

1949

Jess Jimenez v. Ray O'Brien and Boyd Byron Broadwater : Brief of Appellant, Boyd Byron Broadwater

Utah Supreme Court

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Case No. 7264

In the Supreme Court of the State of Utah

JESS JIMENEZ,

Plaintiff and Respondent,

vs.

RAY O'BRIEN and BOYD BYRON
BROADWATER,

Defendants and Appellants.

BRIEF OF APPELLANT,
BOYD BYRON BROADWATER

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Broadwater.

JAN 14 1949

UTAH SUPREME COURT, UTAH

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In the Supreme Court of the State of Utah

JESS JIMENEZ,

Plaintiff and Respondent,

vs.

RAY O'BRIEN and BOYD BYRON
BROADWATER,

Defendants and Appellants.

Case No.
7264

STATEMENT OF FACTS

This appeal involves the validity of certain releases signed and delivered by the plaintiff, Jess Jimenez, August 14, 1945, the time when he left the hospital and the following September 5th, for personal injuries sustained in an automobile accident of July 9, 1945. Plaintiff admitted the execution of the releases, but claimed that they were invalid by reason of total mental incompetency at the time of their execution (See plaintiff's Reply, Tr. 60-2).

Jimenez, age forty-one when the accident occurred (Tr. 181), had been residing at 221 West 4th South for about three years. Prior thereto, he came from Pueblo,

Colorado where his mother and brother were still living. He had three children by Rita Gounis, his former wife, who was driving the car in which he was riding at the time of the accident. When injured, he had just terminated his employment repairing shoes at the Boston Shoe Repair Shop on Third South (Tr. 183-192). He also testified to having had experience as a boiler maker (Tr. 182).

Plaintiff was rendered unconscious on account of the accident and taken to the County Hospital for a few hours and then to the St. Mark's Hospital where he remained from July 9th to August 14th, 1945. X-rays revealed there were no fractures (Tr. 260). The injury was diagnosed by Dr. Stewart Alma Wright, the attending physician, as a severe brain contusion (Tr. 246-7).

His stay in the hospital was marked by a period of unconsciousness and semi-consciousness. Dr. Wright testified there was gradual improvement, plaintiff suffering a set-back the eighth or tenth day, but from thereon, he responded to measures that were used (Tr. 247). He was watched by Dr. Wright very carefully (Tr. 249) and regular progress notes were made by him to see if he was recovering (Tr. 262). By July 29th, he was "clear mentally." (Tr. 265). Plaintiff showed steady improvement after August 1, 1945 (Tr. 274). By August 11th he was "increasing his activity daily" and "had no complaints whatever" (Tr. 265). For the last few days prior to the time he, plaintiff, left the hospital, August 14th, he was ambulatory and walked around and was able to take care of his needs (Tr. 269). When he left the hos-

pital, Dr. Wright made a complete examination and recheck to make sure he was normal (Tr. 266). He (Dr. Wright) "had every reason to expect plaintiff would continue to improve from that time on, if he took care of himself." (Tr. 274). With reference to August 14th, he said: "I don't think he was irrational, in my opinion, on that date." (Tr. 269).

The nurses' daily record (Ex. 8) kept at the hospital for the purpose of showing the medications and treatments given, all observations made, and the way the patient reacts and responds and any complaints that he has or other symptoms (Tr. 416) confirmed plaintiff's steady recovery, as did Dr. Wright's progress reports (Ex. 7).

The attending nurses, Mary L. Pierce and Margaret Anderson, both testified that on August 14th and for several days prior thereto, Jimenez conversed normally and there was nothing irrational or incoherent about his speech or his actions (Tr. 420, 424-5). No medications of any type were administered August 14 (Tr. 258). He had regular visitors at the hospital, including Rita Gounis, his daughter, a brother from Colorado and other friends.

Ben Duncan, the insurance adjuster for Farmers Inter-Insurance Exchange, 1114 Continental Bank Building, insurer of the O'Brien car, first called at the St. Mark's Hospital to interview Jimenez July 13th, four days after the accident. Plaintiff was then under sedatives, so Mr. Duncan excused himself (Tr. 382), calling again about a week later when "he (Jimenez) was much

better." Jimenez conversed and related his family background, but did not recall the facts of the accident. Duncan said that no attempt to obtain a written statement at that time was made (Tr. 383). He thereafter made repeated visits, six or seven in all, during which time Jimenez would recognize him and carry on regular conversations (Tr. 383). Other than being a little weak, there was nothing unusual about his appearance. One time, about August 1st, Duncan found him walking around outside the ward (Tr. 384).

On August 13th, in order to get a statement from plaintiff, Mr. Duncan employed Alice Pannier as a secretary to take the matter down in question and answer form. (Tr. 385). This statement, Exhibit 10, showed plaintiff to be entirely rational at that time, giving a clear, concise answer to all questions, including his entire background. At that time Jimenez explained his plans to leave with his brother for Colorado, the next day (Tr. 38).

Duncan returned to the hospital during visiting hours that evening and discussed settlement (Tr. 387). The amount of the doctor and hospital expense had not been ascertained, but a tentative settlement was agreed upon in the amount of \$1,000 general damages, plus the hospital and doctor bills (Tr. 388). Duncan then contacted Dr. Wright and ascertained the amount of his doctor bill (\$500) and the hospital bill (\$182.05) (Tr. 389). On August 14th, while Mr. Duncan was in the insurance office at the Continental Bank Building, someone phoned

him from the hospital (apparently on behalf of Jimenez) (Tr. 389) requesting that he come over. He thereupon took with him insurance company drafts and releases in accordance with the terms of their proposed settlement (Tr. 390). He found plaintiff fully dressed sitting on the bed with a blonde lady friend and his suit case at the foot of the bed (prepared to leave the hospital) (Tr. 390). Duncan explained the releases and drafts in detail. Then in accordance with the practice of the insurance company, he took what he called a supporting statement in long hand. This statement (Exhibit 9) in the handwriting of Mr. Duncan recited the facts of the accident; that he suffered a brain contusion and that he was hospitalized until his release that day. It further stated:

“I understand that the sum of One Thousand Six Hundred and Eighty-Two Dollars and Five Cents is all the money I will receive from any source as a result of the accident of July 6, 1945. I understand that my injury may be of a permanent nature, and by my own choice I choose to settle in full of claims of the accident of July 6th, 1945.”

Then at the bottom, Jimenez in his own handwriting wrote:

“This statement is true.

Jess Gimenez.”

A usual form release (Exhibit 6) in the amount of \$1682.05 was voluntarily signed and delivered by Jim-

enez, who in his own handwriting likewise wrote at the bottom:

“I have read this releases and understand it to be a release in full.

Jess Gimenez” (Tr. 391).

Three insurance company drafts were signed and delivered to Jimenez, one payable to Jess Gimenez and St. Mark's Hospital in the amount of \$182.05, a second draft to Jess Gimenez and Dr. Alma Wright for \$500, and a third draft payable to Jess Gimenez for \$1,000. These drafts were each duly endorsed by plaintiff, Dr. Wright and the Hospital and cashed in the due course of business through Walker Bank & Trust Company and the First National Bank. The \$1,000 draft payable to Jimenez alone was presented to and paid by the Walker Bank & Trust Company August 22, 1945. Each draft (see Exhibits 1, 3 and 4) above the endorsement reads:

“Endorsement of this draft constitutes a release of all claims, known or unknown, the undersigned has or may have against Farmers Automobile Inter-Insurance Exchange and the insured and any other person on account of any and all claims arising out of the accident referred to on the face hereof.”

After getting out of the hospital, plaintiff changed his mind about going to Colorado and said he decided to stay in Salt Lake (Tr. 200).

Plaintiff was next seen by Mr. Duncan the following September 5th when he, plaintiff and Rita Gounis called

at the insurance office in the Continental Bank Building, on which occasion plaintiff reminded Duncan that he had promised to pay all his hospital bills and that there was one which he, Jimenez, had neglected to mention, and that was \$26.35 incurred at the General Hospital for emergency treatment immediately following the accident (Tr. 393). Upon presentation of this bill, which had been overlooked, Mr. Duncan issued a draft for the stated amount payable to plaintiff (See Exhibit 2) which contained a similar recital to the other drafts. This was duly endorsed by Jimenez, delivered to the Salt Lake County Hospital, which likewise endorsed, and it was cleared through the banks in the regular course of business.

Immediately after Jimenez left, it occurred to Mr. Duncan, that for payment of the \$26.35 he should get a further release, so he caught up with Jimenez in the Bank Building lobby and asked him to go back up to the office and sign another release reciting the \$26.35 consideration (Tr. 394). Jimenez acknowledged the voluntary execution of this release (Exhibit 5), as he did the first one (Tr. 341, 343). His attitude was entirely friendly (Tr. 394). In his own handwriting, he wrote at the bottom of the latter release:

“I have read these release and understand it to be a release in full.

Jess Jimenez” (Tr. 395).

There was nothing unusual about his manner of conversation, appearance or speech on that occasion (Tr. 395).

Later on account of tiredness and inability to sleep, plaintiff says he saw Dr. Wright to see if the doctor could calm him down (Tr. 184). The visits were made to Dr. Wright's office September 15th and November 1st, 1945. The doctor recommended rest from work and a mild sedative (Tr. 258). On those occasions the doctor conversed with plaintiff, who understood him, and responded clearly. There was nothing irrational about his appearance (Tr. 259).

The first steps to commence this suit were taken October 16, 1945 (Tr. 208) when the first summons (Exhibit 11) was served. The complaint on file herein was signed by plaintiff December 15, 1945 (Tr. 208), and filed December 31, 1945 (Tr. 6).

Plaintiff complained of getting worse (Tr. 209) and about November, after the first summons was served, he went to Colorado, staying at his mother's place in Pueblo (Tr. 185). He got worse when he rode the train "that is what really got me." He stayed in bed for a time (Tr. 209). He felt worse for about a year (Tr. 185, 206).

In Pueblo, he saw Dr. J. L. Rosenbloom, Assistant Superintendent of the Colorado State Hospital, as a private patient at the Corwin Hospital. He made visits to see Dr. Rosenbloom November 8th, November 15th, November 29th and December 15, 1945, the following Feb-

ruary 5th, March 28th and August 5, 1946, and July 7, 1947 (Tr. 356).

The only other doctor he saw was Dr. Garland H. Pace, neurologist and psychiatrist on one occasion in October, 1947, (Tr. 311), more than two years after the time of the releases.

Plaintiff returned to Salt Lake in August or September, 1946, (Tr. 185). He obtained employment operating an elevator in the Continental Bank for about a week. He then worked from September into December at the Tooele Ordnance Depot (Tr. 186, 200); then for four or five months he worked in Magna for Babcock and Wilcox taking care of a tool room (Tr. 187-8, 200). He stayed in Colorado during the summer of 1947 (Tr. 188). He returned to Salt Lake the following September or October and obtained employment at the Anderson Dam in Idaho for a couple of months (Tr. 188). He then worked in periods (Tr. 188). At the time of the trial he was working at Devil's Slide but was off to attend the trial. There he was engaged in putting up a water tank in the air, working on a scaffolding one hundred fifteen to one hundred twenty feet high (Tr. 189, 204, 205). His only complaints then were inability to stay with his customary work continuously as he used to do (Tr. 189), and that he still did not sleep well (Tr. 190).

Plaintiff's attorneys acknowledged in open court (Tr. 149) that Jimenez was not mentally incompetent at the time of commencement of suit (the first summons was served October 16, 1945; the complaint actually filed De-

cember 31, 1948), and further stipulated that the releases, drafts, etc., were all signed by plaintiff (Tr. 336).

Jimenez retained all of the benefits and money received by him through the settlement and at no time made any offer or tender to return the consideration received by him.

The court directed a verdict in favor of the defendant Ray O'Brien, the owner of the other automobile involved in the accident, there being no proof of agency or independent negligence on his part.

As to the defendant, Boyd Byron Broadwater, the driver of said automobile, the court submitted the case to the jury on the sole issue of mental competency to execute the releases. The jury returned a verdict in favor of the plaintiff against the defendant in the amount of \$5,000, less \$1708.40, the amount received by Jimenez, or a net verdict of \$3,291.60 (Tr. 447). Defendant's motion for new trial was denied (Tr. 447-8). The defendant, Boyd Byron Broadwater, has appealed from judgment.

QUESTIONS ON APPEAL

The errors raised on this appeal relate entirely to two matters, namely:

1. The insufficiency of the evidence to sustain a finding of mental incompetency at the time of the execution of the releases, August 14th and September 5, 1945; and

2. The question of ratification by reason of plaintiff's accepting the benefits of said settlement and failing to tender or offer to return the benefits of said settlement.

ASSIGNMENT OF ERRORS

The court erred in the following particulars:

1. In denying the defendant's motion for a directed verdict (Tr. 436-8), and in refusing defendant's requested instruction No. 2 (Tr. 105), for a directed verdict in favor of the defendant Boyd Byron Broadwater, duly excepted to (Tr. 445).

2. In submitting the issue of mental competency to the jury by giving its instruction No. 4 (Tr. 91), No. 5 (Tr. 92), duly excepted to (Tr. 444) and instruction No. 14 (Tr. 99), No. 14a (Tr. 100), and No. 15 (Tr. 101), each duly excepted to (Tr. 445).

3. In overruling defendant's motion for a new trial (Tr. 447-8).

AUTHORITIES

Right of individuals to make a compromise settlement of personal injury claims by contractual release is discussed in *Anderson v. O.S.L.*, 47 Utah 614, 155 Pac. 446. The court pointed out that it is not necessary that the parties can at the time foresee or contemplate every possible consequence that may subsequently arise from an injury. Said the court:

“Fortunately such is not the law. If it were, settlements, instead of becoming the means of avoiding strife and unnecessary litigation, would become a most prolific source of both. The general rule respecting the legal effect of such releases is well stated by the Supreme Court of Texas in the case of *Houston, etc., Ry. Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L.R.A. 507, 86 Am. St. Rep. 854. * * *

“ ‘Where a party, who has a claim against another for personal injuries, agrees upon a settlement of his claim, and accepts a sum of money or other thing of value in settlement of such claim, he is, in the absence of fraud or concealment, concluded in the settlement, is a proposition sustained, as we think, by one unbroken line of authority,’ citing numerous cases.”

AUTHORITIES AS TO MENTAL CAPACITY

The test of mental capacity is stated in *Hatch v. Hatch*, 148 Pac. 433, 46 Utah 218, as follows:

“ ‘In ordinary contracts the test is, Were the mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life?’ ”

In that case the action was to set aside two deeds on the grounds of mental incompetency and undue influence. The deeds were executed January 31, 1908 and June 1, 1908. The grantor died December 2, 1911, at the age of

eighty-two. This court held that the evidence was insufficient to authorize a finding that the deceased "at the time he made the deeds in question was not possessed of sufficient mental capacity to make valid conveyance of his property." The court further added:

"Nor is the evidence sufficient to authorize a finding that the deceased, at the time he made the deeds in question, was not possessed of sufficient mental capacity to make valid conveyances of his property."

"Nor does Comp. Laws 1907, Section 4001 (now Sec. 102-13-20 of the probate code defining an incompetent) referred to by counsel for appellant, change the test. To hold that under all the facts and circumstances disclosed by the record before us the deceased did not possess the necessary mental capacity to enter into and execute ordinary contracts affecting property and property rights would result in laying down a rule whereby most all of the transactions of aged men and women who had some mental defects could be successfully assailed in courts of equity. No general or hard and fast rule which shall govern or control in all cases can be promulgated, but every case must, to a very large extent, be determined upon the facts and circumstances present in that case."

The court made the following observations of the evidence:

"There is much evidence to the effect that during the last five or six years preceding his death the deceased suffered lapses of memory to the extent that in the same conversation he would

ask the same question two or three times. A doctor, a grandson of the deceased, testified that his failing memory and his general mental condition was the result of a disease known as 'arterial sclerosis,' which, he said, caused a 'hardening of the arteries,' which resulted in what the doctor called attacks of epilepsy, or what are commonly called epileptic fits. It was shown that the deceased had several of such attacks, the first one along in 1906 and several more thereafter during the later years of his life. Indeed, it is contended that he suffered an attack the day or evening preceding the 1st day of June, 1908, the day the last deed in question here was executed, but from some other evidence the court was justified in entertaining some doubt with regard to that question. It was also made to appear that usually an attack would produce unconsciousness which would at times last for several hours, and that the attacks would affect the deceased's mind more or less for some time thereafter. A large number of witnesses testified with respect to the mental condition of the deceased, but we think the deductions from the facts detailed in the evidence are perhaps best reflected from the testimony of Abram C. Hatch, the plaintiff. * * * We copy his statements in that regard from the bill of exceptions as follows:

“ ‘There were times between 1906 and 1909 when his mind was much better than it was at other times, and I would say that at times during that period from 1906 up to 1909—up to December, 1908, I will put it—he might have been competent to transact ordinary business with which he was acquainted, and other times for quite lengthy periods of times when he was, in my opinion, absolutely incompetent; then from on or about December, 1908, until his death there were

very great differences in his condition of mind. He had these attacks. I don't know what they were. During the attacks he was unconscious, and after it was reported that he had another attack, it was considerable time before he was what I would call rational, so that he could do business at all. And from 1904—I would say the latter part of 1903—I noticed from the latter part of 1903 that he was at times unfit and incompetent to transact business, but I will say that in my judgment from 1905 he was in a condition so that any one in whom he had confidence might have overreached him in a business transaction very well, very easily'."

Mr. Willis, a lawyer who prepared and acknowledged one of the deeds among other things testified:

"He had, as lots of people do, a failing of memory somewhat as people do when they grow older. I suppose he understood what he was doing when he executed those deeds, but I had reason to think otherwise from what he said afterward. Right at the time he executed these deeds I think he knew what he was doing, and I accordingly took his acknowledgment and I certified in that acknowledgment that he duly acknowledged to the execution of that deed."

In *O'Reilly v. McLean*, 84 Utah 551, 37 Pac. (2d) 770, the court reaffirmed the same test as to competency and held that the grantor, a woman of eighty-six years of age, was as a matter of law legally competent to execute the deed, notwithstanding testimony of a Mr. Giles "that her mental condition was very bad in March, 1930" (the deed having been executed about September

30, 1929). Dr. Root testified that "she was of unsound mind in March, 1930, and that this condition had existed for seven or eight years." The court remarked that from his testimony as a whole that her condition was one of forgetfulness and not of incompetency, and that it was evident from the whole of his testimony that her unsoundness of mind consisted of an inability to recollect and a straying of the mind from the subject of the conversation, he having admitted that she "understands what you say and has all the time, and evidently understands all she says."

In *Rawson v. Hardy*, 86 Utah 50, 39 Pac. (2d) 755, the suit was to set aside a deed executed by the plaintiff, an inmate of the State Mental Hospital at Phoenix, Arizona. The deed was dated June 1, 1923. The record disclosed that plaintiff had been three times committed to mental hospitals, once in 1912, once in 1913 and recommitted the same year, and once again in 1928. The last commitment said:

"The diagnosis in this case is that of Dementia Praecox of paranoid type, which I consider a chronic and incurable mental disease."

The court in holding there was no evidence to justify a finding of incompetency as to the execution of the deed commented upon the fact that the testimony of witnesses concerning some of the things done and the tendencies manifested by the grantor were things that might be termed oddities or peculiarities, but that none of it was

sufficient to justify a finding of mental incompetence as to the execution of the deed.

Burgess v. Colby, 93 Utah 103, 71 Pac. (2d) 185 was a suit to set aside a deed dated September 16, 1933. Grantor was 78 years of age in ill health, having died September 25, 1933, nine days after executing the deed. It was alleged that grantor was "wholly incompetent to transact business." The Supreme Court reviewed the entire case as an equity matter and reversed the finding of the lower court wherein the lower court found the grantor was incompetent and held that under the evidence grantor was competent as a matter of law. The facts show that grantor was seriously ill for three or four weeks before his death and several witnesses described him as being incompetent, delirious, flighty, etc. The court said:

"That while he was a sick man and getting weaker day by day and having difficulty of speech on account of having lost his teeth and some apparent soreness, yet he was able to talk about the affairs of the day, of his travels, of the farm and its care, and to recognize his friends when they called. The witnesses for plaintiffs who say that he rambled in his talk or was delirious seemed to use this word in a rather inaccurate way. The rambling apparently was that the old man would change from one subject to another and even these witnesses give very little report of any actual delirium.

The judgment and decree of the trial court is reversed and set aside. * * *

Heath v. Arnovitz, 102 Utah 1, 126 Pac. (2d) 1058, was a proceeding to appoint a guardian of an alleged incompetent. In holding the evidence was insufficient to prove incompetency under Section 102-13-20, the Court said:

“The section implies physical or mental defects which interfere with the rational functioning of the mind. If the mind functions rationally but the individual acts in a way commonly designated as eccentric—that is, his acts deviate from the usual principally because he is less susceptible to public opinion than are many of us—he is not incompetent.

“Such confusion as appears in his answers apparently arises either from defective hearing or ignorance of the facts or law but those answers do not show a mind laboring under difficulty of functioning.”

“The evidence must show a lack of power to function—not an unwillingness to or lack of interest in functioning, be the latter two ever so reprehensible as personal characteristics.”

See also *Chadd v. Moser*, 25 Utah 369, 71 P. 870.

In *Pope v. Bailey-Marsh Co.*, (N. Dak.), 151 N. W. 18, it was held error to deny defendant's motion for a directed verdict where releases were questioned upon grounds of mental incompetency and fraud, although plaintiff disclaimed any knowledge of executing the release and claimed to be in great pain and suffering at that time, while employees of the hospital and the

party taking the release testified to his apparent rationality. The court said:

“* * * we are forced to the conclusion that plaintiff, who concededly had the burden of proof of showing facts relieving him of the legal effect of such formal release by clear and convincing proof, has failed in meeting such burden.

“* * * written instruments cannot be impeached for fraud or any other cause except upon proof that is clear, satisfactory, and convincing, and of such a character as to leave in the mind of the chancellor no hesitation of substantial doubt.”

In *San Antonio & A. P. Railway Co. v. Polka* (Tex.), 124 S. W. 226, the court held the evidence insufficient to find lack of mental capacity to execute a release, notwithstanding the releasor's wife's testimony that she noticed a difference in his mental condition after the injury, such as his loss of pride, loss of self respect, disregard for his wife and child, his sloppy dress, double vision and various peculiarities such as: “He would call me and when I would get into the room and ask him what he wanted, he would say he never called me.”

In *Carlson v. Elwell* (Minn.), 151 N. W. 188, plaintiff signed a release in the hospital on July 25th but claimed he had no recollection of the matter, having no memory from July 18th, the time of an operation, till September. Others testified to plaintiff's ability to talk fair English, answer questions intelligently, though he seemed to lack education and appeared to be dull. Dr. Collins, superintendent of the hospital, testified that

plaintiff was irrational at times during the Winter and Spring, but that at other times he was rational and intelligent. The person taking the release, plaintiff's attorney on the case, testified concerning the execution of the release under circumstances when plaintiff evidently knew what he was doing. The court reversed a judgment based on a verdict in favor of the plaintiff and ordered judgment entered for the defendant.

INADEQUACY OF PLAINTIFF'S EVIDENCE

In the instant case, plaintiff attempted to prove mental incompetency through opinion evidence of Drs. Rosenbloom and Pace. Neither of these witnesses saw plaintiff until after steps were taken to commence suit and until after the lapse of several months' time from the execution of the releases, when circumstances and conditions had changed. When plaintiff first saw Dr. Rosenbloom November 8, 1945, plaintiff had just suffered a setback, had gotten sick on the train, became worse in bed several days. He then complained of dizziness, headaches, instability, disturbed sleep, etc., whereas at the time of the releases, he, plaintiff, had "no complaints."

He was never seen by Dr. Pace except for the one examination of October, 1947, over two years after the second release of September 5, 1945. No treatment was given or recommended.

Of the several friends and relatives who visited plaintiff at the hospital, the only one called by plaintiff as a witness was Mrs. L. D. Loy, a close friend who re-

lated an incident in the hospital when plaintiff told about having a gun under the bed and having shot some pigeons which she was to take home, and other oddities and inconsistencies in his actions before he left for Colorado (Tr. 224-241). Even she testified that before he left the hospital, he was walking around and that sometimes he appeared very rational, talked rationally and was rational as far as she could see at those times (Tr. 241).

PLAINTIFF'S TESTIMONY

Plaintiff at the time of the taking of his deposition, September 12, 1947, and at the trial recalled facts and details with accuracy. He related specific details which occurred before the accident such as going to the cleaners, arranging for the car, himself doing part of the driving, that he did not have a driver's license (Tr. 190-5), his friends and relatives at the hospital and numerous details as to the time and place and details of his work (Tr. 180-223, 328-349). His only personal complaints after he got worse were nervousness, tiredness, sleeplessness, etc. He remembered having a conversation with Ben Duncan, the adjuster, August 14th (Tr. 340). He remembered that day, the day he got out of the hospital very plainly because it was V-J Day (Tr. 183). Remembered discussing settlement (Tr. 342). He read and thought he understood the release (Tr. 343) and voluntarily signed (Tr. 341, 343). Plaintiff said, "He (Duncan) told me that he was going to fix the hospital bills and get a release and he would give me \$1,000 and

so I was concerned about getting out of there and I didn't care about nothing else.'" (Tr. 342). It was his understanding that he was being paid \$1,000 plus medical and hospital expenses (Tr. 348). He remembered cashing the \$1,000 draft without any trouble (Tr. 338).

As to September 5th, he knew he had the bill to pay at the County Hospital when he went up to the bank building that day (Tr. 337). He identified Duncan in the courtroom as the man who took the release (Tr. 332). Remembered signing the release (Tr. 331). Said Duncan "wanted me to come back and do something to sign a release * * * he mentioned release." Remembered getting his check and leaving (Tr. 334). Remembered that the check was given to him for the County Hospital (Tr. 336), because the bill down there had not been paid. He remembered endorsing the check (Tr. 337) and taking it to the County Hospital (Tr. 338).

ARGUMENT

It seems apparent from plaintiff's own testimony that he not only understood the nature and terms of the settlement of August 14th, but that his understanding of the same was confirmed and interpreted by himself when on September 5th, about three weeks later, he discovered the County Hospital bill for \$26.35 had been overlooked, and went to the insurance office and requested Mr. Duncan to take care of that bill in accordance with their agreement.

Plaintiff's later complaints of fatigue, sleeplessness, forgetfulness, etc., the usual subjective symptoms in personal injury suits, did not make him incompetent, much less incompetent on August 14th or September 5, 1945, when he had "no complaints." All who talked with him August 14th, and the undisputed hospital records showed that he was rational, conversed with people and understood them. The nurses were entirely disinterested witnesses. No one, not even Mrs. Loy, a close friend of plaintiff, could admit of any irrationality on those dates the releases were executed. None of plaintiff's other friends and relatives, of which there were several who visited him regularly at the hospital, were called by plaintiff to testify. At the hospital on and prior to August 14th, and for about three weeks between August 14th and September 5, 1945, plaintiff had plenty of opportunity to think the matter over and seek advice or legal counsel. However, he was planning to leave for Colorado the day he left the hospital and was anxious to get his money. He was feeling all right and had "no complaints." He knew he was being paid \$1000.00 general damages plus his hospital and medical expense. He read and understood he was signing a general release. He said he was concerned about getting out of the hospital and "didn't care about nothing else." While later he may not have gotten along as well as expected, it was not many months before he was back to work, and at the time of the trial, he was working full time in skilled industrial work from a high scaffolding, a more responsible and remunerative job

than his work repairing shoes before the accident occurred.

August 14th and September 5, 1945, were the dates on which the releases were executed, and if plaintiff was mentally competent to sign a contract or release and transact ordinary business on either one or both of those dates, the settlement was conclusive so far as he was concerned, and it became the duty of the trial court to so direct the jury.

RATIFICATION BY RETAINING BENEFITS

Even if it should be assumed that plaintiff was incompetent to execute the releases of August 14th and September 5th, 1945, upon regaining his competency, (and he was admittedly competent when suit was commenced that Fall), it then became his duty to return the benefits received in the settlement (\$1708.40) if he sought to disavow or rescind the contract. By accepting and retaining all of the benefits, he thereby again ratified and confirmed the settlement.

AUTHORITIES AS TO RATIFICATION

In *Coke v. Timby*, 57 Utah 53, 192 Pac. 624, the action was to set aside a release on the grounds of fraud. Plaintiff did not offer to return the consideration, \$200.00, prior to bringing suit, but did make a tender in open court, which was refused by defendant. While the court suggested that tender prior to bringing suit did not defeat plaintiff's recovery, in that the \$200.00 previously paid

could be deducted from the verdict by the court without prejudice to the defendant, however, that decision did not pass upon the question involved in this case, namely: Whether, assuming plaintiff to be incompetent when he signed the releases, it was his duty after admittedly regaining competency that Fall to either affirm or disaffirm the contract and offer to return the benefits received by him if he sought to rescind the releases.

In *Morris v. Great Northern Railway Co.*, (Minn.) 69 N. W. 628, the court held that failure to tender or return the consideration precluded plaintiff's right to maintain a suit. The court said:

“Conceding plaintiff's mental incapacity on that day, there is an insuperable obstacle to his recovery in the fact that he has never rescinded nor offered to rescind the settlement but still retains the consideration and has never offered to return it.

“Upon recovering his usual mental condition, it was his duty to elect promptly, that is, within a reasonable time, whether he would affirm or disaffirm and if he elected to do the latter, it was his duty to restore or offer to restore what he had received so as to place the parties in status quo. He cannot affirm in part and reject in part. He cannot escape the burdens of the contract and retain its benefits.”

In *Gibson v. Western New York and P. R. Co.*, 30 Atl. 308, the court similarly held and said:

“It was his duty when he first learned of the existence of the release to disavow it and at least

before suit was brought, return or offer to return the money received under it.

“Plaintiff cannot both affirm and disaffirm, cannot affirm for what he got and disaffirm for the difference between that and what he hoped to get * * *. His keeping the money * * * after restoration to mental health with undoubtedly knowledge as to where the money came from and why, is only consistent with an intent to affirm the contract.”

See also *Walker v. Harbison* (Pa.), 128 Atl. 732; *West v. Seaboard Air Line R. Co.*, 151 N. C. 231, 65 S. E. 979; *Mahr v. Union Pacific R. Co.*, 170 Fed. 699; *Roggenkamp, Exr'x v. Marks et al*, 2 Auto Cases 974, (Ill.) 19 N. E. (2d) 828; *Brown v. Walker Lumber Co.*, 128 S. C. 161, 122 S. E. 670.

Retaining the benefits was not only ratification by the plaintiff in the instant case, but it is not *equitable* or proper to permit plaintiff to retain all the benefits of settlement, and at the same time gamble on a more favorable verdict, that is, he should not be permitted to eat his cake and have it too.

CONCLUSION

We respectfully submit:

1. Plaintiff failed to sustain the burden of proof that he was mentally incompetent to contract or sign the releases either of August 14th or of September 5, 1945, but the evidence is to the contrary that he was mentally competent on those dates.

2. That the plaintiff reaffirmed and ratified the settlement of August 14th on September 5, 1945, by interpreting the contract of settlement in demanding payment of the County Hospital bill, thereby confirming his understanding thereof.

3. That had the evidence been sufficient to prove mental incompetency on August 14th and September 5th, plaintiff again ratified and confirmed the settlement when he regained competency shortly thereafter and retained all of the benefits of the settlement without tendering return of the same.

We respectfully submit that the judgment should be reversed with directions that judgment be entered for the defendant.

Respectfully submitted

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