

205 *Id.* at 666.

206 Indiana Ins. Co. v. Handlon, 216 Ind. 442, 24 N.E.2d 1003 (1940).

207 Southern Ry. v. Jaynes, 86 Ind. App. 451, 140 N.E. 556, 558 (1923).

208 222 Ind. 384, 53 N.E.2d 775 (1944).

209 *Id.* at 779.

cannot help believing that the jury will be led to believe that the plaintiff would have settled only for that amount which a jury would have been willing to allow him if his action had been for damages for the personal injury.

From the foregoing it would seem that even in Indiana there is no certainty that the plaintiff does have an alternative action for damages for deceit in these cases. At least the elements of his proof are in doubt. If the damages are speculative, or if their proof is difficult to the point of impossibility, or if the courts persist in saying that the proof of the damages is in fact a proof of the damages for the personal injury and, therefore, an ineffective attempt at an action based on rescission, it would seem that the plaintiff in these cases does not in fact have an alternative to the action based upon rescission. This is even more reason why the courts should not require restoration before the suit or, at least, why they should be lenient in the application of such a rule when dealing with fraudulently procured releases.

V

CONCLUSION

From the foregoing it would appear that most courts have stated, or have assumed, that restoration, a tender of restoration, or an offer to tender restoration of the consideration received for a release, is a condition precedent to the avoiding of a release and to the bringing of an action on the original tort. Yet, in the application of the rule, they have been willing to find so many exceptions that if the requirement is to continue to exist and have meaning, it would seem necessary to restate it.

A requirement based upon the distinction between law and equity, or as a necessary element of a rescission, would seem to be a purely technical requirement that can serve no useful purpose today. If, therefore, it is to have any

justification it must exist for the purpose of preventing the plaintiff's unjust enrichment and for the protection of the defendant. In cases where the plaintiff, having released his claim, is bringing an action for damages for injuries he has sustained, the problem really before the court is the effect to be given to the release he has signed. "It is not strictly a proceeding to rescind a contract . . . but an effort to obtain full and adequate compensation notwithstanding the previous acknowledgment of entire satisfaction by showing that such an acknowledgment was fraudulently procured."[210] Since it is desirable to assure the permanency of releases and settlements, they ought not to be ignored merely because the plaintiff is dissatisfied with his bargain. On the other hand, it is unfair to the plaintiff to allow an unscrupulous defendant to hide behind such a bargain just because the plaintiff has not restored the consideration he had been paid. If the plaintiff can assert just grounds for avoiding the release, no technical requirement, unless it serves a valid purpose, should be placed in his way. The question, then, is whether the restoration of the consideration before suit is necessary to prevent the unjust enrichment of the plaintiff.

Although they probably would be rare, cases may arise where an unscrupulous plaintiff might attempt to finance his action on the original tort by obtaining money from the defendant on the pretext of signing a release. The insolvency of the plaintiff, and the likelihood that he will not succeed in his action upon the original tort, may make it desirable for the court to dismiss his petition unless he first restores to the defendant what he had received under the release. It may be that this is the only way of adequately protecting the defendant. Even in these cases, however, it is not the tender which protects the defendant. What is needed is an assurance that, if at the conclusion of the action it is found that the plaintiff is indebted to the de-

[210] Texas & P. Ry. v. Jowers, 110 S.W. 946, 949 (Tex. Civ. App. 1908).

fendant, the defendant can obtain payment of that debt. In most cases that assurance might be given by a judgment against the plaintiff, a credit upon the plaintiff's judgment against the defendant, a requirement that the plaintiff tender the property into court, or possibly by his posting a bond. At some stage of the pleadings or during trial it may be advisable to protect the defendant by requiring payment to the defendant or payment into court. With such discretionary power the courts could more effectively protect the defendant against a collection-proof plaintiff. This is especially true since the courts have permitted the plaintiff to retain possession of the property after the defendant has refused the tender. At the same time with this power the courts could give the honest, but impecunious, plaintiff his day in court.

Whether the release was void or voidable, whether the release was procured by fraud in the inducement or fraud in the execution, whether the plaintiff was misled about the nature of the instrument or concerning its contents, whether there was or was not a contract, are not valid distinctions in determining whether there is or is likely to be an unjust enrichment. The fact remains that, if the plaintiff's contention about the release is correct, he is in possession of property which in most cases does not belong to him. The nature of the contract or of the fraud by which the defendant procured it are of little importance. Even in those cases where the releasor contends that he has received the consideration as a gift, in the face of a showing of a release signed by him, it is doubtful if he should be permitted to retain what he has received and still obtain a complete judgment for his damages for personal injuries. However, the effect of the release does depend upon the circumstances surrounding and entering into its procurement. Thus it would seem to make a difference whether it was procured by fraud or duress, or through mistake, or while the plaintiff was incompetent. The cul-

pability of the defendant and of the plaintiff would seem to be elements to consider in determining what steps are advisable to protect the defendant. On one hand, the importance of upholding the stability of releases, the protection of the defendant, and the prevention of unjust enrichment of the plaintiff should be considered. On the other hand, we must also consider the necessity of granting some relief to the plaintiff who has signed a release which in justice should not bar his action for damages for the original tort.

Several elements should be considered in determining the advisability of requiring restoration, or some intermediate relief during the proceedings. The amount of the consideration which has been paid to the plaintiff, and his financial ability to repay are such elements. The promptness with which the plaintiff has acted and the culpability of both the defendant and the plaintiff[211] would seem to be important. The court should also consider if, how, and when the plaintiff has spent the consideration, and whether the defendant was aware of the plaintiff's financial and mental condition at the time the release was signed. If the courts would consider these things, and would mold the requirement of restoration to best meet the particular case before them, much of the litigation involving a purely technical application of the rule could be avoided.

A statute such as that of New York may be necessary to reach this result. However, it is also possible that the goal can be attained by judicial decision as in the *Marple*[212] and *Rase*[213] cases. This would entail only an investigation of the purpose of the rule and its application in the light of present knowledge and procedures.

*Vincent C. Immel**

211 *E.g.*, Whitwell v. Aurora, 139 Mo. App. 597, 123 S.W. 1045 (1909), where the plaintiff executed the release for the purpose of defrauding a third party.

212 Marple v. Minneapolis & St. L. Ry., 115 Minn. 262, 132 N.W. 333 (1911).

213 Rase v. Minneapolis, & St. P. & S. S. M. Ry., 118 Minn. 437, 137 N.W. 176 (1912).

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