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Contracts--Forbearance of Suit as Sufficient Consideration

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removal of her appendix awakened from anesthesia to discover the horrible fact that her Fallopian tubes were gone. With this fact before it, the jury might believe that, had the woman's stepmother been consulted, she would not have consented to the removal of the Fallopian tubes *at that time by that doctor*, that she would have desired further medical consultation, possibly with a specialist, before accepting the fact that the tubes could not be saved. Certainly probable consent would be difficult to prove in a case like this. Still the doctor is entitled to the instruction, as he would be in a closer case, such as the *Bennan* case.

RECAPITULATION

The primary purpose of this note has been to emphasize the need for a new and defined area in the surgical operations cases, that area being here denominated "probable consent." However, two other important proposals are incidentally made. First, that the courts should define emergency cases so as to emphasize the certainty and not the time of death or serious bodily harm should the doctor fail to operate. Second, that the courts no longer imply that consent of a parent is necessary before operating on a child in a case of strict emergency if it is practicably procurable, it being unjust to suggest that consent could be denied in such a case.

The reader may have inferred that the whole purpose and effect of this note is to give the doctor greater immunity from liability when he decides to swing his scalpel. On the contrary, the writer feels that the surgeon is notoriously able to bear any financial loss which he might suffer by reason of the present rule. However, the patients would be the ultimate beneficiaries of the rules here advanced, for under these rules they are more nearly assured of maximum surgical skill.

WILLIAM A. RICE

CONTRACTS—FORBEARANCE OF SUIT AS SUFFICIENT CONSIDERATION

Consideration as a requisite for the enforceability of a promise¹ requires a detriment incurred by the promisee, or a benefit received by the promisor which has been bargained for as the agreed exchange.²

¹ GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS, 81 (1947; Note, 26 HARV. L. REV. 429 (1913)).

² 1 WILLISTON & THOMPSON, WILLISTON ON CONTRACTS 323, (rev. ed. 1936).

It is well settled that forbearance or an agreement to forbear prosecution or institution of legal or equitable proceedings to enforce a legal or equitable demand, either absolutely or for a certain time or for a reasonable time is sufficient consideration.³ Thus, whenever a claimant is lawfully entitled to sue, his release, promise to accept a satisfaction, promise not to sue, or actual forbearance from suit is sufficient consideration for any promise thereby induced. Likewise, whenever one who is lawfully entitled to defend foregoes such defense and yields to the demands of a claimant, any release, promise not to defend, or promise to give satisfaction which is thereby induced is supported by sufficient consideration. The difficult question for determination is: When, if at all, does one have the right to bring suit on such a claim? Since there is nothing to prevent any person from bringing suit, even for purposes of extortion, it might be argued that the forbearance of any suit is sufficient detriment to establish good consideration. However, merely because one has the power to maintain a suit, even one he knows to be groundless, does not mean that he has a legal right to do so. Thus, it would seem that if a claimant honestly believes that he has the right to prosecute his claim and makes his claim in good faith without fraud, duress or other illegal purposes, he has given good consideration by his promise not to sue, whatever the ultimate merits prove to be.

The early English cases did not differentiate claims except to classify them as either good or bad and held that the forbearance to prosecute an unfounded claim was no legal detriment and was therefore insufficient consideration to support a promise. The promisee's belief in the validity of his claim as well as the fact that the claim was fairly doubtful in law or fact were irrelevant.⁴ The test as to whether the claim was good or bad was whether or not the claimant, if he proceeded to suit could actually win his suit or whether the court would think that he could succeed.⁵ Thus, the giving up of a groundless claim was insufficient consideration under all circumstances. This continued to be the English rule until the case of *Longridge v. Dorville*⁶ where the court held that if the surrendered claim was in fact

³ 1 WILLISTON & THOMPSON, WILLISTON ON CONTRACTS, 471, (rev. ed. 1936); CHITTY ON CONTRACTS, 49-52 (20th ed. 1947); RESTATEMENT, CONTRACTS sec. 75 (1) (b) (1932).

⁴ *Jones v. Ashburnham*, 4 East. 455, 102 Eng. Rep. 905 (1804); *Lloyd v. Lee*, 1 Stra. 94, 93 Eng. Rep. 406 (1718); *Rosyer v. Langdale*, Sty. 248, 82 Eng. Rep. 684 (1650); *Smith v. Jones*, Yelv. 134, 80 Eng. Rep. 122 (1610); *Stone v. Wythiopol*, Cro. Eliz. 126, 78 Eng. Rep. 383 (1588). A very excellent review of the early English cases appears in 13 CAN. B. REV. 173 (1935).

⁵ GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS, 106 (1947).

⁶ 5 B. & Ald. 116, 106 Eng. Rep. 1136 (1821).

doubtful, that is, if either the facts or the law were in doubt, that forbearance from suit would support a promise, although the claim was actually invalid.⁷ Later English cases went further in holding that if a claim is honestly asserted, is not wholly unreasonable and is not vexatious or frivolous, the actual or promised forbearance of prosecution is valid consideration.⁸

The stages in the evolution of the English law are reflected in the American decisions with the exception of the early English view. No American jurisdiction has ever held that the claim must actually be valid to be sufficient consideration. A few courts still emphasize that if forbearance is to constitute sufficient consideration for a promise, the claim must be doubtful in fact or law in the opinion of the court.⁹ This view has little merit since it has a tendency to restrict the freedom of compromise unnecessarily by virtually requiring all who have a claim to possess the erudition of a learned court of justice in order to successfully settle their claims out of court. It should be instantly repudiated. A number of American jurisdictions have adopted the modern English rule that forbearance to sue constitutes good consideration if the claim be honest and *bona fide*.¹⁰ In these jurisdictions it is not required that the claimant have a reasonable belief as to the validity of the claim asserted, only that it be known not to be absurd or importunate. Is it not possible, however, that the party be honest and make his claim in good faith and yet it be unreasonable?

This suggests a fourth view that forbearance to assert an invalid claim or defense is good consideration only if the claimant honestly believes his claim to be valid and *his belief is reasonable*. This view is now reflected in an increasing number of American jurisdictions and may be said to represent the weight of authority.¹¹ It is easy to understand why the requirement of the reasonableness of the belief of the

⁷ See also *Keenan v. Handley*, 2 D. & J. 283, 46 Eng. Rep. 384 (1864); *Wilby v. Elgee*, L. R. 10 C. P. 497 (1875).

⁸ *Holsworthy Urban Council v. Holsworthy Rural Council*, 2 Ch. 62 (1907); *Miles v. New Zealand Co.*, 32 Ch. Div. 266 (1886); *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449 (1870).

⁹ *J. H. Gunning v. J. P. Royal*, 59 Miss. 45 (1881); *Throckmorton v. Robinson*, 83 S.W. 2d 696 (Tex. Civ. App. 1935).

¹⁰ *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 P. 624 (1914); *Henderson v. Kendrick*, 82 Fla. 110, 89 So. 635 (1921); *Jansi v. Cervy*, 287 Ill. 359, 122 N.E. 507 (1919); *Sherman v. Werby*, 280 Mass. 157, 182 N.E. 109 (1932); *Addison Miller, Ins. v. Am. Cent. Ins. Co.*, 189 Minn. 336, 249 N.W. 795 (1933); *Matter of Kilgannon*, 146 Misc. 600, 262 N.Y.S. 510 (1933).

¹¹ *Heath v. Portlatch Lumber Co.*, 18 Idaho 42, 108 P. 343 (1910); *Peterson v. Breitag*, 88 Iowa 418, 55 N.W. 86 (1893); *Emmitsburg v. Donoghue*, 67 Md. 383, 10 A. 233 (1887); *Taylor v. Weeks*, 129 Mich. 233, 88 N.W. 466 (1901); *Stanley v. Sumrall*, 167 Miss. 714, 147 So. 786 (1933); *Flanagan v. Kolsome*, 58 N.H. 443 (1878); *In re Miller's Estate*, 279 Pa. 30, 123 A. 646 (1924); *Simmons v. Yoho*, 92 W. Va. 703, 115 S.E. 851 (1923).

claimant has been added. This makes it more difficult and practically impossible for a dishonest claimant to use his claim for extortion or other illegal purposes and yet does not put any serious impediment in the path of the honest claimant.

A prominent writer has pointed out that even in those jurisdictions where the principal stress is upon the honesty and good faith of the claimant, forbearance is insufficient consideration if the claim relinquished is so lacking in foundation as to make its assertion incompatible with both honesty and a reasonable degree of intelligence.¹² Thus, some element of reasonableness in the claim seems to be a factor even in those jurisdictions using the "good faith" test. This test of reasonableness should not be based on the ability of the claimant himself to judge the validity of the claim since he may have no knowledge whatever of law and may not even be thoroughly acquainted with all the pertinent facts of the case. It has been suggested that the test to be applied should be whether a reasonable man with an elementary knowledge of legal principles, under the circumstances would regard the claim as a possibly valid one.¹³

The *Restatement of Contracts* asserts that "the surrender of, or forbearance to assert an invalid claim or defense by one who has not a honest and reasonable belief in its possible validity"¹⁴ is insufficient consideration. This rule combines the subjective requisite of a *bona fide* claim with the objective requisite that it must be reasonably doubtful.

It was early settled in Kentucky that an agreement to forbear suit on a clearly groundless claim is not a sufficient consideration for a promise founded thereon, but that it is essential that the claim be doubtful in law or equity and asserted in good faith.¹⁵ It was not until 1930 that this rule was modified by the famous and leading case of *Forsythe v. Rexroat*.¹⁶ In that case the plaintiff while walking on a sidewalk was struck with a bicycle by the defendant's son. In consideration of plaintiff's forbearance, defendant agreed to pay all expenses of caring for plaintiff's injuries. Upon the faith of this agreement, plaintiff incurred hospital and other expenses amounting to

¹² I WILLISTON & THOMPSON, WILLISTON ON CONTRACTS, 475-476 (rev. ed. 1936).

¹³ *Id.* at 472.

¹⁴ Restatement, Contracts, sec. 76(b) (1932).

¹⁵ Taylor v. Patrick, 4 Ky. (1 Bibb) 168 (1808); Kennedy v. Davis, 5 Ky. (2 Bibb) 343 (1811); Fisher v. May's Heirs, 5 Ky. (2 Bibb) 448 (1811); Sellars v. Jones, 164 Ky. 458, 175 S.W. 1002 (1915); Spriggs v. Spriggs 28 Ky. L. Rep. 944, 90 S.W. 985 (1906); Fain, etc. v. Turner's Admr., 96 Ky. 634, 29 S.W. 629 (1895); Gaither v. Bland, 7 Ky. L. Rep. 518 (1886); Cline & Co. v. Templeton, 78 Ky. 550 (1880).

¹⁶ 234 Ky. 173, 27 S.W. 2d 695 (1930).

\$705.00 of which defendant only partially reimbursed her. In a suit for the balance, defendant set up the defense of no consideration. On appeal, the Kentucky Court of Appeals held that the agreement of plaintiff to forbear suit was good consideration in that the parties themselves in good faith believed that there was liability on the part of the father and that the plaintiff's claim was not so lacking in merit that it could be declared free of doubt by reasonable men under the same circumstances.¹⁷ Considerable weight was placed upon the fact that the son *might* have been on an errand for the father and thus the father *might* have been liable for the negligence of the son, as a principal under the family purpose doctrine.

The Kentucky cases uniformly require an honest belief in the claim. In a few cases there seems to be an implication that good faith alone may be sufficient¹⁸ but this is emphatically denied in the case of *Baker v. Vanderpool*¹⁹ where the court said:

[M]ere good faith and honest belief in an asserted claim is not sufficient to support a compromise. In addition to good faith and honest belief there must be an element of doubt as to the validity of the claim—the compromise claim must be one about which reasonable men at the time may have entertained substantial doubt.²⁰

The court does not inquire into the actual merits of the suit forborne or the claim surrendered, the real test being the reasonableness of the belief of the claimant and not the actual validity of the claim. The claim may be groundless, but it must not be *clearly* groundless to

¹⁷ It should be noted here that the court based their determination as to the reasonableness of plaintiff's belief on the fact that *well informed lawyers* and reasonable men could and doubtless would have been unable to say that there was no liability resting on defendant. Earlier cases set forth this test, *Robb v. Sherril Russell Lumber Co.*, 194 Ky. 835, 241 S.W. 64 (1922); *Simmons' Ex'r. v. Hunt*, 171 Ky. 397, 188 S.W. 495 (1916); *Gray v. U. S. Savings and Loan Co.*, 116 Ky. 967, 77 S.W. 200 (1903); *Bunnell v. Bunnell*, 111 Ky. 566, 64 S.W. 420 (1901); *Creutz v. Heil*, 89 Ky. 429, 433, 12 S.W. 926 (1890), but later cases require only that the compromise claim be one about which reasonable men at the time may have entertained substantial doubt. *Baker v. Vanderpool*, 296 Ky. 663, 178 S.W. 2d 189 (1944); *Posey v. Lambert-Grisham Co.*, 197 Ky. 373, 380, 247 S.W. 30 (1923). It is believed that this "well informed lawyer" test did not affect the decision of the *Forsythe* case and was only dictum since the court only said that plaintiff's claim was one which well informed lawyers *could* regard as doubtful and did not say that they *must* entertain some doubt as to the validity of plaintiff's claim.

¹⁸ *Barr v. Gilmour*, 204 Ky. 582, 265 S.W. 6 (1924); *Ripy Bros. Distilling Co., v. Lillard*, 149 Ky. 726, 149 S.W. 1009 (1912).

¹⁹ 296 Ky. 663, 666, 178 S.W. 2d 189, 190 (1944).

²⁰ *Baker v. Vanderpool*, 296 Ky. 663, 178 S.W. 2d 189 (1944). SEE ALSO, *Murphy v. Henry*, 311 Ky. 799, 225 S.W. 2d 662 (1950); *Davenport v. Anderson*, 216 Ky. 22, 287 S.W. 25 (1926); *Hardin's Adm'r. v. Hardin*, 201 Ky. 310, 256 S.W. 417 (1923); *Sellars v. Jones*, 164 Ky. 453, 175 S.W. 1002 (1915); *Creutz v. Heil*, 89 Ky. 429, 12 S.W. 926 (1890); *Cline & Co. v. Templeton*, 78 Ky. 550 (1880).

a reasonable man at the time²¹ and it is immaterial that the parties in settling the controversy reach a different result than the law would have reached or that the merits ultimately prove to be on the other side.²²

It is submitted that the Kentucky court is in line with the majority and better view and that it follows the rule of the *Restatement of Contracts* in requiring both the subjective requisite of a *bona fide* claim and the objective requisite that it must be reasonably doubtful. It has been said that it is the duty of courts to encourage rather than discourage parties in resorting to a compromise as a mode of adjusting conflicting claims and the nature or extent of the rights of each party should not be closely scrutinized.²³ So far as it can be done legally and properly, the courts should support such agreements having as their object an amicable settlement of doubtful rights. Litigation is always burdensome and the courts should look favorably upon settlement out of court.

JOHN W. MURPHY, JR.

UNINCORPORATED ASSOCIATIONS AS BENEFICIARIES OF PRIVATE TRUSTS

It is generally recognized that an unincorporated association can be the beneficiary of a private trust,¹ although the courts have used several theories to reach this conclusion. Courts are faced with two problems in upholding a private trust made in favor of an unincorporated association. First, since the trust is a private one and must have a definite beneficiary, who holds the equitable title? Secondly, does such a trust contravene the rule against private indestructible

²¹ Adequacy of the consideration given is not inquired into so long as there is something of detriment to one party or benefit to the other, however slight, *Nuckols v. Nuckols*, 293 Ky. 603, 169 S.W. 2d 828 (1943); *Dexter v. Duncan*, 205 Ky. 344, 265 S.W. 832 (1924); *Barr v. Gilmour*, 204 Ky. 582, 265 S.W. 6 (1924); even though the amount is greatly disproportionate to what a party would be legally bound to pay. *Bates v. Todd's Heirs*, 14 Ky. 177 (1823).

²² *Murphy v. Henry*, 311 Ky. 799, 225 S.W. 2d 662 (1949); *Forsythe v. Rexroat*, 234 Ky. 173, 27 S.W. 2d 695 (1930); *Berry v. Berry*, 183 Ky. 481, 209 S.W. 855 (1919); *Gray v. U. S. Savings and Loan Co.*, 116 Ky. 967, 77 S.W. 200 (1903); *Mills' Heirs v. Lee*, 22 Ky. (6 Mon.) 91, 97 (1827).

²³ *Moore v. Sutton*, 311 Ky. 174, 223 S.W. 2d 737 (1949); *Childs v. Hamilton*, 308 Ky. 203, 214 S.W. 2d 106 (1948); *Nuckols v. Nuckols*, 293 Ky. 603, 169 S.W. 2d 828 (1943); *Provident Life and Accident Ins. Co., of Chattanooga, Tenn., v. Ramsey*, 256 Ky. 126, 75 S.W. 2d 781 (1934).

¹ P-H WILLS, ESTATES AND TRUSTS SERV. sec. 3663 (1950).