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# FORDHAM LAW REVIEW

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## VALIDITY OF RELEASES EXECUTED UNDER MISTAKE OF FACT

*EUGENE J. KEEFE*†

THIS article deals with general releases executed under mistakes of fact and therefore that excludes covenants not to sue,[1] partial or particular releases. It includes questions of the validity of releases induced by fraud[2] or compelled by duress[3] when accompanied by mistake. The broad field of mistake of fact would seem to admit of the following divisions: (a) mistake as to the nature of the instrument executed;[4] (b) mistake as to the contents of the instrument signed;[5] (c) mistake of fact leading to the signing of the instrument such as ignorance of the extent of the injuries[6] or the amount of damage in property damage cases.[7]

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1. A release is a covenant not to sue. Bossong v. Muhleman, 254 App. Div. 738, 3 N. Y. S. (2d) 992 (2d Dep't 1938); Shaw v. Crissey, 182 Misc. 27, 43 N. Y. S. (2d) 237 (Sup. Ct. 1943) wherein the court held that a covenant not to sue did not constitute a release.

2. Barker v. Conley, 267 N. Y. 43, 195 N. E. 677 (1935), *rev'g*, 242 App. Div. 808, 275 N. Y. Supp. 210 (4th Dep't 1934).

3. Taylor v. Russell, 258 App. Div. 305, 16 N. Y. S. (2d) 388 (4th Dep't 1939), *reargument den.*, 259 App. Div. 787, 18 N. Y. S. (2d) 751 (4th Dep't 1940); People by Van Schaick v. New York Title & Mortgage Co., 150 Misc. 239, 270 N. Y. Supp. 26 (Sup. Ct. 1934).

4. Farrington v. Harlem Savings Bank, 280 N. Y. 1, 19 N. E. (2d) 657 (1939) *rev'g*, 254 App. Div. 848, 6 N. Y. S. (2d) 366 (1st Dep't 1938); Moses v. Carver, 254 App. Div. 402, 5 N. Y. S. (2d) 783 (3d Dep't 1938), *rev'g*, 164 Misc. 204, 298 N. Y. Supp. 378 (Sup. Ct. 1937).

5. Farrington v. Harlem Savings Bank, 280 N. Y. 1, 19 N. E. (2d) 657 (1939), *rev'g*, 254 App. Div. 848, 6 N. Y. S. (2d) 366 (1st Dep't 1938).

6. Barry v. Lewis, 259 App. Div. 496, 20 N. Y. S. (2d) 88 (4th Dep't 1940), *app. den.*, 259 App. Div. 1072, 21 N. Y. S. (2d) 1023 (4th Dep't 1940); Young v. Marx & Son, 189 So. 167 (La. App. 1939); Johnson v. Chicago, M. & St. P. Ry. Co., 224 Fed. 196 (W. D. Wash. 1915); National Life and Accident Insurance Co. v. Hitt, 194 Ark. 691, 109 S. W. (2d) 426 (1937); Poti v. New England Road Machinery Co., 83 N. H. 232, 140 Atl. 587 (1928); Shetina v. Pittsburgh Terminal Coal Corp., 119 Pa. Super. 425, 179 Atl. 776 (1935); Gambrel v, Duensing, 127 Cal. App. 593, 16 Pac. (2d) 284 (1932).

7. Rector, *etc.*, St. James Church v. City of New York, 261 App. Div. 614, 26 N. Y. S. (2d) 762 (2d Dep't 1941); People *ex rel.* McDonough v. Board of Managers, Buffalo State Asylum for Insane, 96 N. Y. 640 (1884).

An examination of the cases reveals that the problem of obtaining relief from the effects of a general release seldom arises in the form of a reformation proceeding.[8] It is nearly always a rescission *in pais* case or an application for rescission by equitable decree or a suit upon the original claim against which the general release is interposed as a defense. The reason for the paucity of decisions raising the question of the reformation remedy in releases is rather obvious. In the first place the party attacking the release wishes to be relieved of it entirely, not partly; he does not desire it to be operative against him in its reformed state; and secondly, the type of mistake surrounding the execution of a general release is not the type of mistake generally found in reformation actions. There ordinarily is no oral agreement made previously which the written release fails to reproduce in formal manner. In other words, there is no definite prior agreement which the court can substitute for the mistaken one by the processes of reformation. The release either stands or falls.

(a) *Mistake As To The Nature of the Instrument Executed*

In this group of cases there is frequently present an affirmative misrepresentation of the releasee's representative or knowledge on the part of this representative that the releasor is acting under a mistake as to the nature of the instrument being executed and a wrongful failure to apprize the releasor of the true facts.[9]

The courts are uniform in ruling that a mistake induced by misrepresentation of releasee or his representative as to the nature of the instrument signed is such a mistake as will operate to render the release ineffective as a defense to an action upon the original claim or will form a basis for a successful rescission action in equity.[10]

However a more difficult problem arises where the mistake as to the

8. In both Moses v. Carver, 254 App. Div. 402, 5 N. Y. S. (2d) 783 (3d Dep't 1938), *rev'g*, 164 Misc. 204, 298 N. Y. Supp. 378 (Sup. Ct. 1937), and Farrington v. Harlem Savings Bank, 280 N. Y. 1, 19 N. E. (2d) 657 (1939), *rev'g*, 254 App. Div. 848, 6 N. Y. S. (2d) 366 (1st Dep't 1938) where there was evidence of a mistake of the true nature of the instrument, the remedy sought was rescission.

9. Missouri Transportation Co. v. Robinson, 191 Ark. 428, 86 S. W. (2d) 913 (1935); Schneider v. Raymond, 106 Conn. 72, 136 Atl. 874 (1927); Farrington v. Harlem Savings Bank, 280 N. Y. 1, 19 N. E. (2d) 657 (1939); Moses v. Carver, 254 App. Div. 402, 5 N. Y. S. (2d) 783 (3d Dep't 1938); Cleary v. Municipal Electric Light Co., 139 N. Y. 643, 35 N. E. 206 (1893); Wichita Falls & So. R. R. Co. v. Durham, 132 Tex. 143, 120 S. W. (2d) 803 (1938).

10. Schneider v. Raymond, 106 Conn. 72, 136 Atl. 874 (1927); Moses v. Carver, 254 App. Div. 402, 5 N. Y. S. (2d) 783 (3d Dep't 1938), *rev'g*, 164 Misc. 204, 298 N. Y. Supp. 378 (Sup. Ct. 1937).

nature of the instrument executed by the releasor is caused by the failure of the releasor to read the document.[11] Probably the better rule to be taken from this group of cases is that the release is binding where the failure to read the release is inexcusable.[12] But the failure to read the instrument was excused in *Pimpinello v. Swift*,[13] where the releasor was illiterate and her own attorney represented to her that the release was merely a receipt for medical expenses; and in *Moses v. Carver*[14] where the releasor's husband went to the hospital and informed her that he had papers which she would have to sign to get money to pay hospital bills and other expenses; and in *Gould v. John Hancock Mutual Life Insurance Co.*[15] where the releasor was under the influence of drugs at the time of its execution. The same type of excuse for not reading the release prevailed in *Aikens v. Roberts*[16] where the releasor was mentally incompetent at the time of signing; and in *Lynch v. Figgs*[17] where the release was represented as a mere receipt[18] and in *Kelly v. City of New York*[19] where

11. Pimpinello v. Swift & Co., 253 N. Y. 159, 170 N. E. 530 (1930), *aff'g*, 227 App. Div. 740, 236 N. Y. Supp. 877 (2d Dep't 1929); Schenfeld v. Hochman, 100 N. Y. Supp. 1020 (Sup. Ct. 1906).

12. Whitney Co. v. Johnson, 14 F. (2d) 24 (C. C. A. 9th, 1926); Carlson v. Northern Pac. Ry. Co., 82 Mont. 559, 268 Pac. 549 (1928); Rawleigh v. Washburn, 80 Mont. 308, 260 Pac. 1039 (1927). In the *Carlson* case, the court wrote: "He does not contend there was any fraud or artifice practiced upon him to secure his signature, or that he was not given opportunity to have the same read and explained to him by some competent and reliable person. His failure to inform himself of the contents of the release under such circumstances will not relieve him from its effects." In the *Johnson* case, the court wrote: "If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party. If he cannot read it, it is as much his duty to procure some reliable person to read it and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." In Thoroughgood's Case, 2 Coke 96 (Cm. Pl. 1582), the court in holding the instrument invalid wrote: ". . . it is not material who readeth the writing, so as he who maketh it be a lay-man, and being not lettered, be (without any covin in himself) deceived."

13. 253 N. Y. 159, 170 N. E. 530 (1930), *aff'g*, 227 App. Div. 740, 236 N. Y. Supp. 877 (2d Dep't 1929).

14. 254 App. Div. 402, 5 N. Y. S. (2d) 783 (3d Dep't 1938), *aff'g*, 164 Misc. 204, 298 N. Y. Supp. 378 (Sup. Ct. 1937).

15. 114 App. Div. 312, 99 N. Y. Supp. 833 (3d Dep't 1906).

16. 164 N. Y. Supp. 502 (Sup. Ct. 1917).

17. 200 App. Div. 92, 192 N. Y. Supp. 873 (2d Dep't 1922).

18. *Accord*, Markowitz v. Metro. St. Ry. Co., 32 Misc. 751, 65 N. Y. Supp. 784 (N. Y. City Ct. 1900) wherein the releasor was an illiterate and was led to believe that she was signing a receipt for a gratuity. In Cleary v. Municipal Electric Light Co., 139 N. Y. 643, 35 N. E. 206 (1893), the release was held ineffective where the releasor was in-

the releasor, an illiterate, was assured that the release would not in any way prejudice his rights; and in *Whipple v. Brown Bros.*[20] where the signer of the instrument had forgotten his eyeglasses and was misled as to the contents. But the failure to read the instrument was not excused in *Schenfeld v. Hochman*[21] where the plaintiff offered no excuse and testified that "he had never heard the release read . . . and only signed it by advice"; or in *Barker v. Conley*[22] where the court wrote:[23] "No duress was shown and the plaintiff's ignorance of what he was signing is immaterial unless he was deceived in doing so." Protective statutory provisions recognize the danger of executing releases while the releasor is not fit mentally and physically. In New York a statutory crime is committed by anyone who enters a hospital, for the purpose of obtaining a general release, within fifteen days after the personal injuries were sustained.[24] However, a violation of this section does not, *ipso facto,* render the release invalid.[25]

Important considerations in this group of cases are the following; whether or not the releasor is illiterate or educated, was represented by an attorney in the negotiations and whether or not there was any fraudulent misrepresentation or concealment by the releasee or his attorney or other agent. In summary, mere misrepresentation by the releasee or his representative will not relieve the releasor from the necessity of examining the release unless his failure to do so is caused by mental or physical incapacity or justifiable reliance upon his own representative.

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formed that the release was merely a receipt for wages or a gratuity. Wilcox v. A. T. & T. Co., 176 N. Y. 115, 68 N. E. 153 (1903).

19. 16 App. Div. 296, 44 N. Y. Supp. 628 (1st Dep't 1897).

20. 225 N. Y. 237, 121 N. E. 748 (1919); *accord,* Eldorado Jewelry Co. v. Darnell, 135 Iowa 555, 113 N. W. 344 (1907). In Trambly v. Ricard, 130 Mass. 259 (1881) the court wrote at page 263: "A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery."

21. 100 N. Y. Supp. 1020 (Sup. Ct. 1906).

22. 267 N. Y. 43, 195 N. E. 677 (1935). *Also see* Metzger v. Aetna Ins. Co., 227 N. Y. 411, 125 N. E. 814 (1920).

23. 267 N. Y. 43, 47, 195 N. E. 677, 679 (1935).

24. N. Y. PENAL LAW § 270-b

25. Moses v. Carver, 164 Misc. 204, 298 N. Y. Supp. 378 (Sup. Ct. 1937); Thorne v. Columbia Cab Corp., 167 Misc. 72, 3 N. Y. S. (2d) 537 (N. Y. City Ct. 1938); Bloodgood v. Lynch, 267 App. Div. 797, 45 N. Y. S. (2d) 530 (3d Dep't 1943), *app. den.,* 267 App. Div. 853, 47 N. Y. S. (2d) 282 (3d Dep't 1944).

(b) *Mistake As To Contents Of The Instrument Signed*

This group of cases is to be distinguished from the preceding division. In this group, the releasor knows that a release is being negotiated but he is not cognizant of some of the provisions contained therein. This may arise through misrepresentation as to the contents by the releasee or his agent accompanied by a failure to examine properly the instrument by the releasor or a failure by the releasor to examine properly the release without misrepresentation by the releasee or his agent.

The most frequent cases giving rise to this type of mistake involve errors as to the presence of the provision releasing the releasee from claims for injuries "known and unknown"[26] and errors as to the consideration to be paid to the releasor.[27]

In *Barry v. Lewis*[28] the releasor released from known and unknown injuries believing her injuries were superficial when actually she had suffered a fractured rib which activated a dormant tubercular condition; in *Landau v. Hertz Drivurself Station, Inc.*[29] the plaintiff signed the usual form of general release, believing his injuries were not serious when he had a multiple fracture of the pelvis with a marked displacement; in *Dominicis v. U. S. Casualty Co.*[30] the release was executed in ignorance of the condition of the releasor's arm, which subsequently necessitated amputation. The court removed the bar of the release in each of these three cases. The New York rule seems to be that a release of "unknown injuries" will not be binding if at the time of the release, the releasor and the releasee did not intend to release the defendant from unknown claims.[31]

26. Barry v. Lewis, 259 App. Div. 496, 20 N. Y. S. (2d) 88 (4th Dep't 1940), *app. den.*, 259 App. Div. 1072, 21 N. Y. S. (2d) 1023. At page 498 the court wrote: "The law is well settled that when a release is signed without any intention of the parties to release liability for injuries not known, such release will not be a bar to an action to recover for the unknown injuries (citing cases)." *Accord,* Farrington v. Harlem Savings Bank, 280 N. Y. 1, 19 N. E. (2d) 657 (1939); Landau v. Hertz-Drivurself Stations, Inc., 237 App. Div. 141, 260 N. Y. Supp. 561 (1st Dep't 1932); Dominicis v. U. S. Casualty Co., 132 App. Div. 553, 116 N. Y. Supp. 975 (3d Dep't 1909); Kirchner v. New Home Sewing Machine Co., 135 N. Y. 182, 31 N. E. 1104 (1892); Gold Hunter Mining & Smelting Co. v. Bowden, 252 Fed. 388 (C. C. A. 9th, 1918); Texas and Pacific Ry. Co. v. Dashiell, 198 U. S. 521 (1905).

27. People v. Townsend, 133 Misc. 843, 233 N. Y. Supp. 632 (Sup. Ct. 1929); Weitling v. Sorenson, 241 App. Div. 377, 272 N. Y. Supp. 338 (1st Dep't 1934); Thorne v. Columbia Cab Corp., 167 Misc. 72, 3 N. Y. S. (2d) 537 (N. Y. City Ct. 1938).

28. 259 App. Div. 496, 20 N. Y. S. (2d) 88 (4th Dep't 1940).

29. 237 App. Div. 141, 260 N. Y. Supp. 561 (1st Dep't 1932).

30. 132 App. Div. 553, 116 N. Y. Supp. 975 (3d Dep't 1909).

31. Barry v. Lewis, 259 App. Div. 496, 20 N. Y. S. (2d) 88 (4th Dep't 1940), *app. den.*, 259 App. Div. 1072, 21 N. Y. S. (2d) 1023 (4th Dep't 1940). *Contra:* Berry v.

Where the release contains a consideration which neither party agreed upon, it may be reformed or rescinded. Here mutual mistake of fact is present. However, a great number of cases do not present this factual situation. Rather the usual case presented is one where the consideration stated is small and the releasor alone contends he did not know the actual amount when the release was executed[32] and the releasee is not mistaken as to the amount or aware of the releasor's error. The mere fact that he did not know of the amount of the consideration or that the consideration is inadequate is no basis for rescinding the release where the releasee has not induced the mistake through misrepresentation or concealment.[33] However if the releases were given without any consideration, they may be overthrown.[34] Also where the amount of consideration intended to be given and accepted is based upon a mutual mistake of fact the release may be set aside,[35] the inadequacy of the consideration being indicative of either fraud or mistake; and the brief lapse of time intervening between the accident and the execution of the instrument is important in this connection.[36]

(c) *Mistake of Fact Leading to the Signing of the Instrument*

This mistake must be distinguished from the previous classes of mistakes. It is entirely external to the instrument itself. In the preceding types the mistake was one concerning the nature of the instrument or the contents thereof. The type of mistake discussed in this division arises most frequently in cases where the releasor was mistaken as to the extent of the injuries suffered or the amount of property damage sustained.[37] In some instances the mistake as to personal

Struble, 20 Cal. App. (2d) 299, 66 P. (2d) 746 (1937); Anderson v. Oregon Short Line R. R. Co., 47 Utah 614, 155 Pac. 446 (1916).

32. People v. Townsend, 133 Misc. 843, 233 N. Y. Supp. 632 (Sup. Ct. 1929).

33. *Ibid.*

34. Weitling v. Sorenson, 241 App. Div. 377, 272 N. Y .Supp. 338 (1st Dep't 1934).

35. Thorne v. Columbia Cab Corp., 167 Misc. 72, 3 N. Y. S. (2d) 537 (N. Y. City Ct. 1938).

36. *Id.* at 74, 3 N. Y. S. (2d) at 539. The court (quoting from 48 A. L. R. pp. 1515-1518) wrote: "It would seem that the time when the release was executed may have an important bearing upon the present question,. in connection with other circumstances, as tending to show fraud, mutual mistake, or the absence thereof." At page 75, "It seems, also, that the amount of the consideration for the release is an important element in determining whether there has been fraud or mistake. A grossly inadequate consideration may tend to show fraud, or at least the belief of the parties with respect to the nature of the injuries about which they are contracting. This is, however, only one element in the various cases, and not usually the controlling one."

37. These cases are collected in (1935) 96 A. L. R. 1001 and a collection of related cases appears in (1941) 131 A. L. R. 1299.

injuries is caused by advice proffered by a physician acting for the injured person or for the releasee. The question sometimes arises where the releasor was covered by a policy of accident insurance and having released his claim, seeks to avoid the release.[38] These decisions, for the most part, rest upon the provisions of the accident policy.[39] They do not present the more difficult question which arises when the releasor executes the instrument in favor of the party who caused the injuries under a mistake as to their extent.

It is stated generally that a mistake as to the seriousness of the known injuries, unaccompanied by fraud through misrepresentation or concealment on the part of the releasee or his agent, will not relieve the releasor from the bar of the release.[40] However, the decisions have established some fairly well defined distinctions under this general statement. Some cases distinguish between a mistake, usually based upon medical advice, as to what the *present* facts concerning the injury are and a mistake as to what the physical condition *will be* subsequently.[41] The latter is usually based upon a medical prognosis. Relief is generally granted under this distinction where the mistake relates to presently existing facts concerning the injuries,[42] and is denied where the

38. National Life and Accident Ins. Co. v. Hitt, 194 Ark. 691, 109 S. W. (2d) 426 (1937); Crigger v. Mutual Benefit Health and Accident Assoc., 17 Tenn. App. 636, 69 S. W. (2d) 907 (1933).

39. General Accident, Fire, and Life Assurance Corp. v. Harris, 117 Miss. 834, 78 So. 778 (1918); Wood v. Mass. Mutual Accident Assoc., 174 Mass. 217, 54 N. E. 541 (1899). The policy cases will not be discussed here because they are decided upon principles of contractual construction.

40. Spangler v. Kartzmark, 121 N. J. Eq. 64, 187 Atl. 770 (1936); Missouri Pac. R. R. Co. v. Elvins, 176 Ark. 737, 4 S. W. (2d) 528 (1928).

41. Reddicks v. Welsbach G. & E. Co., 124 Pa. Super. Ct. 258, 188 Atl. 417 (1936); Texas Employers Ins. Assoc. v. Watkins, 90 S. W. (2d) 622 (1936) where the releasor was advised by the insurance company's physician that he had suffered a "sprain" of the back and that he would be able to resume work in about two weeks to a month. As a matter of fact he had suffered a spinal injury of a permanent nature. The court upheld the release. Dolgner v. Dayton Co., 182 Minn. 588, 235 N. W. 275 (1931); Metro. Life Ins. Co. v. Humphrey, 167 Tenn. 421, 70 S. W. (2d) 361 (1934).

42. Gambrel v. Duensing, 127 Cal. App. 593, 16 P. (2d) 284 (1932) where the injured person at the time of the signing of the release, had no knowledge whatever that her eyesight had been impaired or would become impaired by reason of any injury that she had suffered. The court at page 601 quoted Section 1542 of the Civil Code: "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 debtor." In Landau v. Hertz Drivurself Stations, Inc., 237 App. Div. 141, 260 N. Y. Supp. 561 (1st Dep't 1932), the release was set aside where, at the time of its execution, the releasor was ignorant of the fact that, instead of his injuries being superficial abrasions and contusions, he had sustained multiple fractures of the pelvis.

mistake is as to the prospective condition.[43] In order that the release be set aside[44] the mistake must relate to a past or present fact concerning the physical condition and not be founded upon opinion as to the subsequent result of the known facts.

Another test, quite similar in substance, is found in those cases which distinguish between a mistake as to the unknown potentialities of the known injuries and a mistake as to the present seriousness of a known injury.[45] The decisions resorting to this distinction set aside the release where it was executed in ignorance of certain existing injuries subsequently discovered[46] but uphold the release where the mistake related to unforeseen results or consequences of known injuries.[47] If the mis-

43. Fornaro v. Minneapolis St. Ry. Co., 182 Minn. 262, 234 N. W. 300 (1931); Davis v. Higgins, 95 Okla. 32, 217 Pac. 193 (1923) where the release, in consideration of $5,200, was executed after advice that his fractured leg would be well in six months, but subsequently through poor union resulted in a permanent condition, the court upheld the release. Powell v. Kansas-Missouri Ry. and Terminal Co., 121 Kan. 622, 249 Pac. 675 (1926) where the court wrote: "The material fact was whether the result of the injury would be the stiffening of plaintiff's finger, and there was not even a prophecy what the result would be. That was a future event which neither party knew or attempted to forecast, and neither had any misconception as to that event. It was treated both as a matter of doubt and uncertainty, and necessarily there was no mistake of fact which could have influenced the making of the compromise and release. . . . It is a compromise which they chose to make an account of the uncertainty involved as to the future effect of the injury."

44. Metro. Life Ins. Co. v. Humphrey, 167 Tenn. 421, 70 S. W. (2d) 361 (1934).

45. Hanson v. Northern States Power Co., 198 Minn. 24, 268 N. W. 642 (1936); Southwest Pump and Machinery Co. v. Jones, 87 F. (2d) 879 (C. C. A. 8th, 1937) where the releasor had been under treatment for some time when the release was executed and despite treatment and X-ray study was in ignorance of the presence of a very large and some smaller pieces of glass in her temple and was also unaware of a sacro-iliac displacement. The court set aside a general release given for two hundred and fifty dollars.

46. Hanson v. Northern States Power Co., 198 Minn. 24, 268 N. W. 642 (1936); Southwest Pump and Machinery Co. v. Jones, 87 F. (2d) 879 (C. C. A. 8th, 1937); Simpson v. Omaha Street Ry. Co., 107 Neb. 779, 186 N. W. 1001 (1922) where the releasor believing that his injuries consisted of a skinned knee, a bruised hand and torn clothing settled his claim for $50. Several weeks later a serious nervous disorder, attributable to the accident, developed. The court held the release ineffective as a bar to a suit for this injury. Richardson v. Chicago Street Ry. Co., 157 Minn. 474, 196 N. W. 643 (1924).

47. Chicago and Northwestern Ry. Co. v. Wilcox, 116 Fed. 913 (C. C. A. 8th, 1902) where the claimant suffered a broken hip which was known to her and to the railway company. Upon the advice of her own physician that she would be well in a year she compromised her claim and executed a general release for $500. Subsequently it appeared that she had suffered a permanent disability. The court wrote: "Ignorance of the duration of the disabilities and of the ultimate effects of the injuries always exist where compromises are made before a complete recovery is effected. The cases are doubtless rare where the duration of the disability corresponds with the prophecy of the physician or with the belief of the parties when settlements are made. But compromises and releases are not voidable

take was mutual as to the extent of the injuries, relief will be granted even though the release referred to both "known and unknown" injuries.[48]

These distinctions seem sufficiently clear and simple in statement. But considerable confusion arises in their application.[49] In *McIsaac v. McMurray*,[50] where the release was executed in ignorance of a hip fracture and under the belief that the injuries consisted of only slight bruises, the court upheld the release. Under the distinction between past or present facts and opinion as to consequential results or the distinction between unknown injuries and the results of known injuries, it would seem that this case would be classified as one involving unknown injuries and that the release would be set aside. The court in refusing to set the release aside reasoned:[51]

"The fact that the parties were justifiably ignorant of the serious injury to the plaintiff's hip does not alone show that the mistake was in respect to a material matter. Whether it was, or not, depends upon the intention of the parties in making the contract. If their purpose was to terminate all dispute and litigation between them in reference to the defendant's liability for negligence in causing the plaintiff's injuries and for the resulting damages, including both the known and unknown—in other words, if the money was paid by the defendant and received by the plaintiff simply to avoid further controversy and not as compensation for the plaintiff's injuries—the mistake as to the extent of his injuries would be immaterial. They may have negotiated upon the actual understanding that it was doubtful who was to blame for the accident and what the plaintiff's injuries might turn out to be, and that in order to avoid litigation upon those questions the amount agreed upon should be deemed a sufficient consideration under the circumstances for the plaintiff's general release. In such a case . . . it is plain both parties intended to take the risk of loss as it might thereafter appear."

The same court upheld[52] a release where the releasor settled for $25.00

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on this account, for the reason that the parties to them know the uncertainty of these future events, and by the very fact of settlement before they develop agree to take the chances of their effects. . . . It was not a mistake of a past or present fact, and it presents no ground for a rescission of this release."

48. O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334 (1928). But *cf.* Berry v. Struble, 20 Cal. App. (2d) 299, 66 P. (2d) 746 (1937), cited *supra* note 31.

49. Poti v. New England Road Machinery Co., 83 N. H. 232, 140 Atl. 587 (1928); Scheer v. Rockne Motors Corp., 68 F. (2d) 942 (C. C. A. 2d, 1934); McIsaac v. McMurray, 77 N. H. 466, 93 Atl. 115 (1915); Harvey v. Georgia, 148 Misc. 633, 266 N. Y. Supp. 168 (Sup. Ct. 1933).

50. 77 N. H. 466, 93 Atl. 115 (1915).

51. *Id.* at 471, 93 Atl. at 118.

52. Cogswell v. Boston and Maine Ry. Co., 78 N. H. 379, 101 Atl. 145 (1917).

under the belief that his injuries consisted of a lame shoulder. Subsequently an aggravated Bright's disease condition induced by the accident caused his death. The court held that, since it was found as a fact that the main objective of the contract was the avoidance of future litigation it was binding. In other words the release did not aim to pay for the injury sustained but to buy the railroad company's peace and the offer was to pay a certain sum to settle once and for all every claim growing out of the accident. Since there was this type of settlement, which was knowingly accepted by the releasor, the extent of the injury did not affect the subject matter of the contract, and the release could not be avoided on the ground of mutual mistake.[53] But the New Hampshire court in *Poti v. New England Road Machinery Co.*,[54] held that the evidence was sufficient to set aside a release where the releasor compromised his claim under the belief that he had suffered a superficial bruise and was so advised by his own physician. Instead of being superficial the injury was such that the "muscles were so injured that they came away from the bone . . . leaving a serious sore, which of necessity will require a long time to heal, and which may result in some permanent disability. . . ."[55] The court in setting aside the release wrote:

"While the parties were mistaken as to the time that would be taken in recovery, that mistake was due wholly to the underlying mistake of the extent to which the muscles were ruptured. . . . It is not a case where the parties took their chances of what might happen, regardless of what the existing situation might be."[56]

The New York cases approach the problem from the broad test—was the release "fairly and knowingly made"?[57] In *Farrington v. Harlem Savings Bank*[58] the release was set aside where the releasor knew only of a scalp wound and some minor bruises. He compromised his claim for thirty dollars.[59] Subsequently a fracture of the humerus causing lost

53. *Ibid.*

54. 83 N. H. 232, 140 Atl. 587 (1928).

55. *Id.* at 234, 140 Atl. at 589.

56. *Id.* at 236, 140 Atl. at 589.

57. Farrington v. Harlem Savings Bank, 280 N. Y. 1, 4, 19 N. E. (2d) 657 (1939); *Cf.* Backhous v. Wagner, 234 N. Y. 429, 138 N. E. (2d) 82 (1922); Shannon v. Horton, 168 App. Div. 953, 153 N. Y. Supp. 436 (2d Dep't 1915); McLoughlin v. Syracuse Rapid Transit Co., 115 App. Div. 774, 101 N. Y. Supp. 196 (4th Dep't 1906); Pugsley v. Sumner, 14 Daly 427, 14 N. Y. St. Rep. 691 (1897).

58. 280 N. Y. 1, 19 N. E. (2d) 657 (1939).

59. In *Farrington v. Harlem Savings Bank*, there was an element of fraud; the agent of the insurance carrier misrepresented the release to be merely a receipt for medical expenses.

motion in the left arm and fingers was discovered. In *Landau v. Hertz Drivurself Stations, Inc.*,[60] the release was held invalid where it was given for fifty dollars under the mutual belief that the releasor had sustained "merely superficial abrasions and bruises" when in fact he had suffered "multiple fractures of the pelvis."[61] In *Barry v. Lewis*[62] the trial court found that at the time the release was executed the plaintiff and the defendant were in complete ignorance of the fact that the plaintiff had suffered a fractured rib and thought her injuries were slight and superficial.[63] The Appellate Court held the release to be no bar to her subsequent action for damages for the unknown injury. But in *Rector*, etc. *St. James Church v. City of New York*[64] the releasor was paid $1,000 in settlement of a claim for damage to a building caused by alleged negligent shoring on the defendant's part. Subsequently more damage appeared upon the plaintiff's property. The court held the release binding upon the releasor. The court wrote[65] ". . . the effect of a release may not be avoided because of lack of knowledge of the true extent of injury sustained." In *Mack v. Albee Press, Inc.*[66] the plaintiff was injured at the defendant's establishment by a heavy knife falling on his foot. He compromised the claim for $275. At the time of the settlement the plaintiff knew he was suffering from diabetes which was unknown to the defendant or its representatives. A short time after the compromise was effected the diabetic condition became worse, gangrene set in, and the plaintiff's leg was amputated. The court held the release to be binding upon the plaintiff.[67] In *Yehle v. New York Central R. R. Co.*[68]

60. 237 App. Div. 141, 260 N. Y. Supp. 561 (1st Dep't 1932).

61. *Id.* at 144, 260 N. Y. Supp. at 565. The court at page 145, quoting from Kirchner v. New Home Sewing Machine Co., 135 N. Y. 182, 31 N. E. 1104 (1892) wrote as follows: "If the plaintiff can show that by a mutual mistake of the parties, or by what is its equivalent, a mistake on his part and fraud on the part of his adversary, the present cause of action is embraced in the release, contrary to the intent of the parties, or contrary to his intent in case fraud is proven . . . the release does not bar his right to recover."

62. *Supra*, note 28.

63. *Id.* at 497, 20 N. Y. S. (2d) at 90.

64. 261 App. Div. 614, 26 N. Y. S. (2d) 762 (2d Dep't 1941).

65. *Id.* at 617, 26 N. Y. S. (2d) at 764.

66. 263 App. Div. 275, 32 N. Y. S. (2d) 231 (1st Dep't 1942) *aff'd without opinion*, 288 N. Y. 623, 42 N. E. (2d) 617 (1942).

67. *Id.* at 277, 32 N. Y. S. (2d) at 233. The court wrote: "When the settlement is made on the assumption of the existence of a state of facts it may be rescinded if that state of facts does not presently exist (citing cases). Where, however, there is no mistake concerning the injuries but only a miscalculation of consequences, the voluntary settlement of the parties is irrevocable as to both."

68. 267 App. Div. 301, 46 N. Y. S. (2d) 5 (4th Dep't 1943), *rev'g*, 179 Misc. 369, 39 N. Y. S. (2d) 198 (Sup. Ct. 1943).

the releasor was paid $9,000 for the release which was executed approximately four and one-half months after the accident. The execution and delivery of the release was preceded by several conferences and very much consideration. At the time of its execution, the parties knew only of injuries to her head, arms, legs, fractures of the nose and left humerus, loss of motion in the left shoulder and arm and vaginal bleeding. After the release was given an injury to the pituitary gland became apparent and the releasor gained so much weight as to make her decidedly ungainly and uncomfortable; her sense of smell and taste became affected. She suffered some loss of vision and her memory became impaired. Neither the plaintiff nor the representatives of the defendant had any knowledge of the glandular injury or its consequences. The court held the release a bar to the plaintiff's subsequent suit. It distinguished the *Barry* and *Landau* cases[69] by pointing out that in those cases, "there was haste on the part of the defendant in securing a release for a negligible sum" whereas in the *Yehle* case[70] there was a lapse of time between the accident and the release and during that time there was diligent effort "to ascertain the full extent of the injuries which came to the plaintiff." The court points out that a "substantial amount of money" was paid by the defendant to the plaintiff. The opinion mentions the fact that the plaintiff was a graduate nurse,[71] and because of that fact greater knowledge on the part of the releasor as to subsequent complications was present.

How may *Mack v. Albee Press, Inc.*,[72] *Rector,* etc. *v. City of New York*[73] and *Yehle v. New York Central R. R. Co.*[74] be distinguished from *Farrington v. Harlem Savings Bank*,[75] *Landau v. Hertz Drivurself Stations, Inc.*[76] and *Barry v. Lewis*?[77] A broad approach to the test of the *Farrington* case—was the release "fairly and knowingly made"—is helpful in reconciling these decisions. The *Farrington* opinion is partially based upon the misrepresentation of the defendant's representative as to the true nature of the instrument being executed. The other five cases do not disclose any misrepresentation and there was no conscious unfairness. There remains for discussion, the

69. *Supra,* notes 28 and 29.
70. 267 App. Div. 301, 311, 46 N. Y. S. (2d) 5, 13 (4th Dep't 1943).
71. *Id.* at 304, 46 N. Y. S. (2d) at 7.
72. *Supra,* note 66.
73. *Supra,* note 64.
74. *Supra,* note 68.
75. *Supra,* note 58.
76. *Supra,* note 29.
77. *Supra,* note 28.

meaning of the term "knowingly made." As construed in the *Farrington, Landau* and *Barry* cases, this did not require actual knowledge of the extent or seriousness of the known injuries. As construed in the *Mack, Rector* and *Yehle* cases, it does not even require actual knowledge of the injuries which have been suffered. In the *Yehle* case the release was sustained even though there was not actual knowledge of the glandular defect; in the *Mack* case the incipient gangrenous condition was unknown; in the *Rector* case the damage sued upon was unknown and probably had not even occurred at the time of the execution of the release. The term "knowingly made" does not require actual knowledge of all the facts; it is complied with if the possibility of the subsequent conditions is within the contemplation of the parties or if that possibility is within the realm of the bargain made by the parties. Furthermore the release is "knowingly made" if the parties take their chances as to the subsequent results of the accident or if they are in doubt or consciously ignorant of what the future may have in store. If the parties, or the releasor particularly believes he has complete and exhaustive knowledge of the injuries and has no doubt upon that score, then the release has not been "knowingly made," if it was executed under a mistake as to the actual injuries suffered. In the latter situation the releasor was mistaken, was unconsciously ignorant of the facts and the subsequently discovered matter is not within the realm of the bargain.

That the release relates to "known and unknown" injuries or to "each and every cause of action" is not conclusive on the issue as to the scope of the release. Rather the important questions, in determining whether the release will bar the subsequent action are (1) what did the parties intend, (2) how much time elapsed between the accident and the release, (3) what amount of money was paid for the release, (4) the intelligence and prior experience of the releasor, (5) the state of mind or conduct of the releasee. All of these elements are germane on the general test—was the release "knowingly made"? If the release was fairly and knowingly made it will be binding upon the releasor. Under the New York and New Hampshire cases herein referred to, the paramount test is—What was the intention of the parties when the release was executed? If their intention was to avoid litigation the release is binding even though an unsuspected serious condition subsequently results. If they took their chances on what might later occur the court will not set aside the release. If they were positive in their mistaken frame of mind about a presently existing condition the release may be set aside and this is true to a greater extent where the releasee was cognizant of the releasor's mistake.

The federal cases involving injuries to seamen are interesting. Appar-

ently, since the question concerning the validity of the release is one "affecting the rights of a seaman under the maritime law" it is a question "which the United States courts have to answer."[78] The state law concerning releases is not binding upon the federal courts in the seamen cases.[79] This is not true where no federal activity is involved.[80] These cases arise frequently out of claims for maintenance and care following an injury.[81] Because seamen are "wards of the admiralty" a much more paternalistic approach is made when the validity of their releases is in question.[82] Because of this fundamental doctrine, the one who interposes the release "must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman."[83] Outside of the seamen's cases the federal rule as to the validity of the releases seems to be similar generally to the state court decisions. The distinctions mentioned herein are recognized.[84]

*Statutory Control Over Releases*

A guardian *ad litem's* release settling a claim or an action for an infant ward is usually controlled by statute.[85] The compromise of death

78. Sitchon v. American Export Lines, Inc., 113 F. (2d) 830, 833 (C. C. A. 2d, 1940).

79. Erie R. R. v. Tompkins, 304 U. S. 64 (1938); Ruhlin v. N. Y. Life Insurance Co., 304 U. S. 202 (1938).

80. Montgomery Ward and Co. v. Callahan, 127 F. (2d) 32 (C. C. A. 10th, 1942); Tulsa Lines, Inc. v. Mains, 107 F. (2d) 377 (C. C. A. 10th, 1939).

81. Sitchon v. American Export Lines, Inc., 113 F. (2d) 830 (C. C. A. 2d, 1940); Bonici v. Standard Oil Co. of New Jersey, 103 F. (2d) 437 (C. C. A. 2d, 1939); Harmon v. U. S., 59 F. (2d) 372 (C. C. A. 5th, 1932).

82. Bonici v. Standard Oil Co. of New Jersey, 103 F. (2d) 437, 438 (C. C. A. 2d, 1939) wherein the court describing this attitude wrote: "The tender consideration of admiralty for these 'favorites' of the court who are 'a class of persons remarkable for their rashness, thoughtlessness, and improvidence'" (quoting from Judge Story in Brown v. Lull, 4 Fed. Cas. 407, 409, No. 2018 (C. C. D. Mass. 1836).

83. Harmon v. U. S., 59 F. (2d) 372, 373 (C. C. A. 5th, 1932); an erudite opinion on seamen's releases appears in Hume v. Moore McCormack Lines, Inc. *et al.*, 121 F. (2d) 336 (C. C. A. 2d, 1941) wherein the court wrote at page 347: "The legislative policy has been to extend that unique protection; in order to effectuate the Congressional intention, statutes . . . have been liberally construed to favor the seaman (citing cases), who has been called the 'ward of the legislature'." In Garrett v. Moore McCormack Co., Inc. *et al.*, 317 U. S. 239, 248 (1942), the court wrote: "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."

84. Southwest Pump and Machinery Co. v. Jones, 87 F. (2d) 879 (C. C. A. 8th, 1937); Scheer v. Rockne Motors Corp., 68 F. (2d) 942 (C. C. A. 2d, 1934); Atlantic Greyhound Lines, Inc. of West Virginia v. Metz, 70 F. (2d) 166 (C. C. A. 4th, 1934); Lion Oil Refining Co. v. Albritton, 21 F. (2d) 280 (C. C. A. 8th, 1927).

85. NEW YORK RULES OF CIVIL PROCEDURE, Rule 294.

claims is subject to the approval of the court.[86] The Workmen's Compensation Acts generally provide that the claim of an employee cannot be waived[87] and any release of a claim is subject to the jurisdiction of the commission.[88] Claims under the Unemployment Insurance Act may not be waived[89] and may not be released without the approval of the commission.[90] The New York State Minimum Wage Standards for Women and Minors[91] does not contain any provision controlling releases. The Fair Labor Standards Act ignores the matter although the Senate bill as first proposed did contain a provision that any attempted release shall be void.[92] This was deleted in the Act as finally passed. However, in a recent United States Supreme Court decision,[93] the court held that a release given for less than the full amount due, is not binding upon the releasor. The provisions of this statute in the light of the general legislative purpose are construed as manifesting an intention on the part of the legislature to invalidate such releases.

Section 112f of the New York Civil Practice Act presents a nice question. This section permits of a recovery for benefits conferred under a mistake of law under conditions where a recovery could be had for a mistake of fact. Prior to the enactment of this statute no recovery could be had where loss had been suffered because of mistake of law and a similar rule prevented a successful attack upon a general release based upon a mistake of law. Probably this section may be construed as permitting a recovery where benefits were conferred by a releasee under a mistake of law or where a releasor attacks a release because of a mistake of law.

86. N. Y. SURROGATE COURT ACT §§ 122, 213.

87. N. Y. WORKMEN'S COMPENSATION LAW § 32.

88. N. Y. WORKMEN'S COMPENSATION LAW § 33. *See* Cretella v. N. Y. Dry Dock Co., 289 N. Y. 254, 45 N. E. (2d) 429.

89. N. Y. LABOR LAW § 512, amended Laws of 1944, c. 705, Sec. 1, effective June 5, 1944.

90. N. Y. LABOR LAW § 513, amended Laws of 1944, c. 705, Sec. 1, effective June 5, 1944.

91. N. Y. LABOR LAW §§ 550-566.

92. *See* Sen. Rep. No. 884, 75th Cong. Sess. (1945) Sec. 20(b).

93. Brooklyn Savings Bank v. O'Neil, 324 U. S. 697 (1945).