SETTING ASIDE AGREEMENTS OF COMPROMISE

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In this article, the first of its kind, the author has collated under one head the learning on setting aside agreements of compromise. It is especially important for the practitioner, as well as the student, because compromise agreements are such an important part of the legal process. In particular, the author has given an interesting insight into the development of the doctrine of mistake in equity in Australia and has foreshadowed future developments in a comparison with the American doctrine.

INTRODUCTION

The compromise is relevant to all fields of the law. Policy favours the effecting of compromises bringing, as they do, an end to litigation. The courts would bear an intolerable burden if every legal dispute was to be pursued to a judicial determination. The problem to be considered in this article is as follows: when can a compromise be set aside so that the parties to it are not contractually prevented by its terms from proceeding further with the dispute? In considering this problem special emphasis has been placed upon the effect of mistake, misrepresentation and lack of form on the validity and enforceability of compromises. These aspects of the problem are the most interesting and, especially in the case of mistake, the most controversial. For the sake of completeness, however, other miscellaneous grounds upon which agreements of compromise may be attacked have been considered albeit, at times, briefly.

THE NATURE OF A COMPROMISE

First it should be noted that a compromise or settlement of a dispute is a contract; and the general principle is that a compromise of a disputed claim made *bona fide* is good consideration for a promise (to pay a sum of money) even though it ultimately appears that the claim was wholly unfounded.[1] The claim which is compromised must not be vexatious or frivolous.[2] *Bona fides,* in this context, connotes two things: the claimant must believe in his claim; it must not be contrived; and no facts should be held back or concealed which would affect the validity of the claim.[3]

Thus the party seeking to affirm a compromise must spell out the elements of a contract in order to prove *prima facie* enforceability. In order to demonstrate sufficient consideration he must establish that a

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[1] *Callisher v. Bischoffsheim* (1870) L.R. 5 Q.B. 449. *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266. *Butler v. Fairclough* (1917) 23 C.L.R. 78, 96. *Hercules Motors Pty Ltd v. Schubert* (1953) 53 S.R. (N.S.W.) 301.

[2] *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266, 291.

[3] *Ibid.* 284.

serious claim maintained by a *bona fide* claimant was compromised in return for say, a cash consideration. If he cannot demonstrate this *prima facie* enforceability, *cadit quaestio.*

Given, however, the establishment of *prima facie* liability in respect of the contract of compromise, under what circumstances can this sort of contract be set aside or declared void?

At this stage it is convenient to point out that '[a] judgment given or an order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment or order'.[4] So the fact that the compromise is embodied in a consent order does not unduly complicate the issue under consideration.

VITIATING FACTORS

Illegality

If the compromise agreement is illegal it will, generally speaking, be void and unenforceable. The consideration offered in return for the withdrawal of the claim may be illegal or, as in *Windhill Local Board of Health v. Vint*,[5] the claim may be of such a nature that it cannot be validly compromised. In the latter case, the plaintiff, a local board, brought an indictment against the defendant for interfering with and obstructing a public road. At the trial of the indictment an agreement of compromise was effected between the parties, sanctioned by the judge, and embodied in a deed; the defendant covenanted to restore the road which it had broken up within seven years, and the plaintiff covenanted that then it would consent to a 'not guilty' verdict being entered on the indictment. In an action by the plaintiff on the covenant for a decree of specific performance and damages, relief was denied. The Court held that the agreement of compromise was illegal. No agreement can be valid that is founded on the consideration of stifling a prosecution in respect of an offence of a public nature.[6] An honest claim, however, in respect of a breach of an illegal contract can, it seems, be the subject of a valid compromise.[7]

Fraud, Duress and Undue Influence

Contracts of compromise may be set aside if effected or obtained by fraud or the application of duress or coercion in the nature of undue

[4] *Halsbury's Laws of England* (3rd ed. 1958) xxii. 792; *Wilding v. Sanderson* [1897] 2 Ch. 534; *Huddersfield Banking Company Limited v. Henry Lister & Son Limited* [1895] 2 Ch. 273; *Kinch v. Walcott* [1929] A.C. 482; *Harvey v. Phillips* (1956) 30 A.L.J. 140, 143.

[5] (1890) 45 Ch. D. 351.

[6] See also *Goldsbrough, Mort & Co. Ltd v. Black* (1926) 29 W.A.L.R. 37; where the offence is of a private nature, the compromise will be valid: *Kerridge v. Simmonds* (1906) 4 C.L.R. 253. In the latter case the distinction between offences of a public and of a private nature was considered.

[7] *Stevens v. Hoberg* [1952] St. R. Qd 10.

influence. If the person asserting the claim knows that it is unfounded, and by a compromise derives an advantage from that claim, his conduct is fraudulent. Thus, in *Priestman v. Thomas*[8] a compromise relating to competing wills one of which had been forged by the party seeking to propound it, was set aside.

Lack of Authority

If the compromise is arranged by an agent acting outside the scope of both his actual and ostensible authority it will be ineffectual to bind the parties to it in the absence of ratification.[9]

As to the authority of counsel to bind his lay client, Lord Alverstone C.J. said in *Neale v. Lady Gordon Lennox*:[10]

> I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement, and further that, notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side.

Where a compromise has been agreed upon by counsel acting only in pursuance of his ostensible or implied authority from his client but, owing to a mistake or misapprehension, in opposition to his client's instructions or in excess of some limitation that has been expressly placed upon his authority, the court may have a discretion. Consider the case where the assistance of the court is sought or invoked to carry a compromise into effect which otherwise could not be enforced by the party relying upon it; for example, a compromise agreement made subject to its future embodiment in an order of the court. Of this case the High Court has observed:[11]

> In such a case, at all events until the judgment or order embodying the compromise has been perfected, an authority exists in the Court to refuse to give effect to or act upon the compromise and perhaps to set it aside: see *Neale v. Gordon Lennox* ([1902] A.C. 465, particularly at pp. 469, 470 and 473), *Shepherd v. Robinson* ([1919] 1 K.B. 474), *Little v. Spreadbury* ([1910] 2 K.B. 658, at p. 662, per Bray, J.), *Hansen v. Marco Engineering Co.* (1948) (2 A.L.R. 17, at pp. 19, 20, per Fullagar, J.), *Schwarz v. Clements* (1944) (171 L.T. 305 at p. 309). [The Court then mentioned the judgment delivered on behalf of the Privy Council by Lord Atkin in *Sheonandan Prasad Singh v. Abdul Fateh Mohammad Reza.*[12]] It is said that this power of the Courts is to be exercised as a matter of discretion when in the circumstances of the case to allow the compromise to stand would involve injustice in view of the restriction on counsel's authority: See Halsbury's Laws of England, Vol. 2, 3rd ed., p. 51 . . .

[8] (1884) 9 P.D. 70, 210.
[9] *Shepherd v. Robinson* [1919] 1 K.B. 474.
[10] [1902] 1 K.B. 838, 843; see also *Hansen v. Marco Engineering (Aust.) Pty Ltd* [1948] V.L.R. 198, 202 *per* Fullagar J.
[11] *Harvey v. Phillips* (1956) 30 A.L.J. 140, 142-3.
[12] (1935) 62 I.A. 196.

It would appear that similar considerations—at least after the issue of the writ or other process—apply in relation to the authority of solicitors to effect compromises on behalf of their clients: *Wells v. D'Amico*.[13]

Agreement to Rescind

If it can be shown that it was an express or implied term of the compromise that, in the event of the parties being mistaken as to a certain fact, the agreement should be rescinded, then, of course, the compromise will, if the parties are so mistaken, be set aside.[14]

Infants' Compromises

Lack of capacity is a further ground upon which agreements of compromise may be impugned. 'The compromise of an action, to which an infant is a party, and which affects his interests, cannot be effected without the sanction of the court in which the action is pending.'[15] It appears that the jurisdiction to give or withhold approval of a compromise in which an infant is directly interested traces its origin to section 16 of the Supreme Court Act 1958. The foregoing provision confers a jurisdiction on the courts in terms of that vested in the Lord High Chancellor of England in respect of 'infants and of natural-born fools, lunatics and persons deprived of understanding and reason by the act of God and unable to govern themselves or their estates'.[16]

Compromises in Ratification of Contracts Incapable of Ratification

A compromise in ratification of a contract which is itself incapable of ratification is not enforceable. This proposition can be best made clear by reference to two cases.

In *Smith v. King*[17] an infant had incurred certain debts. On attaining his majority the infant was proceeded against in respect of the aforementioned debts by his creditor. A compromise was effected. The defendant defaulted. The plaintiff sued on the agreement of compromise. The Divisional Court dismissed the plaintiff's action: the compromise was tantamount to a 'promise made after full age to pay [a] debt contracted during infancy, or [a] ratification made after full age of [a] promise or contract made during infancy'.[18] Such a promise or ratification

[13] [1961] V.R. 672, 676-7 *per* Gavan Duffy J. See also *Little v. Spreadbury* [1910] 2 K.B. 658, 663 *per* Bray J. and *Welsh v. Roe* (1918) 87 L.J. K.B. 520.

[14] *Holmes v. Payne* [1930] 2 K.B. 301.

[15] *Halsbury's Laws of England* (3rd ed. 1957) xxi. 326; *Hargrave v. Hargrave* (1850) 12 Beav. 408; 50 E.R. 1117; *Gray v. Paul* (1877) 25 W.R. 874. See also Motor Car Act 1958, s. 65, and Damages (Infants & Persons of Unsound Mind) Act 1929 (N.S.W.), s. 4. In an interesting judgment in *Katundi v. Hay* [1940] St. R. Qd 39, Philp J. expressed the view that courts having an equitable jurisdiction have the power to *sanction* infants' compromises; purely common law courts, *e.g.* magistrates courts, have no powers of sanction and would be obliged to enter judgment by consent in respect of the compromise.

[16] See *Katundi v. Hay* [1940] St. R. Qd 39, and *Marks v. Collins* [1970] V.R. 400.

[17] [1892] 2 Q.B. 543.

[18] The Infants' Relief Act 1874 (Eng.), s. 2; Supreme Court Act 1958, s. 70.

was void because of the operation of section 2 of the Infants Relief Act 1874. Thus no action could be brought in respect of the compromise.

In *Great North-West Central Railway Company v. Charlebois*[19] the Privy Council considered the following problem: the plaintiff company and the defendant had entered into a contract which was *ultra vires* the plaintiff company. This contract was the subject of a claim and counter-claim between the plaintiff company and the defendant, both parties alleging breaches by the other. At no stage was the legality of the contract in dispute. The plaintiff company and the defendant effected a compromise in respect of their mutual claims and this compromise was embodied in a consent judgment. The plaintiff company then sought to have both the original contract and the consent judgment set aside. Lord Hobhouse, delivering the advice of the Privy Council, held that the contract was invalid and that the consent judgment ought to be set aside:

> It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done [or, *a fortiori,* by effecting a simple agreement of compromise]. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross-action, were equally insisting on the contract . . . [The] judgment [by consent] cannot be of more validity than the invalid contract on which it was founded.[20]

Misrepresentation

A misrepresentation of past or existing fact, as between parties to a compromise, inducing entry into the compromise agreement, will give the representee a *prima facie* right to claim rescission of the agreement. This *prima facie* right will be subject to certain limitations: affirmation, *restitutio in integrum*, and the protection of the rights of third persons.

In *Gilbert v. Endean*[21] a compromise was effected between the plaintiff and the defendant in relation to a debt owing by the defendant to the plaintiff. The plaintiff believed the defendant to be poor and that his father, a man of means, had refused to help the defendant out of his difficulties. The plaintiff therefore settled for a lesser sum. The defendant's solicitor when settling the terms of the compromise, told the plaintiff's solicitor that the father was still refusing to help the defendant when in fact the father had died intestate and it was apparent that the defendant would thus receive more than enough from the estate to meet his debts in full. The Court of Appeal allowed rescission of the compromise.

[19] [1899] A.C. 114.
[20] *Ibid.* 124.
[21] (1878) 9 Ch. D. 259.

The misrepresentation must be made by one contracting party to another, with the intention that it should be acted upon;[22] or, as in *Gilbert v. Endean*,[23] the representation may be between the parties' agents. The misrepresentation must have had the effect of inducing the representee to agree to the compromise.[24] It is not necessary for the representee to act reasonably and thus to correct his false impression in relation to the subject-matter of the representation.[25]

Looking at misrepresentation in the context of compromised personal injuries claims, it can be seen that if a compromise is effected between plaintiff and defendant as a result of the misrepresentation of either party or his agent (for example, his physician) then providing the misrepresentation is as to past or existing fact (for example, as to the *extent* of injuries suffered as opposed to the *consequences* of injuries known to have been inflicted) rescission will, *prima facie*, be available. If after the misrepresentation is made the representee avails himself of independent medical advice and *then* consents to the terms of the proposed compromise it will be difficult to avoid the conclusion that he did not *rely* upon or was not *induced* by the false representation to enter the contract, and that he in fact relied upon independent advice. However, should the representee have access to independent medical advice, it will not go against him if he does not avail himself of it and thus fails to ascertain the falsity of the representation.

Silence rarely gives rise to a representation that the matter concealed does not exist.[26] There are three occasions, however, when silence will give rise to such a representation:[27] there is a duty to disclose facts which would be operative on the mind of the other party if there is a pre-existing fiduciary relationship between the parties; a similar duty to disclose arises if the plaintiff and the defendant are parties to a contract *uberrimae fidei*; and finally if one of the parties makes a statement which is false in fact but which he believes to be true, which is material to the contract, and which during the course of negotiations he discovers to be false, he is under an obligation to correct the erroneous impression he has created; or if a statement has been made which is true at the time of its making but which during the course of negotiations becomes untrue, then, if the representor knows that it has become untrue, he is under an obligation to disclose the change of circumstances to the representee.

[22] *Peek v. Gurney* (1873) L.R. 6 H.L. 377.
[23] (1878) 9 Ch. D. 259.
[24] The misrepresentation need not be the only matter which induced the representee to enter into the compromise. All that is necessary is that it materially contributed to his so acting: *Edgington v. Fitzmaurice* (1885) 29 Ch. D. 459.
[25] *E.g. Redgrave v. Hurd* (1881) 20 Ch. D. 1.
[26] *Turner v. Green* [1895] 2 Ch. 205.
[27] *Davies v. London and Provincial Marine Insurance Co.* (1878) 8 Ch. D. 469, 474-5 *per* Fry J.

Mistake

Generally mistake will not vitiate a contract of compromise; the whole point of such a contract is to eliminate uncertainty in relation to otherwise doubtful issues of law and/or fact and to terminate litigation, to put an end to contention. Compromises would be rendered nugatory if the doubtful issues put to rest by their terms could be resurrected upon their outcome becoming clear.

There are, however, certain occasions upon which mistake can be pleaded in response to an action upon an agreement of compromise.

Although an error entertained by one of the parties to a contract as to the legal meaning of that contract will not of itself be sufficient to invalidate his consent to the contract, nevertheless if that mistake is induced by the other party—even, it seems, innocently—the contract may be set aside. Also a mistake as to the meaning of the words used may be accompanied by a mistake as to the subject-matter dealt with by the contract. The parties will then not be *ad idem* and no contract will be in existence.

These propositions may be illustrated by two decisions: *Hickman v. Berens*[28] and *Wilding v. Sanderson.*[29] In the former case, counsel for the plaintiff and the defendant signed a compromise agreement. It then came to light that counsel were at variance as to what they had intended to concede and accept. Counsel for the plaintiff had considered that he was compromising doubtful issues only to the exclusion of those that were clear; counsel for the defendant had considered that all issues—clear and unclear—were comprehended by the terms of the compromise. The document on its face favoured the defendant. The Court of Appeal set the compromise aside. The Court distinguished the situation where a compromise, the practical consequences of which the aggrieved party did not foresee, is agreed to, from the situation under consideration where the parties could never be said to have been *ad idem*; one party, while intending to concede one thing, had inadvertently and in the belief of the other party conceded another thing.

In *Wilding v. Sanderson*[30] Wilding was induced by Sanderson to believe that the words adopted in a written agreement of compromise had a particular connotation. It was to this connotation that Wilding agreed. The compromise was however interpreted as having another less favourable meaning. The Court of Appeal held that a written contract cannot be set aside merely because one of the parties to it puts an erroneous construction on the words in which it is expressed;

[28] [1895] 2 Ch. 638.
[29] [1897] 2 Ch. 534.
[30] *Ibid.*

but the foregoing principle does not apply to a case where a mistake by one of the parties as to the meaning of the words used has been induced by the other party. Lindley L.J., on an alternative view of the facts, was prepared to hold[31] that the case could be decided on grounds similar to those forming the basis of the decision in *Hickman v. Berens*.[32]

But what if the contracting parties are, to all outward appearances, agreed with sufficient certainty on the same subject-matter? The parties are however both labouring under a common and fundamental misapprehension as to some fact or facts. That is, the parties have contracted on the faith of assumptions believed to have been true but which were in fact erroneous. This situation is to be distinguished from cases where there is a mistake as to a doubtful, disputed, or unassumed fact leading to the compromise.

COMMON MISTAKE AT LAW

The position at law in relation to common mistake and its effect on the formation of contracts has been the subject of great controversy. Perhaps the current view was best enunciated by Dixon C.J. and Fullagar J. in *Svanosio v. McNamara*[33] where Their Honours said after observing that the mistake in the case before them was common and fundamental:[34]

> This Court in *McRae v. Commonwealth Disposals Commission*[35] adopted with respect a passage in the judgment of Denning L.J. (while saying nothing as to the actual decision) in *Solle v. Butcher*.[36] To quote now from that judgment at somewhat greater length, his Lordship said:— '. . . once a contract has been made, this is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know of the mistake but shared it.'[37] Denning L.J. has since expressed the same view in *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.*,[38] after saying that he was 'clearly of opinion that the contract was not a nullity', although 'both parties were under a mistake, and the mistake was of a fundamental character with regard to the subject-matter.'[39]

[31] [1897] 2 Ch. 534, 550.
[32] [1895] 2 Ch. 638.
[33] (1956) 96 C.L.R. 186.
[34] *Ibid.* 195-6.
[35] (1951) 84 C.L.R. 377, 407.
[36] [1950] 1 K.B. 671.
[37] *Ibid.* 691.
[38] [1953] 2 Q.B. 450, 460.
[39] [1953] 2 Q.B. 450, 459. Lord Denning made similar observations in *Leaf v. International Galleries* [1950] 2 K.B. 86, 89 and in *Magee v. Pennine Insurance Co. Ltd* [1969] 2 All E.R. 891, 893. In the latter case Fenton Atkinson L.J. expressed a view to the contrary. His Lordship, relying on the authority of *Bell v. Lever Bros*

Thus the position at law seems to be that once the parties have contracted in relation to a common subject-matter in the same terms and with sufficient certainty of expression the agreement will be valid and will only be set aside for breach of condition, on proof of fraud, or total failure of consideration; otherwise mistake, no matter how fundamental, will not provide a basis for relief at law.

COMMON MISTAKE IN EQUITY

In *Svanosio v. McNamara*[40] Dixon C.J. and Fullagar J. said of this topic:

> 'Mistake' might, of course, afford a ground on which equity would refuse specific performance of a contract, and there may be cases of 'mistake' in which it would be so inequitable that a party should be held to his contract that equity would set it aside. No rule can be laid down a priori as to such cases . . . [I]t is difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract.[41]

This view of the scope of the equitable doctrine of mistake should be looked at in the context in which it was enunciated: the High Court was dealing with a case involving an executed conveyance of an interest in land. As McTiernan, Williams and Webb JJ. pointed out:

> The peculiar nature of a contract for the sale of land, and in particular the opportunity given to the purchaser of investigating the title and his right to rescind the contract if the vendor fails to show a good title and his alternative right if he so chooses to accept such title as the vendor has, and complete the contract either with or without compensation, places a contract for the sale of land in a special category. Upon the execution of the conveyance the rights and obligations of the parties under the contract are merged in the conveyance . . .[42]

In America, as we shall see, common and fundamental mistake provides a ground for rescinding contracts including contracts of compromise. In England the idea that common and fundamental mistake will afford a ground for equitable rescission is gathering momentum.

[39] Continued.
Ltd [1932] A.C. 161, held that '[w]henever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided . . . the assumption must have been fundamental to the continued validity of the contract, or a foundation essential to its existence.' With respect, on the latter reasoning it is difficult to appreciate where the distinction between *Bell's* case and *Magee's* case can be found giving rise to a decision unfavourable to the plaintiff in the former case and favourable to the plaintiff in the latter case.

[40] (1956) 96 C.L.R. 186.

[41] *Ibid.* 196.

[42] (1956) 96 C.L.R. 186, 206.

In *Solle v. Butcher*[43] Denning L.J. (as he then was) said:

> A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights,[44] provided that the misapprehension was fundamental[45] and that the party seeking to set it aside was not himself at fault.[46]

In *Magee v. Pennine Insurance Co. Ltd*[47] Lord Denning M.R. applied the doctrine of mistake in equity to a case concerning a contract of compromise. A compromise was effected between an insurer and an insured in respect of an insurance claim by the latter against the former. Subsequently the insurer discovered that the insurance policy contained certain mis-statements by the insured which entitled the insurer to repudiate the policy. The insurer then refused to pay pursuant to the settlement. The majority of the Court of Appeal[48] rejected the insured's claim to payment. Lord Denning M.R. reiterated what he had said about the effect of mistake in equity in *Solle v. Butcher*[49] and continued:

> Applying that principle here, it is clear that, when the insurance company and the plaintiff made this agreement to pay £385, they were both under a common mistake which was fundamental to the whole agreement. Both thought that the plaintiff was entitled to claim under the policy of insurance, whereas he was not so entitled. That common mistake does not make the agreement to pay £385 a nullity, but it makes it liable to be set aside in equity.[50]

Having decided that the compromise was *liable* to be set aside in equity Lord Denning decided that it should be set aside. His Lordship said:

> I have hesitated on this point, but I cannot shut my eyes to the fact that the plaintiff had no valid claim on the insurance policy; and, if he had no claim on the policy, it is not equitable that he should have a good claim on the agreement to pay £385 . . .[51]

[43] [1950] 1 K.B. 671, 693; and see the remarks of Bucknill L.J. *ibid.* 686.

[44] The phrase 'relative and respective rights' provides a reference to those cases in equity dealing with mistake as to private rights of ownership: *Cooper v. Phibbs* (1867) L.R. 2 H.L. 149 and *Earl of Beauchamp v. Winn* (1873) L.R. 6 H.L. 223.

[45] It seems that fundamentality in this context connotes materiality in relation to the assumption of contractual obligations.

[46] See also *Huddersfield Banking Co. Ltd* v. *Henry Lister & Son Ltd* [1895] 2 Ch. 273, *Frederick E. Rose (London) Ltd v. William H. Pim Jnr & Co. Ltd* [1953] 2 Q.B. 450, 460 *per* Denning L.J., *Oscar Chess Ltd v. Williams* [1957] 1 W.L.R. 370, 373 *per* Denning L.J. and *Grist v. Bailey* [1966] 3 W.L.R. 618.

[47] [1969] 2 All E.R. 891.

[48] Denning M.R. and Fenton Atkinson L.J., Winn L.J. dissenting.

[49] [1950] 1 K.B. 671, 693.

[50] [1969] 2 All E.R. 891, 894.

[51] *Ibid.*

Fenton Atkinson L.J. found for the insurance company without reliance on any principle of equity. He considered that the contract was, as a result of the decision of the House of Lords in *Bell v. Lever Bros Ltd*[52], avoided at law.[53]

It thus appears that if the parties have entered a contract of compromise acting under a common and fundamental mistake of fact, then the contract is liable to be rescinded in equity and will in fact be so rescinded if it would be inequitable to keep it afoot. Delay, inability to make complete restitution of benefits received pursuant to the agreement, or affirmation will influence a court of equity in making its decision as to whether rescission ought to be allowed.

The argument that a contract is liable to be set aside in equity if entered into by the parties under a common and fundamental mistake of fact has had an interesting operation in the United States of America especially in relation to the setting aside of compromises in respect of personal injuries claims.[54] The American experience will become increasingly relevant with the gradual establishment of the equitable doctrine of mistake in the jurisprudence of our own country.

In America while it is conceded that the law favours the settlement of disputes out of court and thus encourages the effecting of compromises, it is nevertheless acknowledged that a general release may, under proper circumstances, be set aside on the ground that it was effected while the parties to it were labouring under a common mistake as to a material fact. The mistake must be as to past or present, fact or facts. Mistakes as to future consequences or incorrect opinions as to future consequences will not afford a basis for relief. Thus a distinction is drawn between a mistake as to nature and extent of injuries suffered and a mistake as to consequences of injuries known to have been suffered. If the parties compromise thinking that one particular type of injury has been suffered and it subsequently appears that other latent injuries have been suffered, the release or compromise is liable to be set aside. If the parties compromise in the belief that only one particular injury has been sustained and that belief is true but the parties miscalculate the seriousness of the consequences of that injury then the release will be upheld. The very reason people enter such compromise agreements is to avoid further recriminations in respect of the injuries which are known to have been suffered.

[52] [1932] A.C. 161.

[53] [1969] 2 All E.R. 891, 896. See n. 37. Winn L.J. dissented. His Lordship considered that the decision in *Bell v. Lever Bros Ltd* [1932] A.C. 161 encompassed the rights of a mistaken party to relief at law *and* in equity. The two cases being not materially different in relation to their facts, relief was denied.

[54] Keefe, 'Validity of Releases Executed Under Mistake of Fact' (1945) XIV *Fordham Law Review* 135 and De Broff, 'Avoidance of A Release For Personal Injuries On The Ground of Mutual Mistake of Fact As To The Extent Or Nature Of The Injuries' (1957) 19 *University of Pittsburgh Law Review* 111. See also (1927) 48 A.L.R. 1462 and (1960) 71 A.L.R. (2d) 82.

Of course it is theoretically possible to draft a compromise which covers liability in respect of all injuries arising out of an accident whether they be known, unknown, latent or patent. It is the rôle of the American court to ascertain the scope the parties intended to ascribe to their compromise and then to consider—if the compromise is only in respect of injuries known to have been suffered—whether the parties were in fact mistaken as to the nature and extent of the injuries suffered or only as to the consequences of the injuries known to have been suffered.

Let us consider each of these problems in turn.

Does the release or compromise provide for both the consequences of known injuries and the existence of unknown injuries? The answer to this question turns on the intention of the parties. The court must ascertain whether the possibility of subsequent conditions and injuries was within the contemplation of the parties or within the realm of the bargain made by them. Was the bargain made only with reference to what was in evidence at the time of its execution or with reference to what might also arise in the future?

In America the terms of the release are accorded an evidentiary rôle only as opposed to a conclusive rôle and, regardless of the fact that the release may literally or by the generality of its terms cover rights in respect of injuries known and unknown, patent and latent, the general attitude appears to be that the terms of the compromise or release should only be conceded a rôle indicative of the actual intention of the parties, but not conclusive of that intention.[55]

In *Schmidtke v. Great Atlantic & Pacific Tea Co. of America*[56], a general release of all claims for injuries 'known and unknown' arising out of the accident was set aside by the Wisconsin Supreme Court.

In *Fraser v. Glass*[57] a release was expressed to be in settlement of all claims and rights of action against the defendant on account of personal injuries in an automobile accident and yet the Illinois Supreme Court set it aside.

Finally, in *Graham v. Atchison T. & S.F. Ry Co.*[58] a release provided for immunity 'from any and all claims and demands which I have now or may hereafter have on account of any or all injuries, including any injuries which may hereafter develop as well as those now apparent'.[59] The release was set aside. General language, it was held, will not include

[55] (1960) 71 A.L.R. 2d 82, 156-65.
[56] (1940) 294 N.W. 828.
[57] (1941) 35 N.E. 2d 953.
[58] (1949) 176 F. 2d 819.
[59] *Ibid.* 822.

a particular unknown injury of a character so serious as to clearly indicate that, had it been known, the release would not have been executed.

If, in the release, specific injuries are mentioned general terms may be limited by the recital of those particular injuries and the release may not be regarded as operating to extinguish claims for serious injuries not included amongst those mentioned.[60]

A factor considered in ascertaining the intention of the parties in relation to the scope of the compromise is whether the releasee has denied liability while nevertheless discontinuing the fight.[61] According to U.S. authority[62] a denial of liability tends to show that the settlement is intended to terminate all controversy regardless of its source; that the releasee is, as it were, buying his peace. The releasee is contracting to stop all liability to suit; he is not simply acknowledging his wrong and making amends for the apparent consequences of his conduct.

The consideration named in the agreement of compromise is scrutinized. If it is in no way commensurate in value with injuries subsequently materializing as well as those known to have been suffered at the time of the agreement then some evidence is provided of an inclination on the part of the contracting parties to contract only with reference to known injuries.[63] A few dollars accepted by way of compromise in order to cover out-of-pocket expenses sustained in relation to a superficial injury points away from an intention on the part of the releasor to free the releasee from liability in respect of possible latent injuries, the existence and import of which were unknown to the parties at the time of the compromise.

The American courts also consider the time of entry into the agreement of compromise in relation to the actual occurrence of the accident giving rise to the injuries. If the agreement is executed after a reasonable lapse of time it is considered that the parties may more plausibly be regarded as having taken their chances on future developments and as intending a final settlement. If however the settlement is effected hastily, on solicitation by the releasee, the courts take the view that there is indicated an intention to settle only in respect of injuries known at the time and not in respect of all injuries which might possibly arise from the accident in the future.[64]

[60] (1927) 48 A.L.R. 1462, 1525.
[61] (1960) 71 A.L.R. 2d 82, 167.
[62] *E.g. McIsaac v. McMurray* (1915) 93 Atl. 115.
[63] (1927) 48 A.L.R. 1462, 1516, (1960) 71 A.L.R. 2d 82, 165.
[64] (1927) 48 A.L.R. 1462, 1515; (1960) 71 A.L.R. 2d 82, 169.

Finally, the knowledge, experience, and relative bargaining power of the releasor are considered by the courts in ascertaining the parties' intentions in relation to the scope of the compromise.[65]

If the compromise does not extend to unknown injuries, will it be set aside?

As we have already seen, there must be a common mistake as to a material past or present fact which fact must have induced the execution of the compromise agreement. In saying that the mistake must be as to an existing or past fact the American courts are stipulating that the mistake must be in relation to the presence of an existing but undiscovered injury or condition and not in relation to the consequences of known injuries.[66] It is with reference to the unknown consequences of known injuries that the parties must be taken to have contracted. Settlements would be rendered nugatory if releasors were able to have releases set aside on the ground that injuries sustained were of a more serious nature than realised. It is not, therefore, sufficient, in order to make out a case for rescission, to demonstrate a mistake as to the permanency of the injury suffered or the time needed for it to heal. A separate and distinct injury must be shown to be in existence, the presence of which was not perceived by the parties until after the execution of the release. If unknown injuries do subsequently materialize it is open to a court to rescind the agreement on the ground that it would be inequitable and unfair to hold the releasor to it.

In *Simpson v. Omaha and C.B. Street Ry Co.*[67] the Nebraskan Supreme Court observed that:

> There seems to be a very great confusion in the opinions of the various courts as to what is required to avoid a release for personal injuries on the ground of mutual mistake. What we believe to be the true rule is that the mistake must relate to either a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to future conditions as the result of present known facts. A mistake as to the future development of a known injury is a matter of opinion, and is not one of fact, and is not such a mistake as will avoid a release; but, where the mistake is as to the extent of the injury due to unknown conditions or relates to injuries that were wholly unknown, then the release may be avoided, unless it further appears that the parties were contracting with respect to possible unknown injuries, and the releasor intended to relinquish all claims, whether known or unknown. In the latter case there would be no mutual mistake. Where one who has sustained personal injuries, and with his attention directed to the known injuries, which are trivial in their nature, contracts for the settlement of his damages with reference thereto, in ignorance of other and

[65] *E.g. Seeley v. Citizens Traction Co.* (1897) 36 Atl. 229, *Hume v. Moore-McCormick Lines* (1941) 121 F. 2d 336, *Yehle v. New York Cent. R. Co.* (1943) 46 N.Y.S. 2d 5.

[66] (1927) 48 A.L.R. 1462, 1467 ff. (1960) 71 A.L.R. 2d 82, 100 ff.

[67] (1922) 186 N.W. 1001.

> more serious injuries, both parties at the time believing that the known injuries are all the injuries sustained, then there is a mutual mistake, and the release, although couched in general terms, should be held not to be a bar to an action for the more serious and unknown injuries.[68]

Cases can arise and have in fact arisen in which the courts have been hard put to distinguish unknown injuries from the consequences of known injuries. Some interesting examples are available: in one case[69] the releasor released his claim thinking that he had suffered no more than a muscle sprain but it was subsequently discovered that he had suffered 'two herneated spinal discs' requiring repeated surgery. The compromise was set aside. In a second case,[70] a release was set aside when it was shown that while compromising his claim the releasor thought he had suffered only exterior scalp laceration when in fact he had suffered damage to his brain tissue which allegedly gave rise to epilepsy. A more difficult case was *Le Francois v. Hobart College*[71] where it was held that serious brain damage was not an unknown consequence of concussion but a separate unknown injury. In *Tewksbury v. Fellsway Laundry*[72] it was held that osteomyelitis leading to permanent disablement was merely an unknown consequence of a general leg injury in respect of which a claim was compromised.

While it can be seen that the distinction does give rise to difficulties it nevertheless is designed to work justice.[73] The theoretical validity of the American approach may however be questioned. A mistake as to the existence of additional injuries may be viewed not as a mistake as to existing fact but as to future fact or opinion. In substance the releasor may be regarded as being mistaken as to the likelihood of any further effects of the accident manifesting themselves in the future. Looked at in this light the releasor is mistaken in his belief as to the course events are to take in the future. The American courts have preferred to interpret this sort of mistake as a mistake as to existing fact: the parties are mistaken as to the existence of other separate latent injuries; the parties are contracting on the basis that the apparent injury is the only injury; the parties assume the risk in relation to the consequences which may flow from that injury and that injury alone.

The readiness of the American courts to assume this jurisdiction to set aside agreements of compromise is probably founded on reasons of policy. Corbin hinted at this when he wrote: '[s]ometimes advantage has been taken of his [the releasor's] weakness and ignorance; and the

[68] *Ibid.* 1003.
[69] *Clancy v. Pacenti* (1957) 145 N.E. 2d 802, *Goodman v. Missouri P.R. Co.* (1958) 312 S.W. 2d 42.
[70] *Harvey v. Georgia* (1933) 266 N.Y.S. 168.
[71] (1941) 31 N.Y.S. 2d 200.
[72] (1946) 65 N.E. 2d 918.
[73] See the cases collected in (1960) 71 A.L.R. 2d 82, 105.

possibility of this, even though not definitely proved, has made courts readier to hold that the release was executed on a mistaken basic assumption as to the nature of the injury'.[74] The policy behind the American experience is designed to protect an unthinking releasor from the effects of his too precipitate action. American policy favours the setting aside of compromises effected in circumstances which would render their enforcement inequitable. The compromise may not be set aside, however, if it can be demonstrated that it was fairly and knowingly made by the releasor. Thus, as we have already seen, in ascertaining whether the bargain struck between the parties countenances liability for both known and unknown injuries the courts have regard to the knowledge, experience and relative bargaining power of the releasor; the courts also consider whether the releasor was given adequate opportunity to appraise his injuries and perhaps to receive independent advice as to their nature and extent. This policy protects the individual from the adverse consequences of an ill-considered readiness to accept an available but inadequate compensation proffered by an experienced insurer.

It is submitted that the possession by our courts of a like jurisdiction to set aside compromises is desirable. Should the jurisdiction be exercised the parties would merely be restored to their original position. It would then be open to them to litigate the issue or to settle afresh. Such a jurisdiction should, however, be exercised with caution. The two competing policy considerations—that favouring the termination of disputes and the sanctity of bargains and that favouring the protection of unwitting and impetuous releasors—should be carefully weighed and justice done according to the circumstances of each case.

The American experience thus indicates that it may be open to a party to a compromise to obtain rescission of that compromise if he can demonstrate that it was effected as a result of a common mistake as to a material fact; that is, if he can show that the parties were mistaken as to the extent or nature of the releasor's injuries. It will not be sufficient for him to show a mistake as to future facts or events; that is, a mistake as to the consequences of known injuries. It is, however, open to the parties to contract with respect to both known and unknown injuries. In order to do this the following steps should be taken so as to provide a clear manifestation of an intention to so contract:

(a) the contract should expressly mention both known and unknown injuries;

(b) the contract should contain a denial of liability by the releasee;

[74] *Corbin on Contracts* (1960) iii. 587.

(c) the contract should stipulate two separate sums representing consideration in respect of each type of injury—known injuries and possible unknown injuries; and finally

(d) the contract should be effected only after a reasonable lapse of time in order to give the releasor an opportunity to ascertain the nature and extent of his injuries.

UNENFORCEABILITY: THE STATUTE OF FRAUDS

Certain contracts in order to be enforceable must be evidenced by some written memorandum signed by the party charged with the agreement, or by his lawfully authorized agent. In the absence of the requisite signed memorandum or a sufficient act of part performance the agreement—of compromise or otherwise—will be unenforceable provided the defendant pleads the issue.[75]

Section 126 of the Instruments Act 1958 provides:

> No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage or upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them or upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

To be read with section 126 is section 127 of the Instruments Act 1958, a unique provision, which provides that:

> No action shall be brought upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them if the agreement or the memorandum or note thereof on which such action is brought is signed by any person other than the party to be charged therewith unless such person so signing be thereunto lawfully authorized in writing signed by the party to be so charged.

Section 9 of the Goods Act 1958 provides that before any contract for the sale of any goods of the value of twenty dollars or more shall be enforceable by action it must be shown that the buyer has accepted part of the goods so sold, and has actually received the same, or has given something in earnest to bind the contract, or in part payment, or that the party charged (or his agent) has signed a note or memorandum in writing of the contract.

It follows that if the agreement of compromise falls within the terms of either section 126 of the Instruments Act 1958 or section 9 of the Goods

[75] See R.S.C. (Vic.), O. xix r. 15.

Act 1958 in that it involves, for example, a sale of goods of the value of twenty dollars or more, or a sale of an interest in land, or is not to be performed within the space of one year, it must generally be evidenced by a written memorandum signed by the person charged with the agreement or his agent (or be evidenced by a sufficient act of part performance) in order to be enforceable. A compromising party's solicitor or counsel, acting within the scope of his authority, can sign the memorandum as a 'person thereunto by him lawfully authorized' within the meaning of the statute.[76]

Cases where compromises have been disregarded because of non-compliance with the provisions of the Statute of Frauds are rare. A recent example of such a case, however, is *Grummitt v. Natalisio*.[77] An action was compromised and the terms of settlement included an agreement that the defendant would sell to the plaintiff certain identified land. The terms of settlement were signed by counsel for each of the parties, who though authorized by their clients to sign were not so authorized in writing. Neither of the parties signed the terms of the settlement. Subsequently, the plaintiff incurred expenses in relation to the surveying of land and other expenses ancillary to the agreement for sale. The defendant refused to complete the sale and the plaintiff brought an action of specific performance to enforce the terms of the settlement. The defendant relied on section 127 of the Instruments Act 1958 and the plaintiff relied on alleged acts of part performance, namely, the incurring of the above-mentioned expenses.

Gillard J. held that the settlement involved a contract for the sale of land; sections 126 and 127 of the Instruments Act 1958 were thus applicable. The plaintiff had to establish therefore that in signing the contract of compromise counsel was acting pursuant to a lawful authorization in writing signed by the defendant. This the plaintiff could not do. In the course of his judgment, Gillard J. said:

> It seems to me that if counsel desires to protect his client so that he obtains an enforceable agreement for sale, counsel should either sight his opponent's authority in writing signed by his client or alternatively require such client's counter-signature to the compromise. In this way only will he ensure his client has a contract which will stand up to the provisions of s. 127 in the event of his seeking to enforce its provisions.[78]

His Honour rejected the contention that on the alleged facts, any part performance of the compromise was proved by the plaintiff.[79] A rebuttal of defence based on estoppel was also rejected.

[76] *Grummitt v. Natalisio* [1968] V.R. 156, 159.

[77] [1968] V.R. 156.

[78] *Ibid.* 160.

[79] *Cooney v. Burns* (1922) 30 C.L.R. 216 establishes that the doctrine of part performance applies to the Instruments Act 1958, s. 127.

The conclusion to be drawn from this case is therefore that a plaintiff in an action for specific performance relying on a compromise in writing, signed by counsel only, as evidencing a 'contract or sale of lands' within section 127 of the Instruments Act 1958, must establish, in order to obtain specific performance of the contract, either that counsel for the defendant was authorized in writing signed by the defendant to sign such compromise, or that there were on his part sufficient acts of part performance.

While it may be said that Gillard J.'s decision in *Grummitt v. Natalisio*,[80] was inevitable having regard to the plain words of section 127 of the Instruments Act 1958, it is nevertheless submitted that the rationale of section 127 itself is not clear. The result achieved in *Grummitt's* case by the application of section 127 is unsatisfactory. Surely counsel should be able to sign a compromise involving a 'contract or sale of lands' on behalf of a lay client without having to obtain that client's signed consent to do so. One may well ask—what is so special about a 'contract or sale of lands' that it, standing apart from all other transactions, should require the performance of this extra formality in order to be enforceable? An agent is at liberty to bind his principal to perform a contract involving perhaps millions of dollars or extending perhaps over many years without needing an independent written and signed authority to do so. Why should a 'contract or sale of lands' be accorded so special a status? It is submitted that the repeal of section 127—a provision which, it will be remembered, is unique in the common law world—ought to be considered. Its present existence is hard to justify.[81]

* * * * *

By way of conclusion one point above all others should be stressed: a compromise is merely another contractual agreement. Any general ground upon which ordinary contracts may be attacked and consequently set aside or declared a nullity is thus relevant. Perhaps the most interesting and as yet unexplored ground for setting aside compromise agreements is mistake. The jurisdiction to set aside contracts of compromise on the ground of common and fundamental mistake has, as has been pointed out, a certain place and an interesting application in American jurisprudence. With the establishment in our own country of the equitable doctrine of mistake as enunciated by Lord Denning the American learning will become more relevant to our own experience.

[80] [1968] V.R. 156.

[81] S. 127 was originally enacted in the Instruments and Securities Amendment Act 1888 in order to check dishonesty and fraudulent misconduct by so-called 'mushroom agents' who were taking advantage of the then current spirit of land speculation. Perhaps the evil that s. 127 was designed to overcome could be as well overcome if that section was to find a place in the estate agents legislation of this State. Its application could then be directed to estate agents as defined in that legislation.

Finally, while the scope of this article has not permitted a discussion of the desirability of retaining as a part of the law of this State the legislative enactments collectively known as the Statute of Frauds, it is nevertheless submitted that there appears to be no real justification for the continued retention of section 127 of the Instruments Act 1958.