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Compromise of Contract Claims--A Criticism of Tanner v. Merrill

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of the common law rule. He would not be deprived of the right to excavate and enjoy the subsoil profits, which is a well recognized right in the law of real property.¹⁴ Mining law has achieved this desirable result in allowing a miner to follow a vein of ore under the land of his neighbor where the apex is on the miner's own land.¹⁵

In a recent New York Case,¹⁶ the existence of a sewer 150 ft. beneath the surface was held not to be such an incumbrance as would permit a claim for breach of covenant against incumbrances. The court said: "It, therefore, appears that the old theory that the title of an owner of real property extends indefinitely upward and downward is no longer an accepted principle in its entirety. Title above the surface is now limited to the extent to which the owner of the soil may reasonably make use thereof. By analogy, the title of an owner of the soil will not be extended to a depth below ground beyond which the owner may not make use thereof."

It would certainly be regrettable to deprive human beings the right to view the intricate and beautiful handiwork of nature confined within American caves, in order to satisfy a rule anciently developed without foresight as to its possible consequences.

IRA G. STEPHENSON

COMPROMISE OF CONTRACT CLAIMS— A CRITICISM OF TANNER V MERRILL

That the law loves a compromise is a familiar maxim. The Kentucky Court has said that it is "the peculiar duty of the Courts of Justice to cherish and support" compromises, for the reason that they contribute to the peace and quiet of the community.

Ballentine's *Law Dictionary* defines a compromise as an agreement based on mutual concessions.³ The reasoning of the court is expressed in terms of consideration since each party has given up something, frequently the right to have his claim decided in court.³ Three types of fact situations are generally classified as compromises, although not all of them fit into this definition.

The first is the part payment of an undisputed debt then due. The creditor may collect the balance by legal action, for there was no consideration. The debtor did no more than he was bound to do and the fact that the creditor gave a receipt in full is immaterial.⁴

¹⁴ 1 TIFFANY, REAL PROPERTY (2d ed. 1920) sec. 253.

¹⁵ COSTIGAN, MINING LAW (1908) secs. 113, 114.

¹⁶ Boehringer v Montalton, 142 Misc. 560, 254 N.Y.S. 276 (1931)

¹ Fisher v May's Heirs, 5 Ky ((2 Bibb) 448, at 450 (1811).

(1930) p. 250.

³ Taylor v. Patrick, 4 Ky (1 Bibb) 168 (1808).

⁴ N. Y. Insurance Co. v. Van Meter's Adm'r., 137 Ky. 4, 121 S.W. 438 (1909), Warren v. Hodge, 121 Mass. 106 (1876), Nixon v. Kiddy, 66 W. Va. 355, 66 S.E. 500 (1909)

In the second situation there is a *bona fide* dispute either as to the existence of the claim or debt or the amount of it. The parties may agree on terms between the two extremes claimed, thus compromising the suit in the true sense,⁵ for each makes a concession and in so doing furnishes consideration for the concession of the other. If the amount of the debt is disputed the matter may be settled by another method, equally well accepted but resting on a more doubtful basis. By this method the acceptance of *any* amount as payment in full constitutes a complete settlement and the debt is discharged.⁶ The law is said to look at a disputed claim as a whole, without setting a value on it, and the adequacy of the consideration will not be questioned. The soundness of this rule will be considered later.

The third situation is one involving two claims, one disputed and the other undisputed, in which case payment of the latter does not discharge the former.⁷

The leading case involving the settlement of a debt of a disputed amount is *Tanner v. Merrill*.⁸ The dispute concerned the sum due an employee. There was no question as to the amount of wages but the employer claimed the right to deduct the cost of the transportation of the employee from the place of employment to the place where the work was done. The protesting employee accepted the amount the employer claimed to be due, giving a receipt in full, and when he sued for the balance the appellate court held for the employer by a three to two decision.

The courts refer to such settlements as compromises, but they clearly do not fit into the definition of a compromise. A more accurate term would be unconditional surrender, for the concession is entirely on one side and the other has done no more than, by his own admission, he is legally bound to do.

Tanner v. Merrill presents a challenging problem to which three approaches are possible. It may be regarded as (1) a single disputed claim, (2) two separate and distinct claims, or (3) a claim and counter-claim.

The settlement of a single disputed claim by the payment of the amount the debtor admits to be due is unsatisfactory to some courts, which hold that there is no consideration for the acceptance of that amount and that the creditor can sue for and recover the remainder.⁹ Conceding that the rule is sound in some situations

⁵ Applicable to any dispute. *Kelly v. Peter and Burghard Stone Co.*, 130 Ky. 530, 133 S.W. 486 (1908).

⁶ 1 WILLISTON, CONTRACTS (Rev. ed. 1936) Sec. 128.

⁷ *Shawnee Sanitary Milk Co. v. Fulkerson's Garage and Machine Shop*, 258 Ky. 639, 79 S.W. (2d) 229 (1935).

⁸ 108 Mich. 58, 65 N.W. 664 (1895).

⁹ *Demeules v. Jewel Tea Co.*, 103 Minn. 150, 114 N.W. 733 (1908).

it may be questioned whether it is applicable to the facts of *Tanner v. Merrill*, for it is difficult to see how a claim for wages and a claim for transportation paid can be regarded as a single claim.

In *Demeules v. Jewel Tea Company*¹⁰ an employee deposited a cash bond. Upon the termination of the employment the employer returned only part of the amount deposited, claiming that the remainder had been forfeited. The employee accepted this but brought an action to recover the balance. He was allowed to recover, the court saying that the company had "suffered no detriment it yielded nothing, and Demeules received nothing. If it had paid any greater sum whatever there would have been a consideration for the agreement to accept less."¹¹ The same court in an earlier case involving similar facts held that "The transaction lacked another element usually found in these compromises, viz., mutual concessions."¹²

The Minnesota court left no room for doubt as to its position in regard to *Tanner v. Merrill*. The facts in the case of *Ness v. Minnesota and Colorado Company*¹³ may be sufficiently differentiated to explain the result, but the court said, "Perhaps the Michigan case sustains his [defendant's] contention, but if it does, we expressly decline to follow, because it is opposed to the general current of authority."

The court which decided *Tanner v. Merrill* would have held that a debtor who had paid only part of an undisputed debt had not discharged the claim because he had furnished no consideration for his creditor's promise to accept that amount in full payment. Even if *Tanner v. Merrill* is regarded as a single claim there seems to be little logic in saying that the receipt of part payment of a claim, the whole of which is conceded, is not sufficient consideration, but that the receipt of payment of only the conceded portion of a disputed claim is sufficient consideration.¹⁴

The second approach to *Tanner v. Merrill* also illustrates the third so-called compromise settlement. This view is that the case presents not one undisputed claim but two distinct claims, one undisputed and the other disputed. It is clear that the payment of the former is not sufficient consideration for the release of the latter, and this is the position taken by the dissenting judges in *Tanner v. Merrill*. One of them said, "I think that the payment of an admitted indebtedness is no consideration for a discharge of a further claim by the creditor."¹⁵

¹⁰ *Ibid.*

¹¹ *Ibid* at —, 114 N.W. at 734 (1908).

¹² *De Mars v. Musser-Sauntry Land, L. and Manuf. Co.*, 37 Minn. 418, 35 N.W. 1 at 2 (1887).

¹³ 87 Minn. 413, 92 N.W. 333 at 334 (1902)

¹⁴ *Whitmire v. Lawrence, Barry, and Stone Counties' Mutual Benefit Ass'n*, 286 S.W. 842 (Mo. 1926).

¹⁵ 108 Mich. 58, 65 N.W. 664, at 666 (1895)

However, the difficulty often lies in determining whether there are two claims or only one. One court has said¹⁶ that if the claims are dependent on separate sets of facts the settlement of one will not release the other. Another has held¹⁷ that if the two claims arise out of separate promises, even in the same contract, the payment of one does not bar a recovery of the other. Many courts—and among them the Kentucky court—have displayed a willingness to find two claims instead of one, often without stating the test used.

It might be suspected that a dislike for the results of *Tanner v. Merrill* has given rise to this willingness, which has culminated in cases approaching the absurd. Thus a Michigan court held that the case of *Sweeney v. Adam Groth Company*¹⁸ involved two claims, one for work done on the "interior" of the church and the other for work done on the "exterior"

The leading Kentucky case of the class under consideration, *Shawnee Sanitary Milk Company v. Fulkerson's Garage and Machine Shop*,¹⁹ is one in which the plaintiff contracted to keep the defendant's trucks in repair at a flat monthly rate. A dispute arose as to whether this contract included work on the bodies of the trucks as well as on the motors. The defendant gave the plaintiff a check marked "account in full", which the latter indorsed and cashed. The court regarded the amount due for work done on the motors as undisputed, with the work on the bodies constituting a separate claim. "The appellant was under a legal duty to appellee to pay the amount admitted to be due, and his performance of that duty was no consideration for the discharge of another debt about which there was no dispute."²⁰

The third possible approach to *Tanner v. Merrill*—to consider it as presenting a counter-claim situation—would appear to be the soundest. Unfortunately, however, this view of the case does not end the difficulty, for there are opposing opinions as to the rule to be applied in such cases.²¹

Some courts hold that if the debtor asserts a counter-claim, which is disputed, the entire claim becomes disputed so that the payment of any sum constitutes a final settlement under the single disputed claim rule.²² If this rule is sound, *Tanner v. Merrill* is right.

¹⁶ Keene v. Gauen, 22 F (2d) 723 (C.C.A. 5th, 1927).

¹⁷ Jefferson Standard Life Insurance Co. v. Lightsey, 49 F (2d) 586 (C.C.A. 4th, 1931).

¹⁸ 269 Mich. 436, 257 N.W. 855 (1934).

¹⁹ 258 Ky. 639, 79 S.W. (2d) 229 (1935).

²⁰ *Ibid* at 642, 79 S.W. (2d) at 230 (1935); Walston v. F. D. Calkins Co., 119 Iowa 150, 93 N.W. 49 (1903); Shumaker v. Lucerne-in-Maine Community Ass'n, 275 Mass. 201, 175 N.E. 469 (1931); Marion v. Hermbach, 62 Minn. 214, 64 N.W. 386 (1895); Manse v. Hossington, 205 N. Y. 33, 98 N.E. 203 (1912).

²¹ 1 C.J.S., Accord and Satisfaction (1936) Sec. 32 at 520.

²² Stanley-Thompson Liquor Co., v. So. Colo. Mercantile Co., 65 Colo. 587, 178 Pac. 577 (1919), Sylva Supply Co. v. Watt, 181 N.C. 432, 107 S.E. 451 (1921).

But is it sound? The criticism may still be made that there is lack of consideration, and it may be doubted whether the presence of a counter-claim *ipso facto* creates a single disputed claim. It seems more logical to say that it creates a two-claim situation.

Still another criticism is possible. It has been pointed out that by merely asserting a counter-claim, in good faith, the debtor assumes a position which permits him to force upon the creditor the amount the former claims to be due. That this must be made in good faith does not lessen the injustice of allowing the debtor to put the creditor in the position either of being compelled to wait indefinitely for what is due him or of accepting a lesser amount in full satisfaction. This is particularly true in employment cases because of the unequal economic positions of the parties. *Tanner v. Merrill* provides an excellent illustration of this inequality. The employer's claim even though made in good faith may have been totally unfounded, but the employe, needing money because of illness at home, accepted the amount tendered by the employer and thereby gave up the right to have the claim decided on the evidence. Aside from the questionable justice of such a rule, let it be repeated that he received nothing in exchange for giving up his right to have the counter-claim decided in court.

The effect of such a rule is to force the creditor to wait for the amount admittedly due him until the right of the counter-claim has been determined in court, under penalty of losing his claim to the disputed amount entirely by accepting the amount tendered. A New York court, in refusing to follow the counter-claim rule, expressed this view very clearly when it said that the defendant "could not, by paying an amount admittedly due in any event, foreclose plaintiffs from claiming that more was due, nor yet subject them to the risk of postponing the payment of the whole claim until defendant's relatively small counter-claim had been judicially liquidated."²³

Some courts have held that the rule is applicable only to counter-claims, not set-offs,²⁴ while others have held that it applies to both.²⁵ A counter-claim is to be distinguished from a set-off in that in the former the defendant's claim against the plaintiff arises from the transaction in connection with which he is being sued,²⁶ whereas in the latter his claim is based upon a different transaction.²⁷ Courts are not always careful to differentiate between the two terms, frequently using them interchangeably. Certain courts, however, have refused to follow the rule in either case, holding

²³ *Frank et al. v Vogt*, 178 N.Y. App. Div. 833 at 834, 166 N.Y.S. 175 at 176 (1917).

²⁴ 1 C.J.S., *Accord and Satisfaction* (1936) Sec. 32 at 520.

²⁵ *Ex parte So. Cotton Oil Co.*, 207 Ala. 704, 93 So. 662 (1922), *Brent v. Whittington*, 214 Ala. 613, 108 So. 567 (1926).

²⁶ *Ballentine Law Dictionary* (1930) at 297.

²⁷ *Ibid* at 1191.

that the debtor in accepting the money has not lost his right to sue and recover.²⁸ Under this view the employee in *Tanner v. Merrill* should have been allowed to have the counter-claim decided upon the evidence.

Another method frequently employed in avoiding the *Tanner v. Merrill* rule is to find that the creditor did not clearly understand that the payment was made in full satisfaction of all claims.²⁹ This view is scarcely convincing since most of the cases involve checks marked payment in full, often adding, *of all claims*. The least that can be said is that the courts are very liberal in finding that the creditor was reasonable in failing to understand the terms of the payment.

Even a casual reading of such cases leads to the belief that many courts, including Kentucky, while supposedly following *Tanner v. Merrill*, are quite willing, perhaps even eager, to be convinced that a given set of facts can be differentiated from that case and a *contra* result obtained. It is suggested that this is due to a conviction that the principal case rests on a doubtful legal basis and is equally questionable from the point of view of attaining justice.

ROSANNA A. BLAKE

WHEN DOES PREPARATION FOR CRIME BECOME A CRIMINAL ATTEMPT?

The law of criminal attempts presents two principal problems. One of these is the effect of impossibility, and the other involves determining when preparation for a crime becomes a criminal attempt. It has been suggested that impossibility is no bar to making out the crime if the defendant reasonably expected to succeed with the means he was using.¹ If the defendant could not have reasonably expected to succeed, then the necessary specific intent cannot be shown, and thus the crime cannot be made out. Impossibility, in this view, is important only for its bearing upon specific intent. In this paper the theory will be advanced that preparation becomes a crime when the preparatory acts are of such an unequivocal nature that a criminal design is manifest. In the cases to be cited subsequently, the language is to the effect that while the act need not be the last proximate step before consummation, yet it must be beyond mere preparation; it must be an act directly tending toward commission of the crime. The effect of holding that an act of preparation is too remote from

²⁸ *Fairfield v. Corbett Hardware Co.*, 25 Ariz. 199, 215 Pac. 510 (1923), *Robinson v. Leatherbee Tie and Lumber Co.*, 120 Ga. 901, 48 S.E. 380 (1904), *Perlitch v. Kanner*, 171 N.Y.S. 148 (1918).

²⁹ 109 Ky. 388, 59 S.W. 323 (1900)

¹ Note (1943) 31 Ky. L. J. 270.