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DURESS BY ECONOMIC PRESSURE I

JOHN DALZELL*

The term duress suggests a big man forcing a poor widow woman to sign a deed at the point of a gun. That form of imposition has been brought under substantially effective control (except as between nations), or at least the rules to be applied are fairly well established. But when the use of superior physical force is barred, man, a resourceful animal, turns to economic weapons; and these have increased in effectiveness, as in frequency of use, more speedily than our readiness to cope with them.

Some economic pressures have for centuries been treated in our courts as requiring restraint,¹ but for the most part our habitual Anglo-Saxon individualism has been in control of the common law, so as to make any such curb exceptional. We have been proud of our "freedom of contract," confident that the maximum of social progress will result from encouragement of each man's initiative and ambition by giving him the right to use his economic powers to the full. One of the most frequently and emphatically declared axioms of contract law is that our courts are not concerned with the equivalence of the consideration given for a promise. But doubts are growing of late years.

"The system of 'free' contract described by nineteenth century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond with reality. As welcome fiction is displaced by sober fact, the regime of freedom can be visualized as merely another system, more elaborate and more highly organized, for the exercise of economic pressure."²

We are not yet ready to allow the idea of individual initiative to be completely swallowed up in the "wave of the future," as has been done in some recently organized societies, but some limitation on economic duress seems inevitable. It is a thesis of this article that no basic difference exists between economic duress and physical duress. The problem of economic coercion has seemed strange, calling for new rules, much less simple and objective than those heretofore set up as gov-

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¹ The common law interfered with freedom of contract as to the mortgagor's equity of redemption, sailors' wage agreements, sales of reversionary interests, and some others; Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454, 482.

² Dawson, *Economic Duress and the Fair Exchange in French and German Law* (1937) 11 TUL. L. REV. 345.

erning cases of physical duress; I believe, in truth, the "new" rules, when properly worked out, will be found applicable to both types of duress, and that the difficulty has been partly that we did not understand, or at least did not state, the fundamental principles which should control the whole field of contracts and payments secured by duress.

A. DURESS AND "REALITY" OF CONSENT

Some consideration of the general theory of duress is necessary at the outset. We have talked of contracts signed under duress as lacking "real consent."³ This seems to be a manner of speech rather than a reasoned conclusion. When I feel that I must choose between having a bullet lodged in my head and signing a contract, my desire to escape the bullet would hardly be described as unreal or merely apparent; and the signing of the contract is simply the expression of that fear of death. To call such a consent "unreal" is to characterize the normal human desire to continue alive as mere pretense. The father who pays a ransom to his daughter's kidnappers does so because he fears he will lose his daughter. Of the only two developments which he then foresees with assurance, his choice is for payment; and, *on the assumption on which he acts*, that he must choose between payment and tragedy, his choice is certainly an expression of the most genuine, heartfelt consent—and often a very happy consent indeed.

What we meant by calling such consent unreal, was that it would not have been given except for the unpleasant alternative. What we overlooked was that that fact has nothing to do with the reality of the consent that was given. Whether a consent is real, genuine, not artificial, depends, it seems to me, not upon the motivation behind it, nor upon whether the consent would have been given under different circumstances; it depends upon whether the consent that was expressed under the circumstances that did exist was truly felt, or was merely ostensible, running counter to the inner preference of the victim as between the alternatives actually presented to him. Faced with the

³ In both of the leading modern authorities on contract there is, in my opinion, a confusion of this concept of duress as concerned with reality of consent, and the idea that duress is consent produced wrongfully. So Professor Williston says, "... there is no doubt that the modern tendency of courts of law is to regard any transaction as voidable [for duress] which the party seeking to avoid was not bound to enter into and which was coerced by fear of a wrongful act by the other party to the transaction"; 5 WILLISTON, CONTRACTS (rev. ed., 1937) §1603, p. 4495; but a few sentences later in the same section he quotes with approval one of the most generally used tests of duress taken from a court decision, a test plainly based on the reality-of-consent doctrine: "The real and ultimate fact to be determined in every case is whether or not the party really had a choice—'whether he had his freedom of exercising his will,'" *Joannin v. Ogilvie*, 49 Minn. 564, 568, 52 N. W. 217, 218 (1892), quoted with approval in 5 WILLISTON, *op. cit.*, §1603, p. 4496. The Restatement defines duress as a wrongful act which compels "apparent assent," or a wrongful threat which precludes the exercise of "free will and judgment"; RESTATEMENT, CONTRACTS (1932) §492.

choice that was offered, the victim of duress gives a genuine consent rather than suffer the alternative consequences.

It will be suggested, however, that, at least as compared with the consent to a valid contract, the consent secured by duress is in some way less genuine, more superficial, in that the latter is the product of constraint, not of a free will, being given merely to avoid a more serious evil. As Justice Holmes has said, it is characteristic of duress that the victim makes a choice, in accordance with his own self-interest, between two evils.⁴ But a similar motivation underlies the ordinary contractual transaction. We speak of a contract as being "voluntary," the result of "free will," but it is easy to forget that a will exercises its freedom only in selecting one of several possible courses of action. I agree to pay ten cents for a loaf of bread, not because I want to give the baker ten cents, but because that's the only way I can get the bread. I am choosing between alternatives, giving up the dime or doing without the bread. If my will were completely unrestrained, I should almost certainly prefer to get the bread and also keep the money. My freedom is simply the opportunity to decide whether I will give up the ten cents, or do without the bread—to choose one of two courses, neither of which is entirely satisfactory. That is, I am "free" to select the lesser of two evils; so far as the present point is concerned, that is exactly the situation I was in when I signed the contract at the point of a gun. The unpleasant alternative to buying the bread might conceivably be death, too; yet if I were forced to surrender my last worldly possession to get food we would hesitate to call the exaction duress. Plainly most contracts that are enforced are entered into merely as a means of avoiding a less desirable alternative, hence this fact cannot be said to impair that real consent which is essential. Professor Llewellyn's statement is,

"'Agreement' does not, even today, carry any connotation of real willingness. Acquiescence in the lesser evil is all that need be understood."⁵

Such acquiescence in the lesser evil is not only all that "need be under-

⁴"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called"; *Union Pacific R. R. v. Public Service Commission*, 248 U. S. 67, 70, 39 S. Ct. 24, 25, 63 L. ed. 131, 133 (1918). Such a choice is not characteristic of those few contracts which are void for duress, instead of voidable; see *RESTATEMENT, CONTRACTS* (1932) §494.

⁵Llewellyn, *What Price Contract* (1931) 40 *YALE L. J.* 704, 728, n.49. See also Hale, *Coercion and Distribution in a Supposedly Non-coercive State* (1923) 38 *POL. SCI. QUAR.* 470; and Hale, *Force and the State; a Comparison of Political and Economic Compulsion* (1935) 35 *COL. L. REV.* 149. When enough research and analysis have been done to make the problems in the field of economic duress reasonably understandable, these two articles by Professor Hale, of Columbia University Law School, will be given the credit which they deserve for calling attention to some major errors in our ideas of contracts.

stood," it is all that usually occurs; but we don't think of it that way, so much a matter of course has it become. When we do stop to think about it, however, it is further plain that the more unpleasant the prospective alternative, the more genuine is the consent to the contract necessary to escape that alternative; in other words, that the consent to a contract resulting from duress is probably far more real than the typical contractual consent.

B. DURESS BASED ON WRONGFUL THREAT, INADEQUATE REMEDY

It seems more reasonable to say that a contract or payment secured by duress is defective not because of some difference in the nature of the consent, but because of the impropriety of the alternative presented; that is, of the pressure used. However, not every improper pressure is duress, since our legal system provides remedies which are reasonably effective in protecting the innocent against improper pressures under ordinary circumstances, and it is better to require the use of such remedies where practicable than to resort to an indiscriminate overhauling of transactions in court. The theory underlying this article is that, to constitute duress, the following elements are both essential and sufficient: (1) the transaction must be induced by a wrongful threat, (2) for which the law offers no adequate remedy, that is, no remedy which (by practical laymen's standards, not those of the common-law nor even of equity) is really sufficient to compensate for the wrong suffered if the threat should be carried out. While this analysis is believed appropriate for all forms of duress, its application to the field of economic or business compulsion alone is intended to be discussed here.⁶ Possibly there is too much uncertainty and confusion in this comparatively new field to make it safe to lay down any rule, even in such broad terms as this one. Certainly the generalization, which cannot be called original,⁷ is dangerous until the terms used are carefully defined—for it

⁶ The expression "economic compulsion" is not quite broad enough to be accurately descriptive of all the cases. The field intended to be covered includes some cases involving threats to personal reputation, and other forms of social or non-physical pressure.

⁷ The idea is at least as old as the case which seems to have originated the doctrine of duress of goods, *Astley v. Reynolds*, 2 Strange 915, 93 Eng. Rep. 939 (K. B. 1732), where the demand of the defendant to which the plaintiff yielded was admittedly wrongful, and the court said the only legal remedy available to the plaintiff, the action of trover, might not "do his business" (see case discussed below, p. 241). Old English legal classics recognized that the availability of relief for alleged duress should depend on the lack of a sufficient remedy for the wrong that was threatened, but their standards of remedial adequacy were lower than those of today. Blackstone explained that although fear of loss of life or limb was sufficient to constitute duress, "... fear of battery ... is no duress ... because ... should the threat be performed a man may have satisfaction by recovering equivalent damages: *but no suitable atonement can be made for the loss of life or limb.*" (Italics supplied.) 1 BL. COMM. *131. To much the same effect is 2 CO. INST. *483, and CO. LITT. *253 b. When modern courts treat threat of battery as duress, they are impliedly admitting that money damages is not quite

uses old phrases in a sense different from anything heretofore connected with them. But it seems worth while to state this theorem at the outset, even before definition is possible, for it should aid in understanding the cases; or, possibly, on the other hand, it is more valuable as a warning to the reader to be on his guard against the danger that the presentation of the cases will be colored by preconceived ideas.

C. EARLY RECOGNITION OF ECONOMIC INEQUALITY CALLING FOR LEGAL REDRESS: DURESS OF GOODS

The idea that courts should intervene to relieve victims of certain excessive economic pressures was not entirely strange to English jurisprudence two hundred years ago. The doctrine of duress of goods, that illegal withholding of personal property from the owner (at least when he has a pressing need for its return) is duress, originated because the courts realized the economic disability of the owner to protect himself in such circumstances. In 1732 a pledgee demanded an illegal bonus before he would surrender the pledged property. The pledgor paid the amount demanded, sued to recover the excess, and secured judgment. The court explained the payment was by compulsion, because "the owner might have such an immediate want of his goods that an action of trover would not do his business."⁸ Those words are worthy of re-reading. Two centuries of judicial opinions applying the rule as to duress of goods have not uncovered any more apt phrase for describing inadequacy of remedy than this expression—that the legal remedy available if the threat was carried out would not "do his business."

The doctrine of duress of goods, that money secured by threat of withholding goods from the owner is secured by duress, is now placed

a "suitable atonement" for that wrong. The application of the same idea to other fields of duress in modern times seems to be traceable to the following dictum: "It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." *Brumagin v. Tillinghast*, 18 Cal. 265, 272 (1861). This decision was written by Chief Justice Field of the California Supreme Court; in 1877, as Justice Field of the United States Supreme Court, he used practically the same dictum in *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. ed. 409, 410 (1877). The language has often been quoted since, and has in many cases developed an interpretation which would probably seriously disturb Mr. Justice Field.

⁸ *Astley v. Reynolds*, 2 Strange 915, 93 Eng. Rep. 939 (K. B. 1732). Possibly the doctrine is older than *Astley v. Reynolds*. In *Summer v. Ferryman*, 11 Mod. 201, 88 Eng. Rep. 989 (Q. B. 1709) the issue was raised before Chief Justice Holt as defense to a bail bond secured from a carrier by threats to goods in his possession and the defendant's attorney alleged the defense had been upheld in an earlier case. Holt rejected the argument, saying "If the goods of a stranger are in my custody and are attached, if I do not contest it, but give a bail bond, their being the goods of a stranger shall not avoid the bail bond." In the same case Justice Powell said flatly duress of goods was not a defense to liability on a bond.

beyond serious question in most common-law jurisdictions.⁹ Occasionally recovery has been denied for failure to prove that the payment was made under the influence of pressing immediate need for return of the goods;¹⁰ in other cases the courts have not insisted on positive evidence to that effect.¹¹ Some older authorities distinguish contracts thus secured from money payments thus collected; money paid under duress of goods could be recovered, since recovery would be sought in assumpsit, an action governed by equitable principles, but if an executory contract were made under such pressure it would be enforced because the enforcement action would be a simple common law suit for damages.¹² This distinction between equitable and legal defenses would probably not be generally recognized today.¹³

In these cases the threat is to seize or detain another's property without justification, an actionable wrong. If the threat should be carried out, our legal system gives the owner a right to damages, but his pressing need for immediate return, proved or assumed, would not be satisfied by resort to that remedy because of the time consumed in enforcement. Damages for the wrongful detention of a workman's tools, even if they could be made to include all the losses, tangible and intangible, caused by his inability to pursue his trade during a period of litigation, would still be poor redress for the hardships he and his family might undergo in the meantime because of loss of income. Hence, the workman is likely to feel that his only reasonable course is to pay the money demanded, get back his tools, and resort to the courts later in hope of recovering the wrongful payment.

Duress of goods, then, is explainable on the basis of the formula suggested above as applicable to duress generally, wrongful threat and

⁹ *Cobb v. Charter*, 32 Conn. 358 (1865); *Whitlock Machine Co. v. Holway*, 92 Me. 414, 42 Atl. 799 (1899); *Berger v. Bonnell Motor Co.*, 4 N. J. Misc. 589, 133 Atl. 778 (Sup. Ct. 1926); 5 WILLISTON, CONTRACTS (rev. ed. 1937) §1617; WOODWARD, QUASI-CONTRACTS (1913) §216.

¹⁰ *Karschner v. Latimer*, 108 Neb. 32, 187 N. W. 83 (1922).

¹¹ See cases cited in note 9 above.

¹² KEENER, QUASI-CONTRACTS (1893) 426, n. 2. For a recent statement setting out this distinction as established law, created by the English courts of a century ago, with such reasons as can be advanced to support it, see Winder, *Undue Influence and Coercion* (1939) 3 Mod. L. Rev. 97, 108. An American text published thirty years ago treats the distinction as a matter of "lingering doubt," citing a few cases in our courts, a minority, as in accord with the old English view; WOODWARD, QUASI-CONTRACTS (1913) §216.

¹³ *Foote v. De Poy*, 126 Iowa 366, 102 N. W. 112 (1905) (settlement procured by threat of guardianship proceedings set aside); *Criterion Holding Co. v. Cerussi et al.*, 140 Misc. 855, 250 N. Y. Supp. 735 (Sup. Ct. 1931) (bond held unenforceable because secured by threat to break contract and interfere with contractual relations with other parties); *Collins v. Westbury*, 2 Bay 211 (S. C. 1799) (duress of goods held a good defense to a bond); 5 WILLISTON, CONTRACTS (rev. ed. 1937) §1617. To the same effect are many cases where a shipper has enforced a common carrier's liability in spite of a limitation in the bill of lading which the court disregarded as procured by duress in threat to withhold rail service, discussed below, p. 243.

inadequate remedy; a threat made without justification where the legal remedy available if the threat were carried out would be so dilatory as to be inadequate to meet the needs of the victim.

D. THREAT OF UTILITY TO REFUSE SERVICE

Another situation where economic duress is always recognized results from the exaction of unreasonable terms for service by a public utility. In 1844 an English railroad was forced to refund excess freight charges collected.¹⁴ In the same year a North Carolina court reached the same conclusion as to tolls improperly required for use of a turnpike.¹⁵ When the question has come up as a problem in duress, the courts have been practically unanimous in holding such payments involuntary and recoverable,¹⁶ and also in refusing enforcement to unjustifiable limitations on a common carrier's liability in bills of lading secured by similar pressure.¹⁷ In some of the earlier cases it was argued

¹⁴ *Parker v. Great Western Ry.*, 7 Man. & G. 253, 135 Eng. Rep. 107 (C. P. 1844). In this case there was no duress of goods, the threat of the carrier being simply to refuse to receive goods for shipment; two years earlier a refund was required from a carrier who had refused to deliver goods to a consignee until excessive charges had been paid, *Ashmole v. Wainwright et al.*, 2 Q. B. 837, 114 Eng. Rep. 325 (1842).

¹⁵ *Newland v. Buncombe Turnpike Co.*, 26 N. C. 372 (1844).

¹⁶ Except where otherwise indicated, the cases involve railroad service. *Mobile & Montgomery Ry. v. Steiner etc. Co.*, 61 Ala. 559 (1878); *Chicago v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803 (1905) (water); *News Publishing Co. v. Associated Press*, 114 Ill. App. 241 (1904) (news service); *Panton et al. v. Duluth Gas and Water Co.*, 50 Minn. 175, 52 N. W. 527 (1892) (water); *Young v. Brooks*, 56 S. W. (2d) 794 (Mo. App. 1933) (gas); *St. Louis Brewing Assoc. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911 (1897) (water); *Piedmont Power Co. v. L. Banks Holt Mfg. Co.*, 183 N. C. 327, 111 S. E. 623 (1922) (electric power); *Barnes Laundry Co. v. Pittsburgh et al.*, 266 Pa. 24, 109 Atl. 535 (1920) (water); *West Virginia Transportation Co. v. Sweetzer*, 25 W. Va. 434 (1885); and cases cited in Note (1932) 79 A. L. R. 655, 667. *Contra*: *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 85 N. E. 200 (1908) (telephone service); *New Orleans and N. E. R. R. v. Louisiana Construction Co.*, 109 La. 25, 33 So. 51 (1902) (wharfage service). North Carolina cases which denied recovery in similar situations may also be opposed, but the decisions do not clearly take the stand that the exactions were wrongful, or in excess of what was properly due in the first instance: *Bernhardt v. Carolina etc. R. R.*, 135 N. C. 258, 47 S. E. 427 (1904) (consignee could have avoided switching charge by what court apparently considered a minor inconvenience); *Mount Pleasant Mfg. Co. v. Cape Fear, etc.*, R. R., 106 N. C. 207, 10 S. E. 1046 (1890). Of course, if payment is made after the service is completed, for instance after delivery of freight, it is made after pressure has ceased and is properly treated as voluntary, *Hardaway v. Southern Ry.*, 90 S. C. 475, 73 S. E. 1020 (1912). But if the shipper is likely to need similar services in the future, fear of subsequent trouble may effectively coerce the payor, as was recognized in *Lafayette & Indianapolis R. R. et al. v. Pattison*, 41 Ind. 312 (1872), and *Peters et al. v. Marietta & Cincinnati R.R.*, 42 Ohio St. 275 (1884), but apparently not in *Kenneth et al. v. South Carolina R. R.*, 15 Rich. L. 284 (S. C. 1868).

¹⁷ *New York Central R. R. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627 (U. S. 1873); *Little Rock & Ft. Smith Ry. et al. v. Cravens*, 57 Ark. 112, 20 S. W. 803 (1892); *Lake Erie & W. R. R. et al. v. Holland*, 162 Ind. 406, 69 N. E. 138 (1903); *St. Louis & S. F. R. R. v. Gorman*, 79 Kan. 643, 100 Pac. 647 (1909); *Parker v. Atlantic C. L. R. R.*, 133 N. C. 335, 45 S. E. 658 (1903); *Nashville C. & St. L. R. R. et al. v. Stone et al.*, 112 Tenn. 348, 79 S. W. 1031 (1903);

that there could be no recovery of the excess paid without proof of tender of the proper charge. This would, however, put on the individual customer the responsibility of determining what the legal fee was, or what was a reasonable charge, merely for the purpose of making a tender which would probably have been futile. Consequently the courts at once rejected the doctrine as one which would have practically nullified the right of recovery, and it has never played any important part in the cases.¹⁸ Almost the same can be said as to the argument that protest must accompany the improper payment to establish the right to a refund. Lack of protest has been of weight in a few cases,¹⁹ but the matter is now seldom referred to except in occasional statements that protest is unnecessary.²⁰

In these decisions the courts talk much of the inequality of the parties as a weighty argument for relief.²¹ The "life or death" of the shipper's business depends upon railroad service²² and this means such service must be prompt. In other words, resort by the shipper to legal means to secure his rights is not practicable because of the delay involved.

Missouri K. & T. Ry. v. Packers, 185 S. W. 1051 (Tex. Civ. App. 1916). *Contra*: Kansas City M. & O. R. R. v. Graham, 145 S. W. 632 (Tex. Civ. App. 1912); *cf.* Louisville & N. R. R. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314 (1890).

¹⁸ Westlake v. St. Louis, 77 Mo. 47 (1882); Parker v. Bristol & Exeter Ry., 6 Ex. 701, 155 Eng. Rep. 726 (1851). Lack of tender of the sum properly due was referred to as a reason for denying recovery of the excess paid under pressure of distress proceedings in Glynn v. Thomas, 11 Ex. 870, 156 Eng. Rep. 1085 (1856) and in Gulliver v. Cosens, 1 C. B. 788, 135 Eng. Rep. 753 (1845).

¹⁹ Apparently determinative in Monongahela Navig. Co. v. Wood, 194 Pa. 47, 45 Atl. 73 (1899); and in cases where long acquiescence or other factors tend to show absence of pressure; the lack of protest may point in the same direction; Kilbourn v. New York Cent. & H. R. R., 100 N. Y. 395, 3 N. E. 293 (1895).

²⁰ Louisville E. & St. L. Consol. R. R. v. Wilson, 132 Ind. 517, 32 N. E. 311 (1892); Heiserman v. Burlington C. R. & N. Ry., 63 Ia. 732, 18 N. W. 903 (1884); Clough v. Boston & M. R. R., 77 N. H. 222, 239, 90 Atl. 863, 871 (1914); Hilton Lumber Co. v. Atlantic C. L. R. R., 141 N. C. 171, 53 S. E. 823 (1906). Where a shipper accepts without objection a bill of lading limiting the carrier's liability there is no threat and no duress according to Cau v. Texas & P. Ry., 194 U. S. 427, 24 S. Ct. 663, 48 L. ed. 1053 (1904); but the effect of this unfortunate holding has been nullified by use of uniform bills of lading prescribed by the Interstate Commerce Commission.

²¹ See especially Heiserman v. Burlington C. R. & N. Ry., 63 Ia. 732, 18 N. W. 903 (1884), and McGregor *et al.* v. Erie Ry., 35 N. J. L. 89 (Sup. Ct. 1871). In one case the court seemed to feel that since the payor was a mighty railroad there was no "inequality of footing" between it and the defendant corporation, so that the reasonable conclusion was that the payment was not recoverable; New Orleans etc. R. R. v. Louisiana Construction etc. Co., 109 La. 25, 33 So. 51 (1902). So far as inequality is to be considered, it is inequality in the particular situation; and the corporate Goliath might have been in such immediate need of the wharfage rights there involved as to put it quite at the mercy of an unconscionable David in an advantageous position.

²² Chicago & Alton R. R. v. Chicago Vermillion etc. Coal Co., 79 Ill. 121 (1875); Louisville, Evansville, St. L. C. R. R. v. Wilson *et al.*, 132 Ind. 517, 32 N. E. 311 (1892).

"He can not afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading . . . the carrier presents. . . . In most cases, he has no alternative but to do this or abandon his business."²³

The threat of cutting off the water supply to plaintiff's store for failure to pay excessive water rates, involving the possibility of loss of use of the premises until the fact that the charge was excessive could be established by law, subjected the plaintiff, as a Minnesota court said, to the danger of "a kind of execution in advance of judgment."²⁴ In allowing recovery of excessive freight charges exacted, the following language was used in a Vermont decision as explaining the meaning of equality in such cases.

"To make the payment a voluntary one, the parties should stand upon an equal footing. . . . But where one has the advantage of the other, *where delay or a resort to the law is indifferent to the one but may produce serious loss and injury to the other*, it is unconscionable to press such advantage to the obtaining of unjust demands. That is extortion."²⁵ (Italics supplied.)

That is, the inequality between the parties consists in this combination of factors: the shipper is entitled to carrier service, and the threat to withhold it to secure unreasonable rates or unreasonable contract terms is wrongful; but resort to legal processes to enforce the shipper's right is likely to cause the shipper such disproportionate loss because of the delay, as to be more burdensome than submission to the carrier's improper demands. A concise statement of the same idea is to say that the shipper's legal remedy against the wrongful threat is inadequate because of delay, insufficient to his protection, will not "do his business."

"Whether he [the shipper] gives the carrier his patronage or does not matters but little to the latter; but whether the carrier transports his property promptly and safely will perhaps determine whether he succeeds or fails in business. If he declines the terms proposed and refrains from shipping, he has no adequate redress. If he sues to recover his damage, he is subjected to all the delay and expense incident to such litigation, and at last recovers only what the law regards as his damage, and must himself stand, what would generally be much greater, the loss which the law deems too remote to estimate as damage."²⁶

"Plaintiffs could *compel* the defendant to carry their freight only by a resort to the courts and at the end of litigation. The history of these suits, begun in 1867, and just ending in 1884, shows that plaintiffs could not obtain *speedy* and *adequate* redress, such as would save their busi-

²³ New York Central R. R. v. Lockwood, 17 Wall. 357, 379, 21 L. ed. 627, 640 (U. S. 1873).

²⁴ Panton *et al.* v. Duluth Gas & Water Co., 50 Minn. 175, 52 N. W. 527 (1892).

²⁵ Beckwith v. Guy Frisbie & Sons, 32 Vt. 559 (1860).

²⁶ Little Rock & Ft. S. Ry. v. Cravens, 57 Ark. 112, 120, 20 S. W. 803, 805.

ness and prevent loss, simply by a resort to the courts to enforce legal rights. And as defendant would not accept the payment of legal rates, and required the full payment of its illegal charges, the plaintiffs . . . were forced to pay them. Their choice and volition were compelled. Such payments were not voluntary."²⁷ (*Italics in the original.*)

There is not much litigation in this field of duress by utilities of late years, but there is no longer much doubt about the rules applicable. Payments or contracts secured by public utilities through wrongful threats to withhold their services are recognized as involuntary, because recourse to legal redress is not a practicable means of securing the public against such wrongs. The legal remedy against the wrong threatened is, without any serious dissent, treated as inadequate because of the delay involved in enforcing it. Freight service or telephone service in modern business is a daily necessity; waiting for such service a year—or a week—for a court decision would be fatal to the enterprise. The situation is one where delay in enjoyment of the right is equivalent to loss of the right. The only practicable course is to surrender so far as necessary to get the service, and seek later relief; and the courts approve this course, allowing subsequent recovery on the theory of economic duress.

It is settled then, that the threat of illegal retention of goods, or of illegal withholding of public utility services, is relievable duress because the threat is wrongful, and the only available legal remedy is inadequate to protect the victim because of the delay involved in enforcement. Here agreement on the subject of economic duress ends; the other fields are hotly contested; but the doctrine has been urged, and approved, in a surprising number of cases.

E. THREATS BY GOVERNMENTAL OFFICERS OR AGENCIES

1. *Collection of Improper Fees by Threat to Enforce Illegal License Ordinance*

Many cases of alleged duress have arisen out of pressure exerted by public officers or agencies. Property taxes have been collected under a statute later held invalid; the taxpayer's right to recover, in absence of a statutory remedy, probably depends on whether the payment was involuntary; this situation has already been investigated and discussed in an article by Professor Field,²⁸ and is not intended to be covered here. But there are other collections by governmental authority which may be subsequently found improper. If a license fee or similar payment has been exacted by a public officer as a condition to some business

²⁷ *Peters, Ricker & Co. v. Marietta & Co. R. R.*, 42 Ohio St. 275, 285 (1884).

²⁸ Field, *The Recovery of Illegal and Unconstitutional Taxes* (1932) 45 HARV. L. REV. 501.

activity, and the collection is later held illegal, the question of recovery is often considered a problem in duress. The decisions are nicely divided on the question of whether the payment made under such circumstances is or is not voluntary.

The reasons most frequently expressed for allowing recovery are:

(1) Payment was involuntary because induced by danger of complete stoppage of the victim's business²⁹ or serious interference with it,³⁰ or by threat of arrest³¹ which is really the same argument since the arrest could be avoided by ceasing the business activities in question. (2) Payment was involuntary because of the inequality in the position of the parties.³² (3) Payment was involuntary because of the lack of any legal protection against the threatened wrong which was reasonably adequate to the needs of the situation.³³ These three arguments are, on

²⁹ *Seattle Brewing & Malting Co. v. A. J. Campbell, Treas.*, 17 Hawaii 364 (1906); *Chicago v. Waukesha Imperial Spring Brewing Co.*, 97 Ill. App. 583 (1901) (deprivation of protection of laws and use of courts called equivalent to business stoppage); *Harbeck v. Sioux City*, 199 Ia. 763, 202 N. W. 507 (1925); *Scottish Union & National Insurance Co. v. Herriott*, 109 Ia. 606, 80 N. W. 665, (1899); *American Mfg. Co. v. St. Louis*, 192 S. W. 399 (Mo. 1916); *Simmons Hardware Co. v. St. Louis*, 192 S. W. 394 (Mo. 1916); *American District Telegraph Co. v. City of New York et al.*, 213 App. Div. 578, 211 N. Y. Supp. 262 (1st Dept. 1925), *aff'd mem.* 243 N. Y. 565, 154 N. E. 607 (1926) (threat to exclude plaintiff's wires from streets and subways); *Ratterman v. American Express Co.*, 49 Ohio St. 608, 32 N. E. 754 (1892) (threat to impose penalties on victim's employees and on other carriers who co-operated with delinquent); *Toledo v. Buechele*, 10 Ohio C. D. 280, 19 Ohio C. C. 127 (1899); *Olympia Brewing Co. v. State of Washington*, 102 Wash. 494, 173 Pac. 430 (1918).

³⁰ *Robertson v. Frank Brothers Co.*, 132 U. S. 17, 10 S. Ct. 5, 32 L. ed. 236 (1889) (payment excessive duty to avoid onerous penalty); *United States v. Holland American Line*, 205 Fed. 943 (S. D. N. Y. 1913), *aff'd without discussion of the point*, 212 Fed. 116 (C. C. A. 2d, 1914), *aff'd mem.* 235 U. S. 686, 35 S. Ct. 203, 59 L. ed. 424 (1914) (threat to detain individual vessels of shipper in port for several weeks or months); *Gentry Bros. v. Lincoln*, 146 Ill. App. 60 (1908) (immediate threat to stop circus parade, ultimate threat to whole circus performance); *Cunningham v. Munroe*, 15 Gray 471 (Mass. 1860) (threat to prevent landing of immigrants from ship); *see Deshong v. City of New York*, 176 N. Y. 475, 479, 68 N. E. 880, 881 (1903) (threat to prevent land-owner from building vault under street).

³¹ *Harvey and Boyd v. President and Board of Trustees of Town of Olney*, 42 Ill. 336 (1866); *Chicago v. Klinkert*, 94 Ill. App. 524 (1900); *Douglas v. Kansas City*, 147 Mo. 428, 48 S. W. 851 (1898); *Newmann v. LaCross*, 94 Wis. 103, 68 N. W. 654 (1896).

³² *Robertson v. Frank Brothers Co.*, 132 U. S. 17, 10 S. Ct. 5, 33 L. ed. 236 (1889); *Swift and Courtney and Beecher Co. v. United States*, 111 U. S. 22, 4 S. Ct. 244, 28 L. ed. 341 (1884); *Callaway v. Milledgeville*, 48 Ga. 309 (1873); *County of LaSalle v. Simmons*, 10 Ill. 513 (1849); *Buckley v. Mayor of New York*, 30 App. Div. 463, 52 N. Y. Supp. 452 (1st Dept. 1898), *aff'd mem.* 159 N. Y. 558, 54 N. E. 1089 (1898); *American Exchange Fire Ins. Co. v. Britton*, 8 Bos. 148 (N. Y. 1861); *Hazleton v. McGroarty*, 6 Kulp 533 (Pa. 1892); *American Steamship Co. v. Young*, 89 Pa. 186 (1879), *aff'd* 105 U. S. 41, 26 L. ed. 966 (1879); *Marshall v. Snediker*, 25 Tex. 460 (1860).

³³ *Union Pacific R. R. v. Public Service Commission of Missouri*, 248 U. S. 67, 39 S. Ct. 24, 63 L. ed. 131 (1918); *Chicago & E. I. Ry. v. Miller*, 309 Ill. 257, 140 N. E. 823 (1923); *Buckley v. Mayor of N. Y.*, 30 App. Div. 463, 52 N. Y. Supp. 452 (1st Dept. 1898), *aff'd mem.* 159 N. Y. 558, 54 N. E. 1089 (1898); *Ratterman v. American Express Co.*, 49 Ohio St. 608, 32 N. E. 754 (1892); *Hazleton v. McGroarty*, 6 Kulp 533 (Pa. 1892); *Minneapolis, St. Paul*

analysis, one; and the third statement appears to get closest to the roots of the controlling idea. The danger of arrest or interference with business is only temporary, for the victim could by litigation remove the illegal obstacle, for of course we are interested only in cases in which the law relied on by the authorities was invalid. In other words, were it not for the delay in court procedure, the victim's business would not have suffered any substantial interference; delay makes the legal remedy inadequate. The second reason alleged, inequality of the parties, appears to mean the same thing. Holding excessive collections for stamp taxes involuntary and recoverable because of inequality of the parties, the Supreme Court said:

"The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria*."³⁴

That is, the inequality derives from the fact that resistance by the private enterprise would require stoppage of business, *until the courts could act*, so that if the litigation delay were not serious, the parties would be on practically equal terms.

Where inadequacy of the remedy has been specified as the reason for holding such payments involuntary, such inadequacy has sometimes been expressly charged to delay;³⁵ but often there is no necessary stoppage while the matter is in court. If a municipality in enforcing a license statute proceeds by arresting the employees of the unlicensed business, there is obvious stoppage until the case is decided; but if there is merely an arrest of the proprietor, and he could be released on a reasonable bond, then he could carry on his business pending the decision, subject to the risk of a criminal liability to be later established. Or there may be economic compulsion by public officials without threat of any direct interference by police authority with a particular activity. The Union Pacific Railroad planned a bond issue, and to assure its legality needed an authorization certificate from every state it touched. Of its 3,500 miles of track, less than one mile was in Missouri; and practically all of its improvement expenditure traceable to this bond issue, and of its property generally, were also outside of Missouri. The

& S. Ste. Marie Ry. v. Railroad Commission of Wisconsin, 183 Wis. 47, 197 N. W. 352 (1924).

³⁴ Swift and Courtney and Beecher Co. v. United States, 111 U. S. 22, 29, 4 S. Ct. 244, 247, 28 L. ed. 341, 343 (1884).

³⁵ Buckley v. Mayor of New York, 30 App. Div. 463, 52 N. Y. Supp. 452 (1st Dept. 1898), *aff'd mem.* 159 N. Y. 558, 54 N. E. 1089 (1898); Ratterman v. American Express Co., 49 Ohio St. 608, 32 N. E. 754 (1892); Hazleton v. McGroarty, 6 Kulp 533 (Pa. 1892).

Missouri Public Service Commission demanded a fee of over \$10,000 for its certification, basing the charge upon the whole bond issue. After the sum was paid by the railroad, under protest, the courts held the charge so exorbitant as to be an unlawful interference with interstate commerce and the payment recoverable as made under duress. The road could have issued the bonds without making any payment, possibly after tendering a reasonable fee for Missouri certification, and put them on the market, relying on its ability to establish the illegality of the demand, and hence the legality of the issue; but investors would hardly buy (except possibly at a low speculative figure) until the legality of the bond issue was cleared up. There was here no threat of any specific interference with the issue by the state; but the Supreme Court, in holding the payment recoverable, explained that the road was not "bound to take the risk" that the bond issue would be held illegal if the certificate was withheld for failure to pay the exorbitant fee demanded. In other words, I should say it was held that the remedy by court action (issuing the bonds without paying the fee, and resisting the subsequent proceeding attacking their legality) was inadequate because of uncertainty.³⁶ The same situation has brought the same result elsewhere.³⁷ These cases also indicate that there may be duress without danger of anything like a complete stoppage of business. In none of the three cases on railroad bond issues³⁸ was it shown that the issue was anything more than a "commercial necessity"; this phrase was used, and apparently deemed quite sufficient, without further emphasis or elaboration, to justify holding the interference duress, in the last two decisions on this point.³⁹

But these are the cases allowing recovery of improperly collected license fees; there are as many decisions, in probably more jurisdictions, opposed to recovery, declaring that such payments should not be treated as resulting from duress. The argument which seems to have controlled most of these decisions is that if the victim had resisted in court from the outset he would have been successful—in other words, that the legal remedy was adequate. The thought is not always phrased the same, but it comes down essentially to that idea.⁴⁰ Massachusetts authorities,

³⁶ *Union Pacific R. R. v. Public Service Commission of Missouri*, 248 U. S. 67, 39 S. Ct. 24, 63 L. ed. 131 (1918) (delay was also an alternative here, but the court did not refer to it).

³⁷ *Chicago and E. I. Ry. v. Miller*, 309 Ill. 257, 140 N. E. 823 (1923); *Minneapolis, St. Paul and S. Ste. Marie Ry. v. Railroad Commission of Wisconsin*, 183 Wis. 47, 197 N. W. 352 (1924).

³⁸ See notes 36 and 37 above.

³⁹ See note 37 above.

⁴⁰ *Southern Ry. v. Mayor and Aldermen, City of Florence*, 141 Ala. 493, 37 So. 844 (1904); *Maxwell v. County of San Luis Obispo*, 71 Cal. 466, 12 Pac. 484 (1886); *Mayor and Aldermen of Savannah v. Feeley*, 66 Ga. 31 (1880); *Baldwin v. Village of Chesaning*, 188 Mich. 17, 154 N. W. 84 (1915); *M. L. Shoemaker & Co. v. Board of Health of Gloucester City*, 83 N. J. L. 425, 85 Atl. 312 (Sup. Ct. 1912); *Mays v. Cincinnati*, 1 Ohio St. (N.S.) 268 (1853); *Cauvin et al. v.*

acting under a statute already held valid in state courts, demanded payment of \$280 "head money" from a ship's master who had landed a boatload of immigrants. The master refused to pay, whereupon his ship was attached for the \$3,000 penalty provided for in the statute. He then paid the \$280 under protest, declaring his intent to seek recovery. The statute was later held invalid; but it was said the payment must be treated as voluntary, since the master did not resist the attachment suit,⁴¹ a reason which indicates that the court felt defense in the attachment action a remedy sufficient to protect the victim. This decision is hard to defend. The court said the only way the victim could protect his right to withhold the \$280 was to risk being held criminally liable for a \$3,000 penalty, under a statute already held valid, and to carry that risk during a period of litigation when he would be deprived of his ship by attachment (unless he could release it by an attachment bond); and this hazardous, dilatory remedy was treated as all the protection he was entitled to, all that was necessary to deprive him of the claim of duress. This is an extreme example of a large group of cases which, according to the present analysis, in effect take the position that delay and uncertainty do not make inadequate the victim's remedy by initial resistance in court to collection of illegal license fees and similar charges by local government units.

There are other points less frequently referred to and usually less important in these decisions on both sides of the question. It must appear that the payment resulted from wrongful pressure; and occasionally, even where there is such pressure in the background there is room for doubt about its having had much effect. The payment may come so readily, with such complete absence of any sign of protest or reluctance, that it is completely dissociated from any suggestion of duress as a cause. In several cases, where the initiative has come from the licensee, the courts have refused to find duress, saying there was no threat,⁴² although some threat would be at least implied in the license ordinance itself; possibly a more defensible explanation is that wrongful

Mayor and City Council of Nashville, 62 Tenn. 453 (1874); *Houston v. Feezer*, 76 Tex. 365, 13 S. W. 266 (1890).

⁴¹ *Benson et al. v. Monroe*, 61 Mass. (7 Cush.) 125 (1851).

⁴² *Tatum v. Town of Trenton*, 85 Ga. 468, 11 S. E. 705 (1890); *Town of Tupelo v. Beard et al.*, 56 Miss. 532 (1879); *Wolff v. City of New York*, 92 App. Div. 449, 87 N. Y. Supp. 214 (1st Dept. 1904), *aff'd mem.* 179 N. Y. 580, 72 N. E. 1153 (1904) (court said no improper threat made; victim apparently understood threat was based on lack of permit to construct vault and secured such a permit, where it may reasonably and rightfully have been based on lack of permit to repair existing vault); *Wood v. Mayor, etc. of New York*, 25 App. Div. 577, 49 N. Y. Supp. 622 (1st Dept. 1898) (holding not quite clear; plaintiff seems to have applied for permit to build vault under street in front of three adjoining lots, and expected to get it for lower fee because he had already a vault in front of one of the lots; court said if he needed no permit as to the old vault, he need not have applied for permit as to the other two lots).

pressure was not shown to have induced the payment. In one probably unique case a 2% gross earnings tax was levied on foreign insurers in lieu of all other taxes as a condition of doing business in the state. The insurers were in favor of the plan, presumably because it saved them money. When this tax was later held invalid, recovery was denied.⁴³ There was a threatened wrong here, and possibly an inadequate remedy, but these did not induce the payment, which resulted directly from the insurers' hope to save on their taxes. Plainly there was no good reason for allowing recovery in this case, especially since the insurer-payors probably escaped other tax obligations which would have been imposed on them if this particular statute had not been passed. In another case, however, where it was said there was no duress because no threat was made, the court uses this language to describe the facts and explain its decision:

"In 1906 one of defendant's policemen called on plaintiff at his dancing school and asked to see his license. Plaintiff stated that he did not have a license. The policeman told plaintiff to go to the Mayor's office and get one; that he (plaintiff) must have a license to run a dancing school. . . . It is observed that plaintiff was not told that he must stop running the dancing school or he would be arrested—not a word about stopping the school; not a word about interfering with the school; not a word about the arrest of the plaintiff; not a word as to consequences of failing to obtain a license; no interference with the running of the school; . . . The claim, duress, has no foundation whatever in what the policeman actually said to the plaintiff, but rests upon the claimed inferences that what was said implied the threat that unless a license was obtained heavy penalties provided in the ordinance would be incurred, or that some steps would be taken to prevent the running of the school. It is clear that there can be no claim made that the payments were made by any coercion in fact."⁴⁴

Probably most Americans, familiar with policemen's English, would think that when a police officer told the plaintiff he had to have a license to operate, it meant clearly that arrest or some criminal penalty would result from disregard of the admonition. But the statement quoted above as to duress was dictum, for the decision went on to hold the ordinance valid.

According to some authorities there must be not only a threat made, but danger of immediate execution of the threat.⁴⁵ Thus if a tax collector threatens to have a warrant issued unless payment is made, but the tax collector would have to go to some other officer to procure a

⁴³ *Yates v. Royal Insurance Co.*, 200 Ill. 202, 65 N. E. 726 (1902).

⁴⁴ *Conley v. Buffalo*, 65 Misc. Rep. 100, 119 N. Y. Supp. 87, 88 (Sup. Ct. 1909).

⁴⁵ *Helena v. Dwyer*, 65 Ark. 155, 45 S. W. 349 (1898); *Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256 (1902); *City of Jackson v. Newman*, 59 Miss. 385 (1882).

warrant, it has been said there was no duress.⁴⁶ And where one person was both city collector and chief of police, the fact that payment was made to him in his capacity as the city collector, and that in such capacity he had no authority to make arrests, was pointed out along with the fact that no threat was made, as indicating there was no duress.⁴⁷ This argument as to the necessity of imminent danger of execution of the threat, which is severely criticized by some decisions,⁴⁸ is probably a carry-over from the rule as to recovery of illegally collected property taxes, which, in some jurisdictions, is made to depend on the immediacy of the danger of loss of the property.⁴⁹ At any rate the decisions are better explained by saying that even if there was wrongful pressure and inadequate legal protection against it, these factors were not a substantial cause of the payment.

A long delay in seeking a refund may reasonably be regarded as laches fatal to the right of refund, especially if no protest accompanied the original payment.⁵⁰ If a governmental unit can be required to make refunds on demands first made in court five years after it has made collections, its finances may be seriously crippled.

Finally the presence or absence of protest is treated in some decisions as a matter of controlling importance.⁵¹ An expression of protest may afford some evidence that the victim made the payment only because of the wrongful pressure. But in many cases persistent efforts of the victim to avoid the payment or other circumstances may point clearly to the same conclusion; and, on the other hand, an express protest may be a mere formality not indicative of any genuine resistance by the payor. The express protest is helpful as a clear and timely notice to the payee of the possibility of a subsequent refund claim. There is good authority to the effect that protest is not essential to relievable duress.⁵²

Two factors probably influence these decisions, refusing recovery of

⁴⁶ *Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256 (1902).

⁴⁷ *Helena v. Dwyer*, 65 Ark. 155, 45 S. W. 349 (1898).

⁴⁸ *Hill v. District of Columbia*, 18 D. C. (7 Mackey) 481 (1889); *American Mfg. Co. v. St. Louis*, 192 S. W. 399 (Mo. 1917).

⁴⁹ To show compulsion in payment of a tax it is necessary to prove, not only that a tax warrant was issued, but that steps were taken to execute it; *Field, Recovery of Illegal and Unconstitutional Taxes* (1932), 45 HARV. L. REV. 501, 526.

⁵⁰ *Fuselier v. St. Landry Parish*, 107 La. 221, 31 So. 678 (1902).

⁵¹ *Northwestern Union Packet Co. v. St. Paul*, 18 Fed. Cas. No. 10,346 at 412 (C. C. D. Minn. 1875); *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458 (1898) (protest relied on as indicating payment involuntary); *Ligonier v. Ackerman*, 46 Ind. 552 (1874); *Fuselier v. St. Landry Parish*, 107 La. 221, 31 So. 678 (1902); *Baldwin v. Village of Chesaning*, 188 Mich. 17, 154 N. W. 84 (1915); *Pardue et al. v. Absher et al.*, 174 N. C. 676, 94 S. E. 414 (1917); *Robinson v. City Council of Charleston*, 2 Rich L. 317 (S. C. 1846).

⁵² *Swift and Courtney and Beecher Co. v. United States*, 111 U. S. 22, 4 S. Ct. 244, 28 L. ed. 341 (1884); *Chicago v. Sperbeck*, 69 Ill. App. 562 (1897); *Olympia Brewing Co. v. State of Washington*, 102 Wash. 494, 173 Pac. 430 (1918).

illegal license fees paid, more than appears in the words of the courts. One is the legal proverb that every one is presumed to know the law, and the derivative rule, that no recovery can be had for a mistake of law. In many of these cases where there was no stoppage of business, if the citizen had been absolutely certain that the law in question was, and would be found to be, invalid, he would not have made any payment under it; to that extent the payment was influenced by a mistake of law. But such absolute certainty is largely an academic concept—is rarely found except in the law school classroom and in law review articles. Neither lawyers nor courts are blessed with any such infallibility, and both are gradually coming to a realization that it should not be expected of laymen. The second factor that very likely plays a strong but silent part in these cases is sympathy with the financial needs of the local government, viewed as of the time of the suit for recovery.

It might reasonably be claimed that the payor's right to recover overpayments made to governmental agencies should not depend on duress—that the public authorities should not be judged by the standard applied to the private individual, who is allowed to retain all he can get into his hands without improper pressure. Possibly the public official's right to retain should be measured by his right to collect in the first instance. At any rate public policy affords a strong argument which has been consistently overlooked for liberal recovery rights to the citizen who has made a payment required by an enactment later held invalid. When an enactment of doubtful validity affects a citizen, he must decide whether he will comply with it temporarily, until the courts have passed on it, or whether he will disregard it temporarily. Is it not clear that public policy is better served by the citizen who decides to comply temporarily—that this is the course which should be encouraged? Yet the opposite conduct has been fostered by the decisions of many courts in this field. The doctrine of economic duress encourages temporary compliance with the demand in doubtful cases, because it provides ultimate redress if the doubt is resolved in favor of the compliant. It is true, as a California court said,⁵³ that the party faced with a demand for a license fee under a statute which provided no means for collection other than a civil action, could test out the validity of the law in such litigation before paying out any money; but he could do so only at the risk of criminal liability for violation of the law. After the enactment has been found invalid, to deny a refund of the payment made is to penalize the citizen who has shown a tendency to err in the direction of over-much respect for the statute.⁵⁴ The courts so denying

⁵³ *Maxwell v. County of San Luis Obispo*, 71 Cal. 466, 12 Pac. 484 (1886); accord *Brumagin v. Tillinghast*, 18 Cal. 265 (1861) (tax case).

⁵⁴ *Catoir v. Watterson*, 38 Ohio St. 319 (1882).

the refund are in effect proclaiming that the individual, to protect himself in such a situation, must be bold enough and selfish enough to think more of his own property rights than of the public interest in avoiding any breach of the criminal law; he must, in all doubtful cases, defy the public authorities from the beginning. It might well be recognized as essential to sound public policy to allow recovery, under the rules of economic compulsion or some other rule, in all cases where the victim has yielded to an illegal demand of the state.

2. *Collection of Overcharges by Threat to Refuse Services of Public Officer*

Where a register of deeds, court clerk or other public officer has insisted upon being paid fees in excess of those allowed by law for filing conveyances, examination of records, or other public services, recovery of the surplus has always been allowed.⁵⁵ Wrongfulness of the threat, expressed or implied, to withhold public services, is plain. Usually, mandamus would lie to require the officer to perform for the proper charge. The decisions do not often refer to the adequacy of this remedy; but sometimes there is reference to the delay that would be involved as a reason for not insisting on resort to that procedure.⁵⁶

3. *Threats of Public Officers to Repudiate Contract*

Federal and state officers are aware of the difficulties in the way of legal action against the government; there is the problem of securing the consent of the sovereign to be sued, and sometimes in addition the problem of securing a legislative appropriation to pay a judgment secured in favor of the claimant. Neither obstacle is today so serious as it was formerly, but they have not been eliminated. When public officials seek modification of government contracts they know well the effectiveness of their simple threat to refuse performance on the contract; and they do not always hesitate to use this abnormal pressure. Settlements thus procured on contract claims arising out of the Civil War were upheld; the federal courts treated as voluntary a full release given by a contracting party to a governmental agency for merely partial payment of the amount due, when the only other course available

⁵⁵ *Trower v. City and County of San Francisco*, 152 Cal. 479, 92 Pac. 1025 (1907) (fees for filing inventory in decedent's estate); *Lum v. McCarty*, 39 N. J. L. 287 (1877) (fees for examining public records); *Townshend v. Dyckman*, 2 E. D. Smith 224 (N. Y. 1853) (five cent fee charged to examine records of conveyances, etc.); *Robinson v. Ezzel*, 72 N. C. 231 (1875) (fee for recording deed); *Alston v. Durant*, 2 Strob. L. 257 (S. C. 1848) (fee paid to sheriff for recovery of lost slave); *Schafer v. Giese et al.*, 135 Wash. 464, 238 Pac. 3 (1925) (fee paid sheriff for care of mortgaged goods); see *Walker v. Ham*, 2 N. H. 238 (1820) (fee paid for service of process).

⁵⁶ *Trower v. City and County of San Francisco*, 152 Cal. 479, 92 Pac. 1025 (1907); *Schafer v. Giese et al.*, 135 Wash. 464, 238 Pac. 3 (1925).

was litigation against the government.⁵⁷ It was immaterial that the payment made was less than the officials admitted to be due.⁵⁸ For the last sixty years, however, the opposite result has been reached consistently; releases or modification agreements forced by threat of a public agency to repudiate its contract and leave the other party to action against the sovereign under the seriously disadvantageous circumstances usually attending such lawsuits, are bad for duress.⁵⁹ In these cases, the threat made was plainly unjustifiable, and in most of them inadequacy of the remedy is expressly referred to as an important factor.

The claim of economic compulsion by government officers has arisen in many other types of cases; but those discussed above represent the more common problems in the field and explain the thesis that the proper tests of such compulsion are a wrongful threat, which if carried out would leave the victim without reasonably sufficient redress for the wrong.

F. THREAT TO BREAK A CONTRACT⁶⁰

1. *Refusal to Pay Money Due*

Private individuals are also aware of the effectiveness in some situations of a threat to break a contract. In some contractual dealings, the two parties cannot always keep abreast of each other in performance as the work progresses. Inequalities of investment in preparation and performance, or other inequalities between the parties, create situations

⁵⁷ *Silliman et al. v. United States*, 101 U. S. 465, 25 L. ed. 987 (1880); *Mason v. United States*, 17 Wall. 67, 21 L. ed. 564 (U. S. 1873); *United States v. Child et al.*, 12 Wall. 232, 20 L. ed. 360 (U. S. 1871).

⁵⁸ *United States v. Child et al.*, 12 Wall. 232, 20 L. ed. 360 (U. S. 1871).

⁵⁹ *Freund et al. v. United States*, 260 U. S. 60, 43 S. Ct. 70, 67 L. ed. 131 (1922); *United States v. Lawson*, 101 U. S. 164, 25 L. ed. 860 (1880); *United States v. Ellsworth*, 101 U. S. 170, 25 L. ed. 862 (1880); *Hazelhurst Oil Mill & Fertilizing Co. v. United States*, 42 F. (2d) 331 (Ct. Cl. 1930); *James Shewan & Sons, Inc. v. United States*, 73 Ct. Cl. 49 (1932); *Horner v. State of New York*, 42 App. Div. 430, 59 N. Y. Supp. 96 (3d Dept. 1899). In two decisions the courts refused to find duress because of failure of pleading or evidence to bring the cases within the above rule; *Hartsville Oil Mill v. United States*, 271 U. S. 43, 46 S. Ct. 389, 70 L. ed. 822 (1926); *De Luca v. United States*, 69 Ct. Cl. 262 (1930), *cert. denied* 283 U. S. 862, 51 S. Ct. 36, 75 L. ed. 763 (1930). One decision within the period referred to in the text is opposed to the rule there stated; *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038 (1901).

⁶⁰ It will be noticed that the sub-titles used are not mutually exclusive. The attempt has been to classify each case on the basis of its most significant characteristic. Thus cases on threats to break a contract will also be found under "Threats of Public Officers to Repudiate Contracts," above page 254 and under "Threats between Husband and Wife," page 276 below. Further the threats of breach of contract considered here are threats directed against the other party to the contract. Pressure may be exerted on a stockholder by threat to repudiate a contract obligation owed not to him but to his corporation; *Harris v. Cary*, 112 Va. 362, 71 S. E. 550 (1911) (finding duress), *York v. Hinkle*, 80 Wis. 624, 50 N. W. 895 (1891) (refusing to find duress). These cases will be referred to in the second article planned to succeed this one on the same subject.

where one can exert considerable pressure on the other by a threat of disregard of contract obligations. A threat to break a contract is always a threat to commit a wrong (except in situations where there is a legal excuse, which are of course excluded from this discussion), and the common law allows damages for that wrong. Our courts have usually but not invariably refused to see any relievable duress in contracts or payments made under such a threat.⁶¹

Consider first a simple threat to refuse payment of money due under a contract. A release or a new contract induced by such a threat is none the less entitled to some protection as a transaction between competent parties; we do not want our courts to overturn such transactions wholesale. Something is to be said in favor of the policy of repose, protecting the security of agreements between man and man in an organized society.⁶² It is better to have parties settle their business matters finally between themselves without resort to judicial tribunals, in normal circumstances. And, even though a transaction is induced by threat to refuse to pay money due, which is a threat of a wrong, if the commonly available remedy for that wrong, an action for breach of contract, is sufficient to meet the needs of the person threatened, the transaction should not be set aside. This reasoning will apparently support many decisions where the courts refused to find relievable duress in such a threat, there being no reference to any facts showing the inadequacy, by reason of delay or otherwise, of an action for damages as a remedy.⁶³

But the same conclusion has been generally applied to situations where there was good reason to doubt the sufficiency of the protection afforded by the normal legal remedy. In the fields where the doctrine of economic duress is already established, duress of goods and duress by utilities, as explained above, the cases seem to turn on a wrongful threat and inadequate remedy; in the present group of cases, and most of those discussed hereafter, this analysis has not yet been generally accepted, or else a different test of remedial adequacy is usually applied.

Here is a debtor representing a partnership who, after computing

⁶¹ Agreements resulting from threats of public officers to repudiate contracts of the state or federal government, discussed in the preceding paragraphs, are to be understood as controlled by a well-established exception to this general rule.

⁶² Of course, the original agreement between the parties may also claim some security against the threatened breach which procured the subsequent agreement; but so far as the later agreement is valid, it should be regarded as a modification of its predecessor.

⁶³ *R. L. Crook & Co. v. The Tensas Basin Levee District*, 51 La. Ann. 285, 25 So. 88 (1899); *Golden v. Bartlett Illuminating Co.*, 114 Mich. 625, 72 N. W. 622 (1897); *Farmers' State Bank v. Day et al.*, 226 S. W. 595 (Mo. App. 1920); *Doyle v. Rector et c.* *Trinity Church*, 133 N. Y. 372, 31 N. E. 221 (1892); *Secor v. Ardsley Ice Co.*, 133 App. Div. 136, 117 N. Y. Supp. 414 (2d Dept. 1900), *aff'd mem.* 201 N. Y. 603, 95 N. E. 1139 (1911); *Earle v. Berry*, 27 R. I. 221, 61 Atl. 671 (1905). In only one of these decisions, *Doyle v. Rector, et c.*, *Trinity Church*, above, is there any clear reference to the adequacy of the remedy available as a reason for finding there was no duress.

their liability from their own records for work already completed, in one sentence, admits owing \$4,260 and offers a \$4,000 note in full settlement, adding that the creditor can take the note or sue, just as he likes. But the creditor is faced with pressing financial obligations, which have been awaiting this payment—so pressing that any considerable delay in meeting them will mean ruin for the creditor. He, accordingly, takes the \$4,000 note and gives a receipt in full; later he attacks the settlement on the ground of duress. The Michigan Supreme Court, in one of the important decisions in this field, *Hackley et al. v. Headley*, reversed the trial court and rejected the claim of duress, saying:

"In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need."⁶⁴

Inadequacy of the remedy available for a threatened wrong had little weight in that decision. The last-quoted statements seem based on the doctrine that a subjective test for duress is impracticable; this theory has been widely discarded since the above decision.⁶⁵ The other argument by the court against duress was that the debtor did not cause the

⁶⁴ 45 Mich. 569, 8 N. W. 511 (1881). In subsequent litigation the release involved in this case was held invalid for lack of consideration; *Headley v. Hackley*, 50 Mich. 43, 14 N. W. 693 (1883). Only a few months later the same court reached a decision which indicates a much more liberal attitude toward economic compulsion. A mortgage had been executed and delivered; the proceeds were in the hands of the mortgagee's local agent for delivery to the mortgagor. The agent claimed a commission from the mortgagor, and delivered the balance of the proceeds only after the mortgagor had given a receipt acknowledging the propriety of the retention of the commission. The receipt was given, but the mortgagor then brought action for the money thus retained, disavowing the receipt. The appellate court upheld a judgment for recovery, saying the receipt was secured by a species of duress; *McAllister v. Engle et al.*, 52 Mich. 56, 17 N. W. 694 (1883). In dealing with this case, defendant's attorneys did, but the Supreme Court did not, cite *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511 (1881).

⁶⁵ 5 WILLISTON, CONTRACTS (rev. ed. 1937) §1605.

embarrassing circumstances which made his threat effective. Where the debtor consciously took advantage of those circumstances, however, the fact that he did not create them should be treated as of little importance.⁶⁸ It is so in other cases of duress. When the employer whose funds have been embezzled secures repayment from the guilty employee's mother by reminding her of the danger of criminal prosecution of the son, there is relievable duress; but the employer's threat is effective because of the crime committed by the son, not because of any circumstances for which the employer is responsible. The debtor in the Michigan case knew of the creditor's financial embarrassment and threatened a wrong, a breach of contract, knowing that threat would be practically irresistible because of the circumstances.

The facts in a Texas case, *Alexander v. S. A. Trufant Commission Co.*, built up an even stronger claim for duress, but the decision was the same as in Michigan. The contract was for the sale of sixty carloads of oats to be shipped to the buyer in New Orleans. It was understood that any delay in payment by the buyer would force the seller out of business, for the seller was securing oats on limited credit to fill the contract; accordingly the contract called for prompt payment of the drafts attached to bills of lading, with subsequent settlement to be made on account of any differences between the parties as to quality or quantity of the oats. The oats were shipped; but the buyer, one of a group of New Orleans merchants fraudulently in control of the local inspection and grading service, alleged the oats were of inferior quality, and refused payment on most of the drafts. Unable to continue his business while these drafts were outstanding, the seller was forced into several contracts with the buyer as a condition of settlement, all of which contracts were here sought to be avoided on the ground of duress. Assuming that the above allegations of the seller's pleading were true, the court nevertheless held there was no duress, because the victim could have resorted to a legal remedy to enforce his contract of sale. The court said:

"If the defendant in error [buyer] violated its contract under which the grain was shipped, the plaintiff in error [seller] had a remedy at

⁶⁸ "Nor is it duress or undue influence when a party is constrained to enter into a transaction by vexation and annoyance or by force of circumstances for which the other party is not responsible. But it seems clear that if such circumstances were known and advantage taken of them by the other party a degree of pressure which would not ordinarily amount to duress, might have such coercive effect as to invalidate a transaction." 5 WILLISTON, CONTRACTS (rev. ed. 1937) §1608, citing cases; RESTATEMENT, CONTRACTS (1932) §493, Illustrations 17, 18, 19. So the claimant who finds his alleged debtor away from home in a foreign jurisdiction under circumstances which make it difficult for the latter to present his meritorious defense, and threatens suit against him there, is simply using for his own advantage the situation created by the other party; but this constitutes duress, according to a number of decisions, including one by the Michigan court, *Welch v. Beeching*, 193 Mich. 338, 159 N. W. 486 (1916). These cases will be discussed in the second article on this subject, to be published soon.

law by which he could have enforced his rights and redressed his wrongs. He was a free man, with the courts of his country opened to him, without restraint either actual or constructive, not threatened either in life, limb, liberty, or property, dealing with one who had not even the semblance of power to harm him, when he entered into the contract by which he says he was so grievously wronged. Courts in this country are not wont to lend a willing ear to the complaints of a man who shows that he has, for the purpose of obtaining a part of what is due him, voluntarily yielded his rights to one who has no power to harm him. If such complaints were favorably entertained, the man who has the courage to stand up for and maintain his rights would be placed at a serious disadvantage by any truckler who might choose to make them against him in our courts. We cannot better express our views on this point than by quoting the language used by Mr. Justice Cooley in a similar case."⁶⁷

The "similar case" referred to was *Hackley v. Headley*, and that opinion was quoted at some length by the Texas court.

The Texas decision in *Alexander v. S. A. Trufant Commission Co.* got closer to the fundamentals of the problem, according to the present analysis, than did Justice Cooley in *Hackley v. Headley*. It would take a good imagination to find in the Michigan decision any support for the idea that adequacy of the remedy is an important consideration in these cases. The Texas court discussed this problem and weakened its decision by that discussion, because of the obvious inaccuracy of some of its statements. Was the victim "not threatened . . . in . . . property," when he faced a business shutdown if he did not submit? The buyer, so far from lacking "even the semblance of power to harm" the seller, had complete power over the seller's business and knew it, and acted accordingly. The action to collect damages was available, but while it was in the courts the seller would probably have been ruined commercially, suffering a loss difficult or impossible to measure in money damages.

These decisions admit that a wrong is threatened, yet deny the victim an efficient protection against that wrong, and thus have the effect of denying him all remedy. These cases are typical of the weight of authority,⁶⁸ but there are some decisions which have treated a refusal to pay money due under a contract as relievable duress.⁶⁹ Where a seaman's wages, payable at the end of a voyage, were withheld until he

⁶⁷ 34 S. W. 182, 183 (Tex. Civ. App. 1895).

⁶⁸ *McCormick v. Dalton*, 53 Kan. 146, 35 Pac. 1113 (1894); *Cable v. Foley et al.*, 45 Minn. 421, 47 N. W. 1135 (1891); *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038 (1901); *Miller v. Coates*, 4 Thomp. & C. 429 (N. Y. 1874); *Wooley et al. v. Chicago & N. W. Ry.*, 150 Wis. 183, 136 N. W. 616 (1912). In all of these cases, unlike those in note 63, above, there was evidence of immediate need for the money, so that a suit to collect would not solve the creditor's problem.

⁶⁹ See, in addition to the cases in notes 70 to 74 below, *McAllister v. Engle et al.*, 52 Mich. 56, 17 N. W. 694 (1883).

gave a release on a disputed claim, comparatively early American decisions treated the release as of no effect.⁷⁰ Another employee was given the same relief as against a settlement agreed to, at the end of a term of employment in Panama, as the only means of collecting out of sums due him from the employer, enough to pay passage money back home; in this case the court looked on the threat used, since it in effect was a threat to keep the employee in a distant country, as analogous to duress by imprisonment.⁷¹ The United States Supreme Court refused to overturn a verdict of duress where a buyer took possession of a ranch and its cattle under a contract of sale, and then threatened to disregard the contract in order to force the seller to enter into a supplemental agreement. The seller faced ruin if the buyer defaulted. The decision by Justice Holmes is not at all clear; but the facts are more fully stated in the decision below, which also indicates that a statutory definition of duress, not quoted, was relied upon.⁷² There are also two cases on construction contracts where the courts found duress in situations somewhat like *Hackley v. Headley*. In *Fitzgerald v. Fitzgerald and Mallory Construction Co.*, the contract for railroad construction called for payment at the end of each ten-mile section, at the rate of \$11,000 a mile. After the construction company had exhausted its assets in building 150 miles without any payment, the railroad offered \$10,000 a mile, making some claim of poor workmanship, which the court seemed to think was largely pretense. The situation was further complicated because of interlocking directorates, a majority of the directors of the construction company being interested in the railroad, and this fact was set out by the court as a sufficient reason for holding the settlement invalid. But the court went on to treat duress as another adequate reason for its conclusion.

"The alleged settlement is voidable for another reason viz., it was procured under circumstances amounting to practical compulsion, which is nearly related to duress, and may be made the ground of relief either at law or equity. A payment or concession exacted will be held compulsory when made or allowed through necessity in order to obtain possession of property illegally withheld, where the detention is fraught with great immediate hardship or irreparable injury . . . [citing cases] . . . The contract, as we have seen, provides for payment on the completion of each ten miles of road. Thirty miles thereof was completed as early as July 15, 1886, and according to the statement of Mr. Mallory, under date of October 30, 1886, there was then completed 115 miles of road and, in addition thereto, 98 miles which would be finished not later than January 1 following. The only response to the repeated

⁷⁰ *Whitney v. Eager*, 29 Fed. Cas. No. 17584, at 1073 (E. D. Pa. 1841); *Thomas v. McDaniel*, 14 Johns. 185 (N. Y. 1817).

⁷¹ *Rourke v. Story*, 4 E. D. Smith 54 (N. Y. 1855).

⁷² *Snyder et al. v. Rosenbaum*, 215 U. S. 261, 30 S. Ct. 73, 54 L. ed. 186 (1909); decision below *sub nom.* *Snyder v. Stribling*, 18 Okla. 168, 89 Pac. 222 (1907).

calls upon the Missouri Pacific for money was assessments of the stock of the construction company until increasing demands had exhausted not only the resources of the company but the private funds as well of Messrs. Fitzgerald and Mallory. So that at the date of the meeting in February both the individuals named and the company were confronted by bankruptcy and financial ruin. It was under these circumstances that the construction company chose to accept payment at the rate of \$10,000 per mile instead of the contract price, rather than the alternative of an entire abandonment of the enterprise in which it was engaged, and that such action was compulsory within the rule established by the authorities can not on the record be doubted."⁷³

A later Virginia case developed out of a building contract where the land owner, while the work was in progress, defaulted on his agreed installment payments to the builder, but of course gave assurances that on completion full payment would be made. Even after the work was done he sang the same refrain for a time, protesting that he did not want any discount. Finally, however, he discovered that the builder had delayed the work in alleged breach of the contract and demanded a \$450 reduction, leaving the builder only such other alternative as the courts afforded. The builder, in desperate need of funds to pay for the labor and materials used in the project, delivered a full release in exchange for the sum offered and then sued for the balance, relying on duress to invalidate the release. The court agreed that the claim of any breach by the builder was pretense, and that the release was not the result of any agreement, but of "aggravated circumstances of constraint," which made the settlement not binding on the builder.⁷⁴

Even these minority decisions which recognize the possibility of duress in a refusal to pay money due cannot be said to give any express approval to the idea that the true test is "threatened wrong plus inadequate legal remedy." No clear reference to inadequacy of remedy appears in any of them. Yet in all of them one essential factor in the decision is the victim's pressing need for immediate payment, either because he is far from home without passage money, or is faced with labor and material claims which demand immediate satisfaction; in all of them, then, the common law remedy, an action to enforce the contract, is insufficient because of the delay involved in its assertion.

2. Refusal to Deliver Personal Property Sold

Our system of free competition or Anglo-Saxon individualism also encourages the seller to refuse delivery on his contract in order to force payment of higher prices, where the buyer is unable to supply his needs elsewhere. The payment or contract secured by these means is not the result of duress, according to practically all our decisions.

⁷³ 44 Neb. 463, 491, 62 N. W. 899, 909 (1895).

⁷⁴ Thomas *et al.* v. Brown, 116 Va. 233, 81 S. E. 56 (1914).

In the days when ice was a product of nature rather than of electricity, and a summer's supply depended almost entirely on the amount cut out of lakes and stored during the preceding winter, a firm of brewers had contracted for a year's supply of ice at \$1.75 a ton, or \$2 if scarcity developed. The brewers had chances during the spring to buy ice elsewhere, and talked to the ice company here involved about making such arrangements, but were assured that the contract would be carried out. In May, however, when it was too late to get ice elsewhere, the seller refused further deliveries at the contract price, because of failure of the winter's ice crop. Five dollars a ton was the price originally demanded by the seller, but this was finally reduced to three dollars and fifty cents. The only ice available was that of this seller, and it was shown that lack of ice for two days, or possibly even one day, would have ruined all the good beer in the making. Of course the brewers gave in, paid three dollars and fifty cents a ton for eight months, and then when sued on a note given to the seller, sought relief on the ground of duress. The decision resulting, *Goebel v. Linn*, is another leading authority from Michigan; the court said, of the defendant brewers' claim of duress:

"It is to be observed of these circumstances that if we confine our attention to the very time when the arrangement for an increased price was made the defendants make out a very plausible case. They had then a very considerable stock of beer on hand, and the case they make is one in which they must have ice at any cost, or they must fail in business. If the ice company had the ability to perform their contract, but took advantage of the circumstances to extort a higher price from the necessities of the defendants, its conduct was reprehensible, and it would perhaps have been in the interest of good morals if defendants had temporarily submitted to the loss and brought suit against the ice company on their contract. No one disputes that at their option they might have taken that course, and that the ice company would have been responsible for all damages legally attributable to the breach of its contract."⁷⁵

After pointing to eight months of acquiescence by the brewers as some evidence that the new arrangement was voluntary, the decision concludes:

"But if our attention were to be restricted to the very day when notice was given that ice would no longer be supplied at the contract price, we could not agree that the case was one of duress. It is not shown to be a case even of a hard bargain; and the price charged was probably not too much under the circumstances. But for the pre-existing contract the one now questioned would probably have been fair enough, and if made with any other party would not have been complained of. The duress is therefore to be found in the refusal to keep the previous

⁷⁵ 47 Mich. 489, 492, 11 N. W. 284, 285 (1882).

engagements. How far this falls short of legal duress was so recently considered by us in *Hackley & McGordon v. Headley*, 45 Mich. 569, that further discussion now would serve no valuable purpose."⁷⁶

The rule which this concluding language expresses, and for which the decision is generally cited, that a threat to refuse delivery of goods according to contract necessarily falls far short of legal duress, indicates a total blindness to business realities, and sometimes works a serious injustice. The ice dealer's threat was a gun pointed at the heart of the brewer's business, and should be treated as such. The court says that if the victim, "in the interest of good morals," had refused to pay the higher price, "all damages legally attributable" to the wrong would have been recoverable. This assurance is not very satisfactory to one who learns that there may be a vast difference between the damages recoverable as "legally attributable" to the wrong, and the damages *actually resulting* from the wrong. Moreover, the remedy of damages is about as satisfactory after the business is dead, as it would be after the pistol had been discharged and the man was dead.

There are other arguments in the decision, almost certainly mere make-weights to support the conclusion already settled upon to follow the rule in *Hackley v. Headley*. The court talks of the fairness of the substituted agreement, or rather of the lack of evidence that it was unfair considering market prices at the time the new agreement was made. In German law, duress problems are decided by looking at the reasonableness of the transaction compelled by the duress, and even by altering the terms when necessary to make the agreement reasonable;⁷⁷ but Anglo-American law is devoted to the theory that the courts should avoid wherever possible all consideration of the reasonableness of the terms of a contract. Although reasonableness of the terms of the contract may be indirect evidence of the absence of coercion, in measuring the reasonableness of the terms for this purpose, something other than current market prices of the product should be considered; from the viewpoint of the buyer who has a valid contract entitling him to the goods at less than market prices, the payment of market prices is not reasonable. And if society is interested in enforcing contracts, this is also the social viewpoint, "in the interest of good morals," as the Michi-

⁷⁶ 47 Mich. 489, 494, 11 N. W. 284, 246 (1882). It may not be surprising that there are two other "ice" cases among the authorities on economic duress, both cases where the seller refused delivery unless paid more than the price he had agreed upon. In *Secor v. Ardsley Ice Co.*, 133 App. Div. 136, 117 N. Y. Supp. 414 (2d Dept. 1909), *aff'd mem.* 201 N. Y. 603, 95 N. E. 1139 (1911), the buyer was allowed recovery of the excess paid, with no discussion of the problem of duress. In the other, *Mandel v. National Ice & Coal Co.*, 180 N. Y. Supp. 429 (1st Dept. 1920), it was shown that the buyer could have gotten ice elsewhere at the same price the seller demanded, and the claim of duress was rejected.

⁷⁷ Dawson, *Economic Duress and the Fair Exchange in French and German Law* (1937) 12 TUL. L. REV. 42.

gan decision admitted. It was also suggested that possibly the brewers agreed to the increase in price as the only means of assuring a supply of ice for themselves, because without it the ice dealer's business would collapse and he would be unable to perform on any of his contracts. If there had been evidence that this was the situation, it should have been considered; but the court's suggestion was admittedly a hypothesis in its most naked form, without a shred of evidence to cover it. The idea is intriguing in its troublesome possibilities,⁷⁸ but should not play any part under the evidence in this case.⁷⁹ The fact that the brewers had sufficient bargaining leverage to reduce the ice dealer's price from the originally demanded \$5.00 a ton to \$3.50 a ton, is substantial evidence that the brewers had some influence over the ice dealer; but the threat of the latter against the business life of the brewer was the controlling factor in the situation, and was, as a matter of plain business fact, simply irresistible.⁸⁰

The cases very largely agree with the Michigan court that it is not duress to threaten refusal of delivery under a contract for the sale of personal property, even though the seller, by carrying out his threat, can impose severe hardship on the buyer.⁸¹ If the buyer has already

⁷⁸ What if the situation is such that, unless the terms agreed upon are changed, both businesses must collapse? Or suppose it can be shown that the continuance of one enterprise depends on the contract being performed as written, while the other business will surely break up unless a change is made? What will be the effect of subsequent developments, so that when the case is tried, the crisis is past, both enterprises are prosperous, and each is well able to carry its liability for past wrongs?

⁷⁹ In fact the evidence in the case went far to make the court's suggestion ridiculous. In the spring, after the ice supply for the year was in the ice house, the ice dealer assured the brewer the contract would be carried out; after he has laid in his season's supply, an ice dealer is not likely to become insolvent because the market value of ice goes up.

⁸⁰ A few years after *Goebel v. Linn*, the same court, without mentioning duress at all, reached a conclusion which seems probably, if not necessarily, based on the idea that money can be recovered, if it was secured by refusal to deliver to the drawee a draft already paid. Plaintiff-acceptor claimed he handed defendant banker \$100 in bills in payment of a draft; the defendant counted only \$90 in the roll. Plaintiff claimed a ten dollar bill on the floor had blown off his pile; the banker insisted it came from another pile left by a depositor. Plaintiff paid another \$10 and sued to recover. The ten dollar bill that had been on the floor was an exhibit in the trial court. It was badly worn and had a hole through it, and plaintiff claimed these peculiarities enabled him to identify that particular bill as one he had received from his brother. The brother was also a witness, and confirmed plaintiff's story, picking the bill in question out of a stack of ten dollar bills in the court room. The banker brought in the depositor who had left the other pile of bills, and who also claimed to be able to recognize the torn bill as one he had delivered to the banker. The jury verdict was for the plaintiff. Those were the days when you didn't give up the fight over a ten dollar bill until the court of last resort had acted, so the banker appealed. The lower court had refused to instruct the jury that the payment was voluntary. The upper court said nothing about duress, but upheld the verdict for the plaintiff-acceptor, referring to the defendant banker as having "picked up a ten-dollar bill that belonged to plaintiff and kept it without right." *McCabe v. Shaver*, 69 Mich. 25, 36 N. W. 800 (1882).

⁸¹ *Manhattan Milling Co. v. Manhattan Gas & Electric Co.*, 115 Kan. 712, 225

re-sold the goods, so that delay is doubly serious for him, the same answer has been given by some courts—no relievable duress.⁸² Of course, if the buyer was purchasing for re-sale on existing contracts, he can use the same threat to repudiate his contracts in an attempt, which may or may not succeed, to push up his prices. Such decisions might result in a long chain of broken contracts.

There are a few authorities opposed. A steel manufacturer's threat to refuse any further delivery under its contract until the buyer paid \$850 in settlement of a disputed claim for about twice that amount was treated as sufficient duress to support a jury verdict for recovery of the \$850 by way of set-off. The buyer needed the steel to fill outstanding orders, and could not get it elsewhere. The seller's claim against the buyer, based on an indorsement unenforceable for failure of due presentment, notice and protest, was clearly unfounded. The majority of the court (one member dissenting) explained its attitude on the question of duress in the paragraph:

"The theory upon which plaintiff attacks the judgment is that . . . as there was a bona fide dispute in regard to the question of whether the defendant was or was not liable, that was sufficient to support a compromise. Defendant's theory of the case, however, was that the facts disclosed and known to the plaintiff show, beyond all dispute, that there was no liability on its part for the item claimed, and that . . . the

Pac. 86 (1924) (manufacturer dependent on electric power paid price in excess of agreed contract price to keep plant in operation; court held payment voluntary so far as it was made after manufacturer, with notice of electric company's demand, repaired a burned-out motor so as to continue use of electric power); *Moore v. Detroit Locomotive Works*, 14 Mich. 266 (1866) (manufacturer of engine, delayed beyond contract period by government work in its shop, refused delivery of engine until buyer waived claim to damages for delay; engine badly needed by buyer); *Matthews v. William Frank Brewing Co.*, 26 Misc. 46, 55 N. Y. Supp. 241 (Sup. Ct. 1899) (supply of beer for saloon endangered unless saloon-keeper acquiesced in payment of more than agreed price for beer); *De La Cuesta v. Insurance Co. of N. A.*, 136 Pa. 62, 20 Atl. 505 (1890) (corporation refused to recognize stockholder's right to participate in new issue of stock at par, insisting on payment of bonus; stockholder risked right to share in new issue if he refused to pay bonus); *White v. T. W. Little Co. et al.*, 118 Wash. 582, 204 Pac. 186 (1922) (excess price demanded for trucks badly needed in buyer's business, with crews waiting to put them into service immediately); see *Texas Co. v. Todd*, 19 Cal. App. (2d) 174, 64 P. (2d) 1180, 1187 (1937) (sale of low-grade gasoline, a necessity in buyer's filling station business). See also cases in note 82, below. In the following cases similar results were reached, but the evidence did not show that the execution of the threat would impose any severe hardship on the buyer; *L. Lazarus Liquor Co. v. Julius Kessler & Co.*, 269 Fed. 520 (C. C. A. 6th, 1920); *Wood v. Kansas City Home Telephone Co.*, 223 Mo. 537, 123 S. W. 6 (1909) (decision not clear); *Mandel v. National Ice Co.*, 180 N. Y. Supp. 429 (1st Dept. 1920); *Boss v. Hutchinson*, 182 App. Div. 88, 169 N. Y. Supp. 513 (1st Dept. 1918); *J. J. Little & Ives Co. v. Madison Paper Stock Co.*, 169 N. Y. Supp. 104 (Sup. Ct. 1918); *Jacobson v. Nicholas*, 155 Wash. 234, 283 Pac. 684 (1930).

⁸² *Michigan Portland Cement Co. v. General Builders' Supply Co.*, 240 Mich. 701, 216 N. W. 376 (1927); *Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712 (1927). *Contra*: *Brown v. Worthington*, 162 Mo. App. 508, 142 S. W. 1082 (1912).

plaintiff . . . took advantage of the situation in which defendant found itself to compel defendant to pay a sum of money which it was not, in any way, obligated to pay, and that the means employed by the plaintiff was its unlawful refusal to perform its contract with the defendant unless defendant complied with its unlawful demands when it knew that such an unlawful refusal to comply with its contractual duty would result in intolerable financial distress to defendant. If the facts contended for by the defendant were true, the action of the plaintiff, under the authorities cited, clearly amounted to moral duress."⁸³

The jury verdict finding duress was accordingly upheld.

It is not quite clear from the above statement whether the court meant to charge the seller with bad faith in urging its claim; the "facts disclosed and known to the plaintiff" might show "beyond all dispute" that there was no valid claim, without giving the plaintiff direct knowledge of the defect; that is, the claimant might know all the facts, but not know the controlling rules of law. But it seems probable that in this case, as in most of the cases agreeing with it in finding duress in a threat of refusal to perform on a contract of sale of goods,⁸⁴ the court felt that the party making the threat was fully aware of the fact that he was threatening an unjustifiable breach of contract. This same threat of a consciously unjustifiable breach, however, is chargeable to the ice dealer in *Goebel v. Linn*⁸⁵ and to the sellers in many of the other cases in the same line of authority,⁸⁶ unless a change in market conditions is justification. It cannot be said, then, that a threat of breach of contract, even if wilful, is generally held to be duress under our cases. Moreover, for reasons given elsewhere, the thesis of this article is that the threat to breach a contract should be treated as duress, whether made in bad faith or in the confident belief in its rightfulness, if the remedy by action is inadequate.

3. *Refusal of Vendor to Convey Land Sold*

A vendee, who is met by the vendor's refusal to convey land unless given a price increase or some other concession not provided for in his contract, can often secure specific performance, the acme of remedial adequacy. Where there were no facts in such cases, or at least none referred to in the decisions, which made prompt settlement a practical necessity for the vendee, the courts have refused to find duress.⁸⁷ But

⁸³ *Pittsburgh Steel Co. v. Hollingshead & Blei*, 202 Ill. App. 177, 182 (1916).

⁸⁴ For instance, *Brown v. Worthington*, 162 Mo. App. 508, 142 S. W. 1082 (1912); *Secor v. Ardsley Ice Co.*, 133 App. Div. 136, 117 N. Y. Supp. 414 (2d Dept. 1909), *aff'd mem.* 201 N. Y. 603, 95 N. E. 1139 (1911) (recovery allowed, without express reference to duress).

⁸⁵ 47 Mich. 489, 11 N. W. 284 (1882).

⁸⁶ See cases cited in note 81, above.

⁸⁷ *Shirey v. Beard*, 62 Ark. 621, 37 S. W. 309 (1896); *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265 (1910) (plaintiff consented to defendant's purchase of land under plaintiff's option, on agreement to re-sell for their joint profit; then

even specific performance at the end of some months of litigation may involve the purchaser in a heavy loss. Where the facts indicate that situation, the cases are about equally divided on the question of giving or denying relief for duress to a vendee who paid a bonus in order to get prompt performance. The decisions allowing relief do not much more than state that conclusion, with little or no analysis or discussion of the reasons which influenced the courts,⁸⁸ although they often emphasize the loss or danger of loss which faced the vendee if, in reliance upon his legal and equitable remedies, he resisted the improper demand.

Of the decisions taking the opposite view and refusing to find duress even though the only relief available by litigation against the vendor would have caused the vendee a heavy forfeiture,⁸⁹ two in particular provoke comment. One grew out of a dispute in Wisconsin as to whether the contract called for a quit-claim deed, or a warranty deed; the vendor had sold some of the lands elsewhere and confessedly lacked title to others. The parties agreed to arbitrate; the arbitrator held that a special warranty deed was required. But the vendor's resourcefulness was equal to the situation; he simply placed a quit-claim deed in the hands of his depository, with instructions for its delivery on payment of the contract price, and then left for the Pacific coast. The vendee

defendant refused to re-sell until promised an increased share of the profits); *McKay v. Fleming*, 24 Colo. App. 380, 134 Pac. 159 (1913); *Keeley v. Pope*, 160 Ill. App. 492 (1911) (vendee, successful businessman, claiming sale by acre and shortage, tendered final payment to vendor, woman, in reduced amount; on refusal paid sum named in contract, allegedly for fear of mortgage foreclosure); *Pearl v. Whitehouse*, 52 N. H. 254 (1872) (payment treated as settlement of *bona fide* dispute); *Smithwick v. Whitley*, 152 N. C. 366, 67 S. E. 914 (1910) (after alleged vendee had taken possession, drained swamp and made it tillable, owner denied existence of contract and, as vendee claimed, raised price \$15 an acre); *Zents v. Shaner*, 7 Atl. 197 (Pa. 1886) (after vendee had disposed of other property in reliance on sale contract with plaintiff, latter refused to proceed without a mortgage to secure note he had agreed to take as part of price).

⁸⁸ *Pemberton v. Williams*, 87 Ill. 15 (1877) (vendee, in order to perform his contract with third party, paid excess demanded by vendor; recovery for duress held jury question); *Van Dyke v. Wood*, 60 App. Div. 208, 70 N. Y. Supp. 324 (3d Dept. 1901) (after wife had been paid for a complete release of her dower rights, she demanded a conveyance of land as a condition of her consenting to a sale of land necessitated by husband's critical financial situation; complaint asking that conveyance to wife be set aside held good on demurrer, three judges dissenting partly on ground of laches); *Johnson v. Ford*, 147 Tenn. 63, 245 S. W. 531 (1922) (after plaintiff in reliance upon option from defendant had assumed other obligations, defendant insisted upon payment of \$15,000 more for a second option on the same property; recovery of overpayment allowed, but specific performance of first option, somewhat broader in terms than the second, denied); *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 Pac. 640 (1921) (vendee of mining claims had spent \$200,000 on improvements and paid most of \$52,500 price on deferred payment contract with forfeiture clause, when vendor demanded payment of interest under erroneous construction of contract; demurrer to complaint seeking recovery of excess paid overruled); see *Congdon v. Preston*, 49 Mich. 204, 206, 13 N. W. 516, 517 (1882).

⁸⁹ *Heysham v. Detre*, 89 Pa. 506 (1879). See also cases cited in notes 90 and 92, below.

had re-sold the land (or more likely a part of it), and delay was seriously embarrassing. The depository, of course, was powerless. The vendee took the deed under protest and later claimed damages for breach of contract. The court refusing any relief, said, in part,

"Defendant [vendee] had no right to that deed except upon the terms assented to by Porter [vendor]. His right, if Porter refused to carry out the agreement which they had made, was to bring action against him, either for specific performance or for damages resulting from the breach. He had no other alternative to the acceptance of the deed on the terms which Porter had imposed. . . . When and if Cook [vendee] declared that he would take the deed only as conveyance as far as it went, and would reserve his rights upon the original contract, Porter had the right to respond that he would not deliver it at all."⁹⁰

If, as the decision tacitly assumes, Porter had contracted to give a special warranty deed, the last clause uses the term "right" inaccurately; the accurate statement would be that any refusal by Porter to deliver to Cook a special warranty deed was a wrong perpetrated by Porter, rather than the exercise of a right. The argument of the court continues:

"Here the rights of the parties being in dispute, plaintiff offered the conveyance only on condition that it settle that dispute. . . . Its acceptance or rejection on those terms was matter of new contract, and defendant's adoption of the one course or the other can be avoided for duress or coercion only when it is such as to override the will of the consenting party. The fact that he must decide between serious inconvenience, embarrassment, or loss as to the result of electing either course is not enough."⁹¹

There is here no recognition of the fact that whenever litigation, though eventually successful, seems likely to cause a greater loss, by reason of the delay, than immediate compliance with the wrongful demand, the "will of the consenting party," if he is a normal, sensible man, will surely be overridden. If that was the situation here (the facts as to the loss by delay are not fully set out, but the decision proceeded on the assumption that they were irrelevant) then to enforce this "new contract" is to deny the vendee effective protection in his legal rights, which is the same, in the end, as denying him all protection.

An Arkansas decision supports the same conclusion by quoting, from an earlier case in the same court, a terse statement to the effect that "one cannot be heard to say that he had the law with him, but feared to meet his adversary in court."⁹² Fear to meet the adversary in court has been recognized as a valid basis for a claim of duress in a

⁹⁰ Porter v. Cook, 114 Wis. 60, 64, 89 N. W. 823, 825 (1902).

⁹¹ Porter v. Cook, 114 Wis. 60, 65, 89 N. W. 823, 825 (1902).

⁹² Odell & Kleiner v. Henrich, 143 Ark. 435, 221 S. W. 865 (1920). The earlier case quoted was Vick v. Shinn, 49 Ark. 70, 4 S. W. 60 (1887).

number of decisions; it played a part, for instance, in the holding that the Union Pacific Railroad acted under duress when it paid the exorbitant fee demanded by the Missouri Commission for approval of the bond issue rather than risk litigation of the dispute.⁹³ But in the Arkansas case, as in others, there was evidence of other pressure also on the vendee, danger of loss of a re-sale contract on the land; so that even if the vendee was completely confident about the result of the litigation, he would still be forced to yield, or risk a possibly heavy loss. The claim of the Arkansas vendor was not plainly wrongful, for there was room for difference of opinion as to the interpretation of the contract;⁹⁴ but the court did not deem itself called upon to settle this question, saying the controversy was definitely closed by the voluntary payment of the amount demanded. The rule laid down in these cases was not such as to encourage a settlement based on fairness and reason, but rather one based on the advantageous position of one party. To call such a settlement agreement "voluntary" is to use the word in an arbitrary sense quite divorced from the realities of the situation.

4. *Lessor's Threat to Break Lease*

A lessee who has built up a business and possibly made extensive improvements on property in reliance on a long-term lease, faced with an unjustifiable demand from the lessor backed by a threat of eviction, must sometimes choose between submission and either sacrifice of a large investment, or an overpowering danger of such a sacrifice. If no legal process for determining the rights of the parties without endangering the lessee's leasehold interest was available, the theory of duress would probably be generally applied today to allow recovery of payments made in such a situation.

A valuable decision resulted from a dispute over the interpretation of a Chicago lease, on property occupied by a portion of the Marshall Field department store. The lease required the lessee to pay all taxes on the premises, and provided for forfeiture on default continuing sixty days after notice. The lessor took the position that the tax provision in the lease covered income taxes paid by lessor on rents collected from the lessee, and threatened forfeiture unless re-imbursed within the sixty-day period for some \$8,000 paid out on account of such taxes. Forfeiture, according to the allegations, would have involved the loss of a sixty-year leasehold worth \$2,000,000, and a \$1,000,000 building. The lessee paid under protest, and brought suit to recover the money paid,

⁹³ *Union Pacific R. R. v. Public Service Commission of Missouri*, 248 U. S. 67, 39 S. Ct. 24, 63 L. ed. 131 (1918), discussed above, p. 248.

⁹⁴ The contract was to sell the foreclosing lien-holder's "interest" for \$1400; the vendor demanded costs and attorneys fees in addition to that sum before he would release the judgment of foreclosure.

claiming duress. Although the lessee's interpretation of the lease was upheld, recovery was denied because the court said the lessee had an adequate remedy which he failed to use, injunction proceedings to restrain the forfeiture. The decision is important for present purposes because of the following dictum as to duress:

"From the Illinois cases cited, and those of other jurisdictions, the rule is deducible that where one, to prevent injury to his person, business or property, is compelled to make payment of money which the party demanding has no right to receive and no adequate opportunity is afforded the payor to effectively resist such payment, it is made under duress and can be recovered."⁹⁵

The availability of injunctive relief was not entirely beyond question; the intermediate appellate court had held it was not available,⁹⁶ and the Supreme Court had to dispose of several apparently contrary authorities to reach its decision. This might suggest the proposed remedy was inadequate for uncertainty; but if the rights of the parties could be kept in *status quo* by a temporary restraining order pending the determination of the controversy, uncertainty of the final outcome would not be a matter of great importance. Possibly one reason the lessee did not resort to an injunction proceeding was the fear of arousing other lessors on the adjoining parcels of the same property to make similar claims. The action to recover was not brought until the invalidity of the lessor's claim had been determined in another action.⁹⁷ The danger of publicity, awakening other claimants to an assertion of rights which have been lying dormant, probably should not be considered to make the remedy by court action so inadequate as to call for relief by duress.

A few years before the Illinois decision, the New Jersey court handled a similar problem. Lessor and lessee differed over the taxes lessee was bound to pay. The lessor threatened to "take such action under said lease as it might be advised to be necessary"; and the lessee, fearing loss of a valuable leasehold with 15 years still to run, paid the amount demanded. The upper court was not concerned with the correct interpretation of the lease, refusing to see anything but a voluntary payment by the lessee. The latter seems to have argued that his remedy by court action was, for procedural reasons, insufficient. Although the decision treats the matter as of little importance, it does point out a procedure other than that to which the lessee's argument referred, which he could have followed to protect his interests.⁹⁸ There are other decisions, in

⁹⁵ *Illinois Merchants Trust Co. v. Harvey*, 335 Ill. 284, 291, 167 N. E. 69, 72 (1929).

⁹⁶ *Illinois Merchants Trust Co. v. Harvey*, 248 Ill. App. 498 (1928).

⁹⁷ *Young v. Illinois Athletic Club*, 310 Ill. 75, 141 N. E. 369 (1923).

⁹⁸ *McCrorry Stores Corp. et al. v. S. M. Braunstein, Inc.*, 99 N. J. L. 166, 122 Atl. 814 (1923).

parallel situations, on both sides of the question, but those which find duress in the absence of adequate remedy against the wrong, are more recent. So in *Dale v. Simon*, the lessee of oil land could not agree with the lessor as to certain cash payments claimed under the lease. Forfeiture was threatened, and the lessee surrendered and paid the amount demanded; he would otherwise have faced damage suits by about one hundred oil drillers, and by several partial assignees of an interest in the lease. The lessor's demand was held improper under the lease, and the payment recoverable as made under duress, in spite of the lessor's *bona fide* belief in the justice of his claim.⁹⁹

5. Threat to Disregard Fiduciary Obligation

An agent or other fiduciary is often in a position to put great pressure on his principal by threat to repudiate his obligation. So where a financial agent, already paid his full commission, \$300, for securing a re-financing loan for a mortgagor, said he would block the pending loan unless he was paid an additional \$1,000, there being no time to arrange another loan, the court said this procedure was "extortion of the most flagrant character."¹⁰⁰ Two other clear-cut decisions hold that similar pressure by a financial agent was relievable duress.¹⁰¹ Although some decisions are opposed,¹⁰² it seems probable, on a consideration of all the cases which have been turned up in the research for this article, that any agent who thus threatens to disregard his fiduciary obligation in a situation where submission is the only course practicable for the victim, will generally be held guilty of duress.

⁹⁹ 267 S. W. 467 (Tex. Com. App. 1924). Other decisions finding duress in similar circumstances are: *Goodhue v. Hawkins*, 133 S. W. 288 (Tex. Civ. App. 1910); *Ferguson v. Associated Oil Co.*, 173 Wash. 672, 24 P. (2d) 82 (1933). *Contra*: *Regan v. Baldwin*, 126 Mass. 485 (1879) (apparently lease gave lessor option to terminate, so lessor's threat was not wrongful; but court makes no reference to this in its argument that lessee's chance to litigate made payment voluntary); *cf. Shell Oil Co. v. Cy. Miller, Inc.*, 53 F. (2d) 74 (C. C. A. 9th, 1931).

¹⁰⁰ *Lappin et al. v. Crawford et al.*, 221 Mo. 380, 390, 120 S. W. 605, 607 (1909).

¹⁰¹ *Criterion Holding Co. Inc. v. Cerussi et al.*, 250 N. Y. Supp. 735 (Sup. Ct. 1931); *Winget v. Rockwood et al.*, 69 F. (2d) 326 (C. C. A. 8th, 1934); *see Teeter et al. v. Veitch*, 61 Atl. 14 (N. J. Ch. 1905).

¹⁰² *Craig v. Frauenthal*, 145 Ark. 185, 224 S. W. 434 (1920) (client claimed attorney agreed to serve without charge, but demanded execution of due-bill under threat to block pending settlement); *Taylor v. Ford*, 131 Cal. 440, 63 Pac. 770 (1901) (threat of partner to sell out before end of agreed term). In *Phoenix Land Co. et al. v. Exall et al.*, 159 S. W. 474 (Tex. Civ. App. 1913), after bringing to a successful conclusion litigation establishing his client's land claim, and after the attorney-client relation had terminated, certain other litigation about the land developed; the attorney threatened to give his support to parties adverse to his former clients. The court seems to treat the threat as rightful, and refused to see any duress. In *Dickson et al. v. Fowler*, 114 Md. 344, 79 Atl. 519 (1911), the decision may be based upon the idea that there was no breach of contract threatened. In *Shirley v. Beard*, 62 Ark. 621, 37 S. W. 309 (1896) the existence of a fiduciary obligation was disputed.

6. Threat to Break Service Contract

Extortion of a bonus or other concession by threat to break a covenant for services in the midst of performance has been treated as duress in all the cases discovered (except where disputes with labor unions are involved).¹⁰³ It is striking that in all of these cases the victim was caught in a critical situation such that resort to other relief from the threatened wrong was at best a very doubtful remedy. For instance, the threat of an actor, a star performer on the New York and Boston stages over a hundred years ago, to break his contract in the midst of his engagement and refuse to appear further, was held sufficient to make payments induced thereby involuntary and recoverable.¹⁰⁴ There are a few other cases all reaching the same conclusion, some involving shipping contracts,¹⁰⁵ and some involving other service agreements.¹⁰⁶

7. Threat of Corporation to Disregard Stockholder's Rights

When a corporation proposes to disregard rights of its stockholders, it is threatening to break a contract. In the earliest case of this sort, the corporation refused to transfer stock to a *bona fide* purchaser until he had paid a debt owed to the corporation by the seller of the stock; the purchaser paid the debt as demanded, and later recovered the amount in excess of the corporation's lien on the stock as secured by duress.¹⁰⁷ In the latest case found which might be regarded as in the same field, an assessment illegally levied and collected by threat to sell the stock if it was not paid, was held to be recoverable in an action against the directors who exacted the payment; the court saying the payor acted reasonably in view of the danger of losing his stock entirely.¹⁰⁸ In a decision handed down between the dates of these two, however, the court refused relief where a corporation had issued new stock at double its par value, and refused to recognize the right of its stockholders to subscribe for it at par, the right of pre-emption. Here the court discusses and rejects the claim that the uncertainty of the legal remedy makes it so inadequate as to make the doctrine of duress applicable.¹⁰⁹

¹⁰³ Cases involving disputes with labor organizations have not been included in this article.

¹⁰⁴ *Dana v. Kemble*, 34 Mass. (17 Pick.) 545 (1836).

¹⁰⁵ *McPherson v. Cox et al.*, 86 N. Y. 472 (1881); *Darling Singer Lumber Co. v. Oriental Navigating Co.*, 127 Ore. 655, 272 Pac. 275 (1929); *Goddard v. Bulow et al.*, 1 Nott & M'C. 45 (S. C. 1818).

¹⁰⁶ *Jung et al. v. Gwin*, 174 La. 111, 139 So. 774 (1932); *Independent Belotzer-kower Aid Society v. Lurie*, 187 N. Y. Supp. 59 (1st Dept. 1921).

¹⁰⁷ *Bates v. New York Insurance Co.*, 3 Johns. Cas. 238, 1 N. Y. C. L. Rep. 681 (1802).

¹⁰⁸ *Young v. Hoagland et al.*, 212 Cal. 426, 298 Pac. 996 (1931).

¹⁰⁹ *De La Cuesta v. Insurance Co. of N. A.*, 136 Pa. 62, 20 Atl. 505 (1890).

8. *Threat of Insurer Without Cause to Declare Forfeiture of Life Policy*

The possible loss of rights in a life insurance policy, before maturity, if any considerable amount of premium has been paid, is a serious matter for the insured, especially if he has become uninsurable through advancing age or illness. The disability premium waiver clause is especially likely to be the source of dispute involving the danger of such forfeiture. The insured claims he is disabled and therefore, under such clause, that his liability to pay premiums is ended. The insurer denies the disability, and threatens forfeiture if premiums are not paid. Both may well be acting in perfect good faith, for total disability is a most indefinite concept, extremely difficult to apply to specific cases. The insured then can hardly be even reasonably confident of protecting his policy rights, unless he does pay the premiums. If he acts prudently he is very likely to start at once an action to establish his disability, paying the premiums in the meantime under protest. If the courts eventually find he was disabled, then recovery of the amount paid as premiums since disability began will depend on what view the court takes of the doctrine of duress. Since the rights of the insured would have been fully protected if he had refused the payment of premiums some courts feel the payment must be called voluntary.¹¹⁰ The opposite view has been explained in the following words:

"... complainant [insured] was confronted with the alternative of paying the premiums when due, or by not doing so, assuming the risk of losing his right to continue his insurance in force until its maturity at his death, if he should be unsuccessful in proving his disability to be both total and permanent. That this was a real hazard, with the outcome uncertain, is inherently obvious in the nature of the issue in controversy . . . the question of the totality and permanency of the disability was one to be determined upon probabilities, not capable of ascertainment with exact certainty. This uncertainty created by the defendant's refusal to concede the disability and waive the premiums, was the compulsion which prompted and impelled the complainant to pay the two premiums, rather than risk his right to continue the insurance on the waiver contracted for."¹¹¹

¹¹⁰ *Ignatovig v. Prudential Ins. Co. of Amer.*, 16 F. Supp. 764 (M. D. Pa. 1935), note (1937) 15 N. C. L. R. 413; *Rosenfeld v. Boston Mut. Life Ins. Co.*, 222 Mass. 284, 110 N. E. 304 (1915); *Featherstone v. Stonewall Life Ins. Co.*, 165 Miss. 164, 147 So. 305 (1933); see *Howard et al. v. Mutual Reserve Fund Life Assoc.*, 125 N. C. 49, 53, 34 S. E. 199, 200 (1899); cf. *Jones et al. v. Provident Savings Life Assur. Soc.*, 147 N. C. 540, 61 S. E. 388 (1908).

¹¹¹ *Still v. Equitable Life Assur. Soc.*, 165 Tenn. 224, 230, 54 S. W. (2d) 947, 949 (1932); accord, *Pacific Mutual Life Ins. Co. of Calif. v. McCaskill*, 126 Fla. 82, 170 So. 579 (1936) (practically reverses decision *contra* which it attempts to distinguish, *New York Life Ins. Co. v. Lecks*, 122 Fla. 127, 165 So. 50 (1936)); *Wenstrom v. Aetna Life Ins. Co.*, 55 N. D. 647, 215 N. W. 93 (1927); *Federal Life Ins. Co. v. Lewis*, 76 Okla. 142, 183 Pac. 975 (1919).

This reasoning and the conclusion it leads to recognize sensibly the only practical way to give the insured protection in his contract rights. The insurer should not be allowed to rely on the finality of payments made under such circumstances. Most of the decisions which have dealt with the problem have refused to treat the insurer's threat to cancel a policy as duress, whether arising out of a disputed disability claim or otherwise;¹¹² but the four cases which do protect the insured are a good foundation for the better rule.

9. Threat of Mortgagee to Disregard Obligation Under Mortgage

The power of the money-lender to force the borrower into hard bargains was traditional before Shakespeare wrote of Shylock,¹¹³ and in legal history as far back as usury statutes are traceable. It is recognition of the superior bargaining power of the lender-mortgagee over the borrower-mortgagor which probably accounts, in part, for the doctrine that an absolute deed may be declared merely a mortgage, in equity,¹¹⁴ and also for the zeal with which the chancellor and his successors protected the mortgagor's equity of redemption in contracts with the mortgagee.¹¹⁵ With this background it might be taken for granted that the courts would find relievable duress wherever the mortgagee secures payment of an excess over the amount due by threat of wrongful foreclosure or unjustified refusal of a release. The decisions, however, are evenly divided on this problem; and the division is much the same whether

¹¹² See cases in note 110 above.

¹¹³ Antonio was not pictured as unwilling, but the background for Shakespeare's plot was a tradition of hard bargains.

¹¹⁴ *Wagg v. Herbert et al.*, 19 Okla. 525, 559, 92 Pac. 250 (1907).

¹¹⁵ A provision in the original mortgage surrendering the equity of redemption will be quite completely disregarded by the courts, 2 JONES, MORTGAGES (8th ed. 1928) §1332; and a later sale of the equity of redemption from mortgagor to mortgagee is not treated like the ordinary contract, but is most suspiciously regarded—the mortgagee must carry the burden of proving it free, adequately paid for, and not secured by fraud or oppression. *Russell v. Southard et al.*, 12 How. 139, 13 L. ed. 927 (U. S. 1851); *Pearsall v. Hyde*, 189 Ala. 86, 66 So. 665 (1914); *Johansen v. Looney et al.*, 31 Idaho 754, 176 Pac. 778 (1918); *Jones v. Williams et al.*, 176 N. C. 245, 96 S. E. 1036 (1918); *Cole et al. v. Boyd et al.*, 175 N. C. 555, 95 S. E. 778 (1918). The following forceful dictum occurs in *Whitehead v. Hellen*, 76 N. C. 99, 100 (1877): "... if this mortgagor had, by deed, released his equity of redemption, we should have required the plaintiff [mortgagee] to take the burden of proof and satisfy us that the man whom he had in his power, manacled and fettered by a mortgage and a peremptory power of sale, had, without undue influence and for fair consideration, executed a release of his right to redeem the land." The purchase of the equity of redemption by a mortgagee is "closely scrutinized in a court of equity to prevent any oppression of the debtor. The burden is on the mortgagee to allege and prove that the transaction was in all things fair and frank, entirely free from fraud or oppression and that adequate consideration was given. But this rule does not seem to apply unless it appears affirmatively that the execution of the conveyance was traceable to the inequality of the positions of the parties. . . . Equity will set aside the conveyance if procured by the mortgagee's fraud, oppression, or undue influence." 2 JONES, MORTGAGES (8th ed. 1928) §880.

the mortgagee be in or out of possession and whether the threat be to foreclose at once or to refuse a release and whether the mortgage be on real or personal property.¹¹⁶ If one more factor be considered, however, much can be done to resolve this conflict of opinion. In some of the cases refusing to find duress on the part of the mortgagee there is no indication of any reason why the mortgagor could not have resorted to litigation without heavy loss; that is, there was no sale of the property pending nor any other contract of the mortgagor which would have been forfeited by the delay of court proceedings. If these cases be eliminated, then, and we consider the cases where the facts show the normal legal remedy was not sufficiently effective to protect the mortgagor's rights, the weight of case authority supports the conclusion that an unjustifiable threat by the mortgagee is duress. This is true whether the mortgagee be in possession¹¹⁷ or not, and whether the threat be to foreclose¹¹⁸ or simply to refuse a release with no immediate danger of foreclosure.¹¹⁹ Of the few cases involving threats to foreclose on chattel security, only two reached a finding of duress;¹²⁰ some small support

¹¹⁶ Note, *Payment of Illegal Bonus for Discharging Mortgage* (1906) 2 L. R. A. (N.S.) 574.

¹¹⁷ *Cazenove v. Cutler et al.*, 45 Mass. (4 Metc.) 246 (1842); *Bennett et al. v. Healey*, 6 Minn. 240 (1861). *Contra*: *Sanborn v. Bush et al.*, 41 Tex. Civ. App. 24, 91 S. W. 883 (1906).

¹¹⁸ *Whitcomb et al. v. Harris*, 90 Me. 206, 38 Atl. 138 (1897); *McMurtrie v. Kennan*, 109 Mass. 185 (1872); *Klein et al. v. Bayer*, 81 Mich. 233, 45 N. W. 991 (1890); *Hawkins v. Ellis*, 168 Miss. 428, 151 So. 569 (1934); *Link et al. v. Aiple-Hemmelmann Real Estate Co.*, 182 Mo. App. 531, 165 S. W. 832 (1914); *Homecrest Bldg. Co. Inc. v. Weinstein's Estate*, 165 N. Y. Supp. 176 (2d Dept. 1917); *Ward v. Scarborough*, 236 S. W. 434 (Tex. Com. App. 1922); *cf. McMullan v. Vischer*, 14 Cal. 232 (1859). *Contra*: *Dawson v. Mann*, 49 Ia. 596 (1878). In the following cases the courts refused to find duress, without reference to any evidence showing inadequacy of the normal legal remedy, and generally without any indication that remedial adequacy or inadequacy played any part in the decision: *Rodgers v. Wittenmeyer*, 88 Cal. 553, 26 Pac. 369 (1891); *Patterson et al. v. Cox*, 25 Ind. 261 (1865); *Vereycken v. Vandenbrooks*, 102 Mich. 119, 60 N. W. 687 (1894); *Morgan v. Joy et al.*, 121 Mo. 677, 26 S. W. 670 (1894); *Bliss v. Wallis et al.*, 3 How. Pr. (N. S.) 325 (Sup. Ct. N. Y. 1885); *Wessel v. D. S. B. Johnston Land and Mtge. Co.*, 3 N. D. 160, 54 N. W. 922 (1893); *Williamson v. Cole*, 26 Ohio St. 207 (1875); *cf. Hicks v. Levett et al.*, 19 La. App. 836, 140 So. 276 (1932).

¹¹⁹ *Rowland v. Watson*, 4 Cal. App. 476, 88 Pac. 495 (1906); *Wells v. Adams et al.*, 88 Mo. App. 220 (1901); *Fout et al. v. Giraladin et al.*, 64 Mo. App. 165 (1895); *First National Bank v. Sargeant*, 65 Neb. 594, 91 N. W. 595 (1902); *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163, 75 N. E. 1124 (1905); *Union Central Life Ins. Co. v. Erwin*, 44 Okla. 768, 145 Pac. 1125 (1915); *Redford et al. v. Weller*, 27 S. D. 334, 131 N. W. 296 (1911). *Contra*, where there was evidence of remedial inadequacy: *Crittenden v. Royce*, 100 Conn. 617, 124 Atl. 215 (1924); *Scheer-Ginsberg Realty etc. Co. v. Devin*, 76 Misc. 201, 134 N. Y. Supp. 505 (Sup. Ct. 1912); *Cram v. Powell*, 100 Ore. 708, 197 Pac. 280 (1921). In the following decisions there was no reference to facts showing remedial inadequacy: *Awalt v. Eutaw Bldg. Assoc.*, 34 Md. 435 (1871); *Windbiell v. Carroll et al.*, 16 Hun. 101 (N. Y. 1878).

¹²⁰ *Miller v. Eisele et al.*, 111 N. J. L. 268, 168 Atl. 426 (1933) (pledgee in possession); *Bratburg v. Advance-Rumely Thresher Co. Inc.*, 61 N. D. 452, 238 N. W. 552 (1931).

for the remedial adequacy test is discernible in the language of some of the others.¹²¹

G. THREATS BETWEEN HUSBAND AND WIFE

The threat of an unscrupulous husband or wife to break up the family by abandonment, or to take off the children to distant parts, is not normally *business* or *economic* compulsion; but the problem is similar, for there is pressure through fear of damage to non-physical interests, family or domestic interests in this case rather than property interests. It seems plain that the threat of abandonment or separation, in the absence of some justification, is wrongful; and also that in many cases the execution of the threat and breaking up of the family would work a wrong which no subsequent redress would right. If the problem had been discussed from this viewpoint in the decisions, there might have been less confusion in the results. Two cases, overturning land conveyances secured after such threats, offer substantial support to the argument of duress in these circumstances.¹²² Two other American courts denied relief to the spouse who claimed to have been the victim of such a situation. Both of these cases may be distinguishable on factual grounds, but they leave the law doubtful. In one (where there was admittedly justification for the divorce threatened) the court expressed doubt whether the threat of divorce or separation was duress, but then relied heavily on the fact that the victim refused to accede to the threat until after he had consulted his friend and business adviser as indicating that the threat did not force the transfer by overcoming the victim's will (a doubtful conclusion).¹²³ In the other, the court doubted whether there was any duress but said if there was duress by the husband, it would not prejudice the position of the *bona fide* third party mortgagee whose rights were in question.¹²⁴ The threat of a husband to convey all his property out of reach of his wife has been called rightful, and therefore not duress.¹²⁵

It is not unheard of for the pressure between husband and wife to originate before the marriage ceremony. One prospective groom simply

¹²¹ *Vick v. Shinn*, 49 Ark. 70, 4 S. W. 60 (1886) (excess payment on threat of foreclosure held voluntary because mortgagee could not get possession without lawsuit); *Forbes v. Appleton*, 59 Mass. (5 Cush.) 115 (1849) (court pointed out victim of threat could have avoided loss of possession by posting security bond); *Lamb v. Rathborn*, 118 Mich. 666, 77 N. W. 268 (1898) (court said no threat expressed); *Ott v. Pace et al.*, 43 Mont. 82, 115 Pac. 37 (1911).

¹²² *Line v. Blizzard et ux.*, 70 Ind. 23 (1880) (threat of husband to abandon wife and three small children finally broke down her resistance to mortgaging her separate property to secure his creditor); *Faulkner v. Faulkner*, 162 App. Div. 848, 147 N. Y. Supp. 745 (Sup. Ct. 1914) (relied more on fraud than on duress).

¹²³ *Cummins v. Carter et al.*, 17 Hawaii 71 (1905); cf. *De Pret-Roose v. De Pret-Roose*, 78 Sol. J. 892 (Chan. Div. 1934).

¹²⁴ *Herald et al. v. Hardin*, 95 Fla. 889, 116 So. 863 (1928).

¹²⁵ *Hughes v. Leonard et al.*, 66 Colo. 509, 181 Pac. 200 (1919).

announced, after the invitations were out, that he would not appear at the ceremony unless a proposed property settlement was signed; the bride signed, tearfully, and was refused any relief, the court explaining that her opportunity to choose between alternatives negated the claim of coercion.¹²⁶ The other property settlement before marriage attacked for duress was secured by the promised groom's threats of unfounded lawsuits, and utter ruin of his fiancée's business interests; and the court agreed this was duress or undue influence.¹²⁷

All the cases discussed so far have involved threats to commit an actionable wrong. Not that the threat has always been uttered by one who was conscious that he was proposing to do a wrong; sometimes he believed sincerely that the contemplated act was quite rightful. But in the litigation on duress it has been shown, or at least assumed, that if the threat had been carried out, the victim's civil rights would have been violated so as to give him a cause of action for breach of contract or for some other infringement of his rights. Not all problems in economic duress, however, involve a threat that is so obviously wrongful. The question has come up in a number of situations where the execution of the threat would certainly not involve an actionable wrong. The threat to start a lawsuit has often been the foundation of a claim of duress—and sometimes the courts have sustained the claim. Even the threat to refuse to make a contract has been advanced as the basis for a claim of coercion. The discussion of these cases in a second article to be published in the near future is likely to throw more light on what threats the courts regard as so blameworthy that the resulting transaction must be undone. After that discussion, I shall make some suggestions about the tests of "wrongfulness" and "inadequate remedy" which may reasonably be applied to the definition of duress by economic compulsion.

¹²⁶ *Neely's Appeal*, 124 Pa. 406, 16 Atl. 883 (1889).

¹²⁷ *Ring v. Ring*, 127 App. Div. 411, 111 N. Y. Supp. 713 (2d Dept. 1908), *aff'd mem.* 199 N. Y. 574, 93 N. E. 1130 (1910).