

June 1940

## Contracts--Forbearance to Prosecute a Claim as Consideration

W. J. C.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Contracts Commons](#)

---

### Recommended Citation

W. J. C., *Contracts--Forbearance to Prosecute a Claim as Consideration*, 46 W. Va. L. Rev. (1940).

Available at: <https://researchrepository.wvu.edu/wvlr/vol46/iss4/7>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## RECENT CASE COMMENTS

CONTRACTS — FORBEARANCE TO PROSECUTE A CLAIM AS CONSIDERATION. — A widow entered into a contract with her prospective heirs at law, promising that she would not dispose of her property in her lifetime, and that at her death it would be distributed equally among the promisees, upon a recited consideration of an agreement to settle a controversy growing out of an estate in which she and her prospective heirs were interested. *Held*, that the settlement of a controversy constitutes a valid consideration for a contract only where the controversy has some foundation in fact, and as there was no adequate foundation in fact for the controversy, the contract was void for lack of consideration. *Steber v. Combs*.<sup>1</sup>

Ordinarily the parol evidence rule prevents the adding of terms to a contract after it has been expressed in a writing which constitutes an "integration" of the agreement.<sup>2</sup> The writing in the instant case was obviously not intended as a complete "integration" of the contract as only one side of the contract was stated. Therefore, since the parol evidence rule does not apply, the court may look to the actual facts of the controversy to see if there is sufficient consideration.<sup>3</sup> In the principal case there was no proof of the facts of the controversy allegedly settled by this instrument, and possibly the alleged contract should fail due to insufficient proof of its terms.<sup>4</sup> The court did not decide the instant case on this ground but rather on the ground that the consideration was insufficient.

The early English cases held that the forbearance to prosecute an unfounded claim was no legal detriment and was therefore insufficient consideration to support a promise.<sup>5</sup> Ordinarily consideration is absent or present depending on how the situation appeared to the parties when they entered the contract. Thus, if it appears at that time to the promisor that the avoidance of the hazard of paying the alleged claim in full has some present value there is a legal benefit, and if the promisee sells a chance to recover the whole claim there is a legal detriment.<sup>6</sup> Recent English cases

<sup>1</sup> 5 S. E. (2d) 420 (W. Va. 1939).

<sup>2</sup> *Cohn v. Dunn*, 111 Conn. 342, 149 Atl. 851 (1930); WILLISTON, CONTRACTS (Rev. ed. 1938) §§ 631 *et seq.*

<sup>3</sup> *Brosty v. Thompson*, 79 Conn. 133, 64 Atl. 1 (1906); *Stahelin v. Sowlo*, 87 Mich. 124, 49 N. W. 529 (1891); *Wilson v. Scarboro*, 163 N. C. 380, 79 S. E. 811 (1913).

<sup>4</sup> WILLISTON, CONTRACTS § 18.

<sup>5</sup> *Jones v. Ashburnham*, 4 East 455 (1804).

<sup>6</sup> *Talbott v. Stemmons' Ex'r*, 89 Ky. 222, 12 S. W. 297 (1889); *Bigelow v.*

hold that if a claim is honestly asserted, is reasonable, and is not vexatious or frivolous, the actual or promised forbearance of prosecution is consideration.<sup>7</sup> Some American jurisdictions require only that the claim be *bona fide*,<sup>8</sup> while others have the additional requirement that it be doubtful.<sup>9</sup> In all cases the forbearance is insufficient consideration if the claim is obviously unfounded or not even doubtful.<sup>10</sup> The *Restatement of Contracts* says that the claim must be *bona fide* and reasonably doubtful.<sup>11</sup>

The statement in the main case that the controversy must have some foundation in law and fact is too broad. West Virginia cases variously state the requirements as follows: the claim must be honest and doubtful with some possible foundation in law and fact;<sup>12</sup> it must be colorable,<sup>13</sup> and its voidness must be doubtful.<sup>14</sup> The basic reason for the rule that the settlement of a *bona fide* and doubtful claim is consideration, is that there should be an end to litigation. It should be possible to settle a claim without being harassed by future litigation.<sup>15</sup> The rule as stated in the principal case ignores this reason, as by it, no release would ever be effective for it could always be reopened as to the merits of the original controversy. Thus the law of West Virginia is more soundly and probably more accurately stated to be that the settlement of a controversy is consideration even though the well foundedness of it be doubtful, if it has some possible foundation in law and fact.

W. J. C.

Bigelow, 95 Me. 17, 49 Atl. 49 (1901); *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256 (1891).

<sup>7</sup> *Holsworthy Urban Council v. Holsworthy Rural Council*, [1907] 2 Ch. 62; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449 (1870).

<sup>8</sup> *Mason v. Wilson*, 43 Ark. 172 (1884); *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 Pac. 624 (1914).

<sup>9</sup> *Stewart v. Bradford*, 26 Ala. 410 (1855); *Potts v. Polk County*, 80 Iowa 401, 45 N. W. 775 (1890); *Sutton v. Dudley*, 193 Pa. 194, 44 Atl. 438 (1899).

<sup>10</sup> *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708 (1907); *Montgomery v. Grenier*, 117 Minn. 416, 136 N. W. 9 (1912); *Davisson v. Ford*, 23 W. Va. 617 (1884); *WILLISTON, CONTRACTS* §§ 135, 136.

<sup>11</sup> 1 *RESTATEMENT, CONTRACTS* (1932) § 76. "Any consideration that is not a promise is sufficient to satisfy the requirement of § 19 (c) except the following: . . . (b) The surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity. . . ."

<sup>12</sup> *Davisson v. Ford*, 23 W. Va. 617 (1884); see *Davis v. Lilly*, 96 W. Va. 144, 122 S. E. 444 (1924).

<sup>13</sup> *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240 (1904); *Beall v. Morgantown & K. R. R.*, 116 W. Va. 515, 182 S. E. 295 (1935).

<sup>14</sup> *Jarrett v. Ludington*, 9 W. Va. 333 (1876); *Simmons v. Yoho*, 92 W. Va. 703, 115 S. E. 851 (1923).

<sup>15</sup> *Knepper v. Eggiman*, 177 Ind. 56, 97 N. E. 161 (1912); *Adams v. Adams*, 70 Iowa 253, 30 N. W. 795 (1886); *Jarrett v. Ludington*, 9 W. Va. 333 (1876).