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DURESS BY ECONOMIC PRESSURE II *

JOHN DALZELL**

This paper has been concerned with the growing readiness of our courts to treat economic pressure (and some other non-physical pressures) as duress, having the same effect on the rights of the parties as the cruder form of duress recognized by Blackstone. The thesis, as stated at the outset,¹²⁸ has been that the essentials of all duress are, (1) a wrongful threat, in such circumstances that, (2) the victim would not have any effective legal remedy, effective either for prevention of the wrong or to secure sufficient redress if the threat were carried out. The cases involving threats of actionable wrongs, such as the threat to break a contract, have been discussed in the first part of the article already published. The cases that have not yet been taken up, then, for the most part, involve threats to do something which would not be an actionable wrong; in most of these cases, that is, even if the person voicing the threat should carry it out, the victim would not have suffered any injury cognizable at law. The first group of cases to be taken up here does include some, however, in which the execution of the threat would have involved liability in tort.

H. THREAT OF INTERFERENCE WITH CONTRACTURAL RELATIONS, PRESENT OR PROSPECTIVE, BETWEEN VICTIM AND THIRD PARTY

A threat to induce a third party to refuse performance of a contractual promise is often an effective means of putting pressure on the promisee.

After Schiffer had bought a half interest in a mining property from Adams, he had to pay Adams' son \$10,000 to get a release of the son's, invalid and probably fraudulent claim to the property. The vendor-father apparently was neither legally nor morally responsible for the assertion of this claim; but Schiffer demanded partial reimbursement from Adams senior, and backed his demand with the threat to withhold the father's \$8,000 deposit in a bank controlled by a firm of which Schiffer was a partner. During the four months' negotiation with Adams junior for a quitclaim deed, Schiffer had already succeeded in preventing withdrawals from the father's account, except for necessary living expenses. Adams finally accepted a settlement proposition from

* The first part of this article, published in the April issue (1942) 20 N. C. L. REV. 237, will be referred to hereafter in the notes simply as "Part I," with a specific number for the page to which cross reference is made.

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¹²⁸ Part I, 240.

Schiffer, surrendering \$2,500 from the bank deposit and also releasing a \$6,000 contingent interest which Adams still held under the original contract of sale to Schiffer. This transaction was successfully attacked for duress in an action by Adams. The plaintiff cited and the court relied on the cases on duress of goods¹²⁹ and said the settlement with Schiffer was "clearly made under duress of property"; that what was threatened was

"... not a mere withholding of a debt due from [Schiffer] himself, but an unlawful interference between the plaintiff and other debtors, by means of which he stopped the payment to plaintiff of sums due him;"¹³⁰

There was here certainly no duress of goods in the ordinary meaning of that phrase, for the bank deposit did not make the banker a bailee of Adams' money; there was simply a debtor-creditor relation established, as the court expressly admitted on the same page from which the above language was quoted. Schiffer's threat was to induce a third party, here the bank, to disregard its contract with Adams, and the decision treats resort to that threat as duress.¹³¹ There is no discussion of the remedies that might be available to Adams.

Another decision points in the same direction. The action was to collect royalties under an agreement licensing the use of certain patent rights in the erection of a commercial garage building. The licensing agreement was signed after the construction of the building had begun; the plaintiff-patentee appeared, alleged the erection was an infringement of its patent rights, and threatened to persuade the mortgagee to withhold funds needed for the building. The mortgagee did refuse to supply funds, the erection project was about to stop, and defendants were in danger of bankruptcy, when they surrendered to plaintiff's demands by signing the license-contract. The court held a cross complaint alleging these facts, and denying any projected patent infringement, was good against demurrer, but gave no reasons for their decision other than a

¹²⁹ Part I, 241.

¹³⁰ *Adams v. Schiffer et al.*, 11 Colo. 15, 17 Pac. 27 (1888).

¹³¹ This decision should have been cited in Part I in discussing the threat to break a contract as duress. The court, elsewhere in the same opinion, rejected a claim of Adams for rescission of another transaction with Schiffer, saying that a threat to break a contract cannot be duress, 11 Colo. 15, 32, 17 Pac. 21, 30 (1888); and the language quoted from the decision in the text above makes the same distinction. In other words, if the bank had threatened to withhold Adams' money, that would not have been duress; but the threat of a third party to induce the bank to act thus is duress! If there is any difference the former threat should be treated as a stronger basis for a claim of duress than the latter. The threat of the contracting party, the bank itself, is both more wrongful than the threat of a third party who is not bound on the contract, and also more powerful, because the third party cannot bring any force to bear on his victim except by persuading another individual.

reference to the doctrine of "business-compulsion."¹³² In another case, the Michigan court decided that an account settlement forced by threats of the debtor to interfere, possibly by garnishment proceedings, with payments due to the creditor-victim from other debtors, was voidable for duress.¹³³

The cases just referred to have involved threats to interfere with an existing contract right; several claims of duress have been based on a threat to interfere with prospective contracts with other parties. Among these, the strongest case for duress was made where a bank threatened to ruin the plaintiff's credit with other banks in the community, a threat which apparently could have been carried out effectively under the relations existing between the local banks. Under this pressure the plaintiff-maker paid a note which he claimed had been altered materially. The court said there were no unauthorized alterations of the note, and also that a threat to credit could not be duress, because it involved no danger of personal harm, nor loss of liberty nor property.¹³⁴ In the same class of threats to prospective contract relations was the threat of a member of a bondholders' committee to block a sale of the insolvent utility's assets unless he was given a secret share in the profits of the deal by the purchaser. The purchaser yielded, after considering the matter for five weeks; then, over a year later, he asked the court to get back his bribe-money. The court said the parties were *in pari delicto*, that there was no such duress as to relieve the plaintiff from this disability, and refused any refund.¹³⁵

I. PRESSURE ON STOCKHOLDER BY THREAT TO BREAK CONTRACT WITH HIS CORPORATION

Two cases in our reports deal with situations where pressure has been exerted on a stockholder by threat to disregard a contract obliga-

¹³² Ramp Buildings Corp. v. Northwest Building Co., 164 Wash. 603, 4 P. (2d) 507 (1931). A concurring opinion took the position that plaintiff's conduct should be called, not "business compulsion," but duress.

¹³³ Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997 (1879); see discussion below, p. 348.

¹³⁴ Coleman v. Merchants National Bank, 6 Ohio Dec. 1063, 10 Am. Law Record 49 (1881). The other cases in the group all reached the same conclusion; but in them the evidence that threats were made was much weaker, based on implication or imagination of the victim. Fonville v. Wichita State Bank & Tr. Co., 161 Ark. 93, 255 S. W. 561 (1923); R. S. Jacobs Banking Co. v. Federal Reserve Bank, 34 S. W. (2d) 173 (Mo. App. 1930); Sawyer *et al.* v. Gruner *et al.*, 60 N. Y. Super. 285, 17 N. Y. Supp. 465 (1892); F. B. Collins Investment Co. v. Easeley *et al.*, 44 Okla. 429, 144 Pac. 1072 (1914); Harvey v. Girard Nat. Bank, 119 Pa. 212, 13 Atl. 202 (1888). In York v. Hinkle *et al.*, 80 Wis. 624, 629, 50 N. W. 895, 896 (1891) rejecting a claim of duress based on a threat to force into bankruptcy a corporation in which the victim held considerable stock, it was said that the party making such threats was under no obligation to refrain from communicating them to possible purchasers of the victim's stock, so as to interfere with his chance to sell the stock at a profit.

¹³⁵ Marshall v. Lovell, 19 F. (2d) 751 (C. C. A. 8th, 1927).

tion owed to his corporation, a contract obligation in which the stockholder had no legal rights, but in which he was vitally interested. In both cases the threat was to cut off the credit of the corporation and so drive it into bankruptcy; and in both the threat succeeded in forcing the stockholder to transfer his corporate interest at a sacrifice. The victim in the earlier case did not clearly prove a threat to break the contract with the corporation, but this point was not treated as controlling; the decision was decidedly unsympathetic to all the plaintiff's arguments for duress, was not made to depend on this point.¹³⁶

The later decision is equally emphatic in finding duress. The plaintiff, Harris, had spent several years locating coal lands and purchasing them on option, for the corporation, in reliance on a contract by which he was to have a two-ninths interest in the common stock, and Cary, the defendant, was to furnish the necessary capital. After the corporation had secured a large block of valuable options, Cary came forward with a claim that their contract, rightly construed, did not entitle Harris to a two-ninths share, and demanded that Harris transfer a part of his interest to Cary. The new claim as to the construction of the contract was probably advanced without any genuine belief in its validity; but Cary said that he would cut off all further support of the corporation and allow it to collapse unless Harris surrendered. The bill asking cancellation of the transfer of stock made in these circumstances was upheld against demurrer.¹³⁷ The court relied heavily on the analogy to duress of goods, saying the plaintiff's corporate holdings were within the defendant's control. There was no reference to the alternative remedy available, a stockholder's representative action, which would probably have been ineffective because of the delay involved.

J. THREAT TO SUE, OR RESORT TO OTHER CIVIL LEGAL REMEDIES

Courts and judicial processes exist for the purpose of enforcement of rights against recalcitrant obligors, and it is not surprising that frequently civil claims are settled only under a threat of resort to some legal remedy; but it may seem startlingly unreasonable to suggest that the resulting settlement might be voidable for duress. Such a threat is no more than a statement of intent to refer a private dispute to a public tribunal for orderly settlement; how can it be duress to tell the adverse party that these tribunals are to be called in to administer justice according to established law? An advance warning of a plan to use these governmental institutions for the end they are supposed to serve often shows consideration for the other fellow, and certainly seems far removed from improper pressure; but resort to such a threat has been

¹³⁶ *York v. Hinkle*, 80 Wis. 624, 50 N. W. 895 (1891).

¹³⁷ *Harris v. Cary et al.*, 112 Va. 362, 71 S. E. 551 (1911).

called duress by many litigants in our courts, not always without reason, nor always without success.

In the great majority of such cases, however, the courts have rejected the claim that a threat of civil litigation was duress. Sometimes the threat was to sue on a cause of action ultimately shown to have been well founded, and was used to force discharge of the obligation on which that cause was based; of course this is not the exercise of wrongful pressure.¹³⁸ Even where the threat to sue on a valid debt is used to force the victim, not to pay that debt, but to enter into some other transaction, the courts see nothing to condemn. So a bank threatened to sue the maker on two overdue notes unless he would assume an additional liability by indorsing two other notes made by his brother-in-law; and the North Carolina courts enforced these indorsements, saying there was no duress.¹³⁹ The creditor's right to sue is regarded as property which he can sell, as if it were a tract of land, on any terms he chooses to insist upon. In other cases the rightfulness of the claim made by the threatening party was not clearly disproved even in the subsequent litigation on the issue of duress, and the transaction under attack was defensible as a settlement of a possibly valid claim; the tendency is strong to uphold such transactions, sometimes apparently without much genuine study of the opposing contention.¹⁴⁰ If the claim on which suit was threatened was partly valid and partly invalid, the threat is treated as being within the creditor's rights;¹⁴¹ and this is probably unobjectionable if the excess was not claimed in bad faith, and if there was no tender of the amount properly due.

At the other extreme are a group of cases on which the authorities are unanimous. If the party threatening suit was acting in bad faith knowing he had no right of action, it is agreed that his victim deserves relief which can properly be made available by finding duress.¹⁴²

¹³⁸ *Hunt v. Bass et al.*, 17 N. C. 292 (1832); *Harris v. Tyson*, 24 Pa. 347 (1855).

¹³⁹ *Charlotte Bank and Trust Co. v. Smith et al.*, 193 N. C. 141, 136 S. E. 358 (1927). To the same effect are *Lilienthal et al. v. Geo. Bechtel Brewing Co.*, 118 App. Div. 205, 102 N. Y. Supp. 1051 (1st Dep't 1907); and *Harris v. Tyson*, 24 Pa. 347 (1855); cf. *Neilson v. McDonald et al.*, 6 Johns. Ch. 201 (N. Y. 1822), discussed below, p. 352, *rev'd on other grounds*, 2 Cow. 139 (N. Y. 1823).

¹⁴⁰ *Manigault v. S. M. Ward & Co. et al.*, 125 Fed. 707 (C. C. S. C. 1903); *King v. Williams*, 65 Iowa 167, 21 N. W. 502 (1884); *Ripy Brothers Distilling Co. v. Lillard*, 149 Ky. 726, 149 S. W. 1009 (1912); *Devereux v. Rochester German Insurance Co.*, 98 N. C. 6, 3 S. E. 639 (1887); *Zent v. Lewis*, 90 Wash. 651, 156 Pac. 848 (1916); *Crookshanks et al. v. Ransbarger et al.*, 80 W. Va. 21, 92 S. E. 78 (1917); *Whittaker v. Southwest Va. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507 (1890).

¹⁴¹ *Atkinson et al. v. Allen et al.*, 71 Fed. 58 (C. C. A. 8th, 1895); *Holt v. Thomas et al.*, 105 Calif. 273, 38 Pac. 891 (1894); *James et al. v. Dalbey et al.*, 107 Iowa 463, 78 N. W. 51 (1899); *Kiler v. Wohletz*, 79 Kan. 716, 101 Pac. 474 (1909); *Hilborn v. Bucknam et al.*, 78 Me. 482, 7 Atl. 272 (1886).

¹⁴² *Moise Brothers Co., Inc. v. Jamison*, 89 Colo. 278, 1 P. (2d) 925 (1931); *Spaids v. Barrett et al.*, 57 Ill. 289 (1870); *Rees v. Schmits et al.*, 164 Ill. App. 250

These cases on which there is no great dispute having been put aside, there is a considerable group left; cases where there was a threat to sue on a claim asserted in good faith, but later shown to have been quite unfounded (or assumed to have been unfounded for purposes of ruling on the issue of duress). So far as precedent is concerned, there is a large degree of unanimity here also; few decisions find relievable duress for the victim of such a threat. It makes no great difference whether the later development showing invalidity of the claim was newly discovered evidence¹⁴³ or newly discovered law.¹⁴⁴ So where the maker was induced to pay his notes a second time by threat of the executor of the payee to sue, and thereafter the maker uncovered clear evidence that he had paid them during the payee's life, no relievable duress was found.¹⁴⁵ The same result was reached where the victim was related to the claim asserted only by marriage, having become the second husband of the widow of the decedent debtor, and he yielded to the threat of the creditor to sue him.¹⁴⁶ It was, presumably, newly discovered law, at least to the creditor, that the successor to the deceased debtor's marital rights did not take upon himself the decedent's financial obligation. In these and similar cases the creditor was able by threats to secure and retain that to which he had no rightful claim; but the victim could have secured reasonable protection by resisting the claim in court,¹⁴⁷ and no rational explanation appeared for his reluctance to take this course of action.¹⁴⁸

(1911); *Chandler v. Sanger et al.*, 114 Mass. 364 (1874); *White v. McCoy Land Co.*, 224 Mo. App. 1019, 87 S. W. (2d) 672 (1935), *aff'd sub. nom.*, *White v. Scarritt*, 341 Mo. 1004, 111 S. W. (2d) 18 (1937); *Aronoff et al. v. Levine et al.*, 190 App. Div. 172, 179 N. Y. Supp. 247 (2d Dep't 1919), *aff'd mem.*, 232 N. Y. 529, 134 N. E. 558 (1921); *Brownell v. Talcott*, 47 Vt. 243 (1875); *Sartwell v. Horton*, 28 Vt. 370 (1856); *see Adams v. Reeves et al.*, 68 N. C. 134 (1873).

¹⁴³ *New York Life Insurance Co. v. Chittenden & Eastman et al.*, 134 Iowa 613, 112 N. W. 96 (1907); *Shockley v. Wickliffe et al.*, 150 S. C. 476, 148 S. E. 476 (1929).

¹⁴⁴ *Monroe National Bank v. Catlin*, 82 Conn. 227, 73 Atl. 3 (1909); *Downs v. Donnelly*, 5 Ind. 496 (1854); *City of Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185 (1876); *Evans v. Gale*, 18 N. H. 397 (1846); *Sprague v. Birdsall*, 2 Cow. 419 (N. Y. 1823); *see Schelp v. Nicholls*, 263 S. W. 1017 (Mo. App. 1924).

¹⁴⁵ *Shockley v. Wickliffe et al.*, 150 S. C. 476, 148 S. E. 476 (1929). The clear evidence of prior payment was the fact that the original notes were in the maker's hands, delivered to him when he paid them during the payee's life. This also proved misrepresentation by the executor who had said he had the original notes among the decedent's papers; but the court said there was no reliance on this misrepresentation because the maker believed all along that the notes were in his own possession, but he could not find them.

¹⁴⁶ *Downs v. Donnelly*, 5 Ind. 496 (1854).

¹⁴⁷ Where newly discovered evidence was involved, as in *Shockley v. Wickliffe et al.*, 150 S. C. 476, 148 S. E. 476 (1929), of course resort to the courts would not be assured protection for the victim unless the evidence was discovered before the trial; but at any rate resort to the courts would be reasonable protection in the sense that it is about all that is practicable for any judicial system to afford litigants. Indefinite postponement while evidence is being searched for is hardly to be expected.

¹⁴⁸ In *Downs v. Donnelly*, 5 Ind. 496 (1854) and in *Evans v. Gale*, 18 N. H.

In other words, a remedy which was at least reasonably adequate was available to him, if he had chosen to use it.

The reasons commonly given for refusing relief to the victim of a threat to sue are not especially enlightening. Sometimes the courts have simply said that a threat to seek legal remedies could not be duress,¹⁴⁹ probably with the idea expressed by a South Carolina court that a contrary holding would defeat the purpose for which courts are instituted,¹⁵⁰ and also the thought that if the threat were carried out the party sued would have his day in court before his obligations were determined. Other courts have settled this problem to their own satisfaction by arguing that a threat to exercise a legal right cannot be duress,¹⁵¹ and assuming, usually without saying it, that everyone has a clear legal right to sue anyone else, at any time, on any alleged cause of action, in the absence of malice.*

A slight preponderance of authority denies relief even where the victim dared not go into court with his valid defense because the mere initiation of the litigation, regardless of its outcome, would have been disastrous for him, as when a receivership was threatened,¹⁵² or his business was in such a precarious condition that any litigation would have been ruinous.¹⁵³ An attachment against the alleged interest of a

397 (1846), the victims said they yielded because of a personal dislike of litigation. This idiosyncrasy (which did not hinder either of them from litigating as a plaintiff) is certainly not sufficient to make the remedy inadequate. The subjective test of duress should not be allowed to go that far.

¹⁴⁹ *Monroe National Bank v. Catlin*, 82 Conn. 22, 73 Atl. 3 (1909); *Buck et al. v. Axt*, 85 Ind. 512 (1882) (threat apparently to sue on valid claim); *New York Life Insurance Co. v. Chittenden et al.*, 134 Iowa 613, 112 N. W. 96 (1907); *Pryor v. Hunter*, 31 Neb. 678, 48 N. W. 736 (1891); *Shockley v. Wickliffe et al.*, 150 S. C. 476, 148 S. E. 476 (1929); *Houston Ice and Brewing Co. v. Harlan*, 228 S. W. 1090 (Tex. Comm. App. 1921) (threat to sue on valid claim).

¹⁵⁰ *Shockley v. Wickliffe et al.*, 150 S. C. 476, 148 S. E. 476 (1929).

¹⁵¹ *McKenzie-Hague Co. v. Carbide and Carbon Chemicals Corp.*, 73 F. (2d) 78 (C. C. A. 8th, 1934) (threat made in bad faith); *Kreider et al. v. Fanning*, 74 Ill. App. 230 (1897) (threat to sue on valid claim); *Wilson Sewing Machine Co. et al. v. Curry et al.*, 126 Ind. 161, 25 N. E. 896 (1890) (threat to sue on allegedly excessive claim; court said duress argument so clearly insufficient that no discussion was necessary); *Kiler v. Wohletz*, 79 Kan. 716, 101 Pac. 474 (1909); *Lilienthal et al. v. Geo. Bechtel Brewing Co.*, 118 App. Div. 205, 102 N. Y. Supp. 1051 (1st Dep't 1907) (threat apparently rightful); *Charlotte Bank & Trust Co. v. Smith et al.*, 193 N. C. 141, 136 S. E. 358 (1927) (threat to sue on valid claim); *Houston Ice & Brewing Co. v. Harlan*, 228 S. W. 1090 (Tex. Comm. App. 1921) (threat to sue on valid claim).

¹⁵² *Dick et al. v. Marx & Rawolle, Inc.*, 4 F. (2) 879 (App. D. C. 1925), cert. denied, 268 U. S. 688, 45 S. Ct. 509, 69 L. ed. 1158 (1925); *Byron v. Byron, Heffernan & Co. et al.*, 98 N. J. L. 127, 119 Atl. 12 (Ct. Errors and App. 1922); *Cornwall v. Anderson et al.*, 85 Wash. 369, 148 Pac. 1 (1915); *Walla Walla Fire Insurance Co. v. Spencer et al.*, 52 Wash. 369, 100 Pac. 741 (1909).

¹⁵³ *Lipman, Wolfe & Co. v. Phoenix Assurance Co., Ltd.*, 258 Fed. 544 (C. C. A. 9th, 1919); *Morton v. Morris*, 72 Fed. 392 (C. C. A. 8th, 1896); *Teem v. Town of Ellijay*, 89 Ga. 154, 15 S. E. 33 (1892) (demand, assumed wrongful, for \$10,000 license fee for liquor sales two years earlier; town bought other claims against victim, who was in financial crisis, and threatened suit forcing compromise payment of \$500 on license claim; held voluntary); *Hipp v. Crenshaw*, 64 Iowa 404. 20

debtor in a going business is likely to embarrass or ruin that business while the matter is in court for the purpose of proving that the debtor had no interest in the firm; but this was not sufficient to make the note given by the remaining partner to forestall the attachment proceeding voidable for duress.¹⁵⁴ An injunction against a play which is ready to open would in many cases practically close out the producer, even if he were able to show in the course of the injunction proceeding that the petitioner's claim was without foundation; but a court refused to see any duress in such a situation, without recognizing any necessity to discuss the merits of the petitioner's claim, or the chances that the producer could have escaped serious loss by posting a bond or otherwise preventing the issuance of a temporary restraining order.¹⁵⁵ But the Michigan court, which has had more than its share of trouble with this problem of economic compulsion in many forms,¹⁵⁶ said that a settlement secured from a creditor by the debtor's threats of stopping payments from other parties to the creditor, at a time when, as the debtor knew, the creditor was financially embarrassed, was voidable for duress; the reason given was that the legal remedy available to the creditor-victim would not meet the situation because during the delay incident to litigation the victim's business would be ruined.¹⁵⁷ There are other decisions supporting the same conclusion.¹⁵⁸

The threat of a lawsuit which would seriously damage the reputation of the victim or a near relative has been treated as sufficient to show duress.¹⁵⁹ In some cases the fact that the victim was in poor health and

N. W. 492 (1884) (while appeal involving validity of judgment was pending, debtor, in financial straits, had to pay off judgment in order to get mortgage); *Alamo Amusement Co. v. Harcol Motion Picture Industries, Inc.*, 147 So. 114 (La. App. 1933); *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997 (1879); *Weber v. Kirkendall et al.*, 39 Neb. 193, 57 N. W. 1026 (1894); *Hart v. Walsh et al.*, 84 Misc. Rep. 421, 146 N. Y. Supp. 235 (Sup. Ct. 1914); *Bolln v. Metcalf*, 6 Wyo. 1, 42 Pac. 12 (1895); *Maskell v. Horner*, [1915] 3 K. B. 106.

¹⁵⁴ *Bolln v. Metcalf*, 6 Wyo. 1, 42 Pac. 12 (1895), *on rehearing*, 6 Wyo. 1, 44 Pac. 694 (1896).

¹⁵⁵ *Hart v. Walsh et al.*, 84 Misc. 421, 146 N. Y. Supp. 235 (Sup. Ct. 1914); *cf. Dana v. Kemble*, 34 Mass. (17 Pick.) 545 (1836) (discussed in Part I, p. 273).

¹⁵⁶ See, for instance, *Hackley et al. v. Headley*, 45 Mich. 569, 8 N. W. 511 (1881) (discussed in Part I, p. 257); *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284 (1882) (discussed in Part I, pp. 260-1); *Welch v. Beeching*, 193 Mich. 338, 159 N. W. 486 (1916) (discussed below, p. 353).

¹⁵⁷ *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997 (1879) (court called debtor's act a wrong, but the basis of his threatened garnishment actions was not stated at all).

¹⁵⁸ *Lipman, Wolfe & Co. v. Phoenix Assurance Co., Ltd.*, 258 Fed. 544 (C. C. A. 9th, 1919); *Thurman v. Burt*, 53 Ill. 129 (1870); *Laterrade v. Kaiser*, 15 La. Ann. 296 (1860); *Lobit et al. v. Marcoulides et al.*, 225 S. W. 757 (Tex. Civ. App. 1920); *Maskell v. Horner*, [1915] 3 K. B. 106.

¹⁵⁹ *Lipman, Wolfe & Co. v. Phoenix Assurance Co., Ltd.*, 258 Fed. 544 (C. C. A. 9th, 1919); *Prickett v. Madison County*, 14 Ill. App. 454 (1883); *Mississippi Valley Trust Co. v. Begley et al.*, 298 Mo. 684, 252 S. W. 76 (1923). *Contra: Zent v. Lewis*, 90 Wash. 651, 156 Pac. 848 (1916); *Batavian Bank v. North*, 114 Wis. 637, 90 N. W. 1016 (1902) (vague threat of disgrace to victim's brother).

so unable to resist effectively has influenced the court considerably toward a finding of duress based on a threat of litigation.¹⁶⁰

The courts agree in finding duress where guardianship proceedings have been threatened in order to procure property settlements in favor of the individual making the threat.¹⁶¹ An Iowa court has said that such arrangements are inescapably caught between the horns of a dilemma both equally fatal to the settlement thus procured: either the victim was a proper subject for guardianship proceedings, and the settlement is voidable because of his incompetency; or else he was not a proper subject for guardianship, so that the settlement is voidable because the proceedings should not have been initiated or threatened.¹⁶² The alternatives suggested may not be exhaustive, however; there is a third possibility, that the subject was competent, but sufficient reasonable doubt existed about his competency to make legal proceedings to establish the truth at least morally justifiable. If this was the situation, the settlement would not be impaled on either horn of the Iowa court's dilemma. But the possible incompetency which made the guardianship proceeding justifiable probably made the settlement unjustifiable according to any decent standards; and this idea suggests a sound basic reason for refusing to enforce an agreement thus procured. Guardianship proceedings are provided for the protection of the property of the subject, and the use made of them in the cases under discussion to enrich unscrupulous children is a misuse of the power to initiate such legal proceedings, as obviously anti-social and wrongful as when the power to initiate a criminal prosecution is misused to force payment of a private claim. This theory fits in nicely with another decision which indicates that a threat to support guardianship proceedings is not duress if used for a proper purpose. A mother had been placed under guardianship as incompetent; and a separate guardian had been appointed for her two minor children. The mother sought to terminate her own guardianship; and in order to induce the guardian of the children not to oppose such termination, she gave bond to provide certain fixed amounts for the support of the children. Here, if it can be said that the children's guardian made any threat, it was used, not for enrichment of the party

¹⁶⁰ *Parker v. Hill*, 85 Ark. 363 (1908); *Hollingsworth v. Stone*, 90 Ind. 244 (1883); cf. *Horn v. Davis*, 70 Ore. 498, 142 Pac. 544 (1914), where the victim made a settlement, under threat to sue, because he felt that to disprove the claim asserted he would have to leave his wife who was ill; the court, saying he could have refused to settle without making the investigation, found the settlement voluntary, and also affirmed the lower court's refusal to allow amendment of the pleadings to set up the duress issue.

¹⁶¹ *Harris v. Flack et al.*, 289 Ill. 222, 124 N. E. 377 (1919); *Foote et al. v. DePoy et al.*, 126 Iowa 366, 102 N. W. 112 (1905); *Gill's Trustee et al. v. Gill et al.*, 124 S. W. 875 (Ky. App. 1910); *Hogan v. Leeper*, 37 Okla. 655, 133 Pac. 190 (1913).

¹⁶² *Foote et al. v. DePoy et al.*, 126 Iowa 366, 102 N. W. 112 (1905).

making the threat, but to insure that the parent would provide from her estate for her children, as she was in duty bound to do; and the court refused to set aside this agreement for duress.¹⁶³ This was an eminently proper use of the power to influence the disposition of guardianship proceedings.

It has generally been treated as immaterial that the threat was not to start an ordinary civil lawsuit, but to resort to some remedy which was apt to exert more immediate pressure, such as attachment or garnishment,¹⁶⁴ writ of restitution or ejectment,¹⁶⁵ levy of execution,¹⁶⁶ retention or enforcement of judgment lien,¹⁶⁷ threat to sell property under a judgment,¹⁶⁸ threat of receivership or bankruptcy proceedings,¹⁶⁹ or of some other extraordinary legal procedure;¹⁷⁰ authority is

¹⁶³ *Lawrence v. Morris et al.*, 167 App. Div. 186, 152 N. Y. Supp. 777 (1st Dep't 1915).

¹⁶⁴ Holding threat of attachment or garnishment not duress (claim on which threat based invalid, or assumed to be invalid, except where otherwise specified): *Satchfield v. Laconia Levee District*, 74 Ark. 270, 85 S. W. 409 (1905); *Remington Arms Union Metallic Cartridge Co. v. Feeney Tool Co.*, 97 Conn. 129, 115 Atl. 629 (1921) (threat of attachment on claim partly valid, partly invalid); *McClair v. Wilson et al.*, 18 Colo. 82, 31 Pac. 502 (1892) (claim apparently valid); *Teem v. Town of Ellijay*, 89 Ga. 154, 15 S. E. 33 (1892) (apparently valid claims); *Myers v. Watson*, 204 Iowa 635, 215 N. W. 634 (1927) (apparently valid claim); *Paulson v. Barger*, 132 Iowa 547, 109 N. W. 1081 (1906); *Shelby v. Bowman*, 64 Kan. 879, 68 Pac. 1131 (1902); *Waller v. Cralle*, 47 Ky. 11 (1848) (apparently valid claim); *Weber v. Kirkendall et al.*, 44 Neb. 766, 63 N. W. 35 (1895); *Natcher v. Natcher*, 47 Pa. 496 (1864); *Flack et al. v. National Bank of Commerce*, 8 Utah 193, 30 Pac. 746 (1892); *Bolin v. Metcalf*, 6 Wyo. 1, 42 Pac. 12 (1895), *on rehearing*, 6 Wyo. 1, 44 Pac. 694 (1896); *see Security Savings Bank v. Kellems*, 274 S. W. 112 (Mo. App. 1925), *aff'd*, 321 Mo. 1, 9 S. W. (2d) 967 (1928). *Contra*, finding duress based on such threat: *Welch v. Beeching*, 193 Mich. 338, 159 N. W. 486 (1916) (debtor embarrassed by threat of garnishment while away from home in another state; see case discussed below, p. 353); *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997 (1879); *Collins v. Westbury et al.*, 2 Bay 211 (S. C. 1799) (another case of threat to sue in foreign jurisdiction).

¹⁶⁵ Holding no duress: *Davis v. Rice*, 88 Ala. 388, 6 So. 751 (1889); *Emmons v. Scudder*, 115 Mass. 367 (1874); *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115 (1883); *Pottsville Bank v. Cake*, 12 Pa. Super. Ct. 61 (1899) (apparently valid claim).

¹⁶⁶ Holding no duress: *Strange v. Franklin et al.*, 126 Ga. 715, 55 S. E. 943 (1906) (claim apparently valid, but judgment invalid for lack of jurisdiction); *Wilcox v. Howland*, 40 Mass. 167 (1839) (claim apparently valid); *State ex rel. Sanborn v. Stonestreet et al.*, 92 Mo. App. 214 (1902) (claim assumed partly valid, partly invalid); *Gerecke et al. v. Campbell*, 24 Neb. 306, 38 N. W. 847 (1888) (judgment irregular but not void); *Dispeau v. First National Bank of Pawtucket*, 53 Atl. 868 (R. I. 1902) (claim apparently valid). *Contra*: *Thurman v. Burt*, 53 Ill. 129 (1870); *Hollingsworth v. Stone*, 90 Ind. 244 (1883); *Neilson v. M'Donald et al.*, 6 Johns. Ch. 201 (N. Y. 1822) (claim valid; reversed for laches and on other grounds, 2 Cow. 139 (N. Y. 1823); see case discussed below, p. 352).

¹⁶⁷ Holding no duress: *Stover v. Mitchell*, 45 Ill. 213 (1867); *Hipp v. Crenshaw*, 64 Iowa 404, 20 N. W. 492 (1884); *Lathrop v. McBride*, 31 Neb. 289, 47 N. W. 922 (1891). *Contra*: *Lobit et al. v. Marcoulides et al.*, 225 S. W. 757 (Tex. Civ. App. 1920).

¹⁶⁸ Holding no duress: *In re First National Bank of St. Albans*, 49 Fed. 120 (C. C. Vt. 1891) (judgment irregular); *Mariposa Co. v. Bowman*, 16 Fed. Cas. 755, No. 9089 (C. C. Calif. 1867); *Manning v. Poling et al.*, 114 Iowa 20, 83 N. W. 895 (1901); *Weaver v. Stacy et al.*, 93 Iowa 683, 62 N. W. 22 (1895); *Richardson v. Brown*, 260 Mass. 509, 157 N. E. 603 (1927).

¹⁶⁹ Holding no duress (claims apparently valid in all cases except as noted).

divided on the question whether it is duress to threaten the filing of an unfounded or excessive mechanic's lien.¹⁷¹ But the power to initiate such proceedings (or, indeed, an ordinary lawsuit) may, like the power to initiate guardianship proceedings, be resorted to under such unfair circumstances that the use may reasonably be described as an abuse of the power. When a claimant plans to sue he is not likely to select the time which is most convenient for his opponent. But sometimes it is apparent that a plaintiff has carefully timed his attack for a moment when the defendant is helpless, unable to assert any defense. The best illustration is the attachment of the alleged debtor's ice wagons just before they were ready to start on their daily deliveries to his customers. The victim suggested release by an attachment bond, but the claimant remarked it would take some three days to arrange that. The claim was paid, but a later action based on duress forced a refund.¹⁷² That claimant knew he had no cause of action, so the case is one of those we have excluded as involving a *mala fide* claim; but the same conclusion should certainly be reached if the claim was invalid but asserted in good faith. Not that the claimant should be forced to await the end of the summer before attaching the ice wagons; but if he does attach when it is impossible for the alleged debtor to use his defense, then an opportunity later to try out the claim on the merits should be allowed through appli-

French v. Shoemaker, 14 Wall. 314, 20 L. ed. 852 (1872); Dick *et al.* v. Marx & Rawolle, Inc., 4 F. (2d) 879 (App. D. C. 1925) (merits of claim not discussed); Fuller *et al.* v. Roberts, 35 Fla. 110, 17 So. 359 (1895); Snyder *et ux.* v. Braden, 58 Ind. 143 (1877); Byron v. Byron, Heffernan & Co. *et al.*, 98 N. J. L. 127, 119 Atl. 12 (Ct. Errors and App. 1922); Peabody *et al.* v. Tenney *et al.*, 18 R. I. 498, 30 Atl. 456 (1894); Cornwall v. Anderson *et al.*, 85 Wash. 369, 148 Pac. 1 (1915); Walla Walla Fire Insurance Co. v. Spencer *et al.*, 52 Wash. 369, 100 Pac. 741 (1909) (merits of claim in dispute). *Contra*: Rose v. Owen, 45 Ind. App. 137, 85 N. E. 129 (1908) (merits of claim disputed).

¹⁷⁰ In all of these cases the courts refused to find duress. Threat of arrest on civil claim: Prichard v. Sharp, 51 Mich. 432, 16 N. W. 798 (1883) (merits of claim not discussed, described as immaterial); Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76 (1885) (disputed claim). Threat of distress warrant: Webber v. Aldrich, 2 N. H. 461 (1822) (apparently invalid claim); Colwell v. Peden, 3 Watts 327 (Pa. 1834) (disputed claim); Glynn v. Thomas, 11 Ex. 870, 156 Eng. Rep. 1085 (1856) (claim partly valid, partly invalid). Threat of injunction to protect disputed claim: Hart v. Walsh *et al.*, 84 Misc. Rep. 421, 146 N. Y. Supp. 235 (Sup. Ct. 1914). Threat of replevin: James C. McGuire & Co. v. H. G. Vogel Co., 164 App. Div. 173, 149 N. Y. Supp. 756 (1st Dep't 1914) (threat of replevin to collect invalid claim alleged as duress; demurrer sustained). Threat of mandamus: Supervisors of Onondaga v. Briggs, 2 Denio 26 (N. Y. 1846) (claim partly valid, partly invalid). Threat of securing writ of *ne exeat*: Gunter v. Thomas, 36 N. C. 199 (1840) (part of claim disputed). But see the discussion of cases on threat of guardianship proceedings above, p. 349.

¹⁷¹ Finding of duress based on such a threat: Joannin *et al.* v. Ogilvie *et al.*, 49 Minn. 564, 52 N. W. 217 (1892); Gates *et al.* v. Dundon *et al.*, 42 N. Y. St. Rep. 660, 18 N. Y. Supp. 149 (N. Y. City Ct. 1891), *rev'd for failure to plead duress*, 46 N. Y. St. Rep. 757, 19 N. Y. Supp. 390 (N. Y. City Ct. 1892). *Contra*: Abelman v. Indelli & Conforti Co., 170 App. Div. 740, 156 N. Y. Supp. 740 (1st Dep't 1915).

¹⁷² Chandler v. Sanger *et al.*, 114 Mass. 364 (1874); *cf.* Spaid v. Barrett *et al.*, 57 Ill. 289 (1870).

cation of the doctrine of duress. Where the underlying claim is valid, threat of such seizure announced at a moment deliberately selected to put the debtor at a serious disadvantage has been held insufficient to show abuse of process or duress.¹⁷³ But the New York Court of Chancery furnishes some opposing authority more than a century old. A creditor holding a valid judgment against *N*, and notes made by *N*'s son, wanted to force *N* to assume liability on the notes. With this in view, an execution sale on the judgment was planned for a day when *N* would be unable to secure cash, and so to prevent sacrifice of his household goods and other property, except by complying with any terms the creditor insisted on for postponement of the sale. The creditor thus got the agreement he wanted for *N*; but the agreement was canceled by the court, which talked of coercion, abuse of process and conspiracy.¹⁷⁴

When a dispute exists as to whether a judgment is a lien on a certain property interest or not, means are generally found for settling the matter by a final adjudication before enforcement of the judgment. But in three reported cases payments have been made under threat of sale of the payor's property interest on execution, and later the courts have either reversed the judgment on which the execution was based, or have found that it did not reach the payor's interest in the property. Neither of the payors was able to get back any part of the money he had paid, on the basis of duress or any other theory. One such victim, Ferguson, had purchased land at a mortgage foreclosure sale. A judgment creditor of the mortgagor claimed a lien on the land prior to the mortgage, and the lower court had upheld his claim. While Ferguson's appeal from this decision was pending, the redemption period under the sale on the creditor's judgment was running, and Ferguson paid the judgment just before the period expired. The appellate court held the judgment lien was subordinate to Ferguson's claim; but no duress was found to justify recovery of the sum paid on the judgment. The decision was made to turn on the fact that Ferguson had a sufficient remedy available, which he failed to use; he could have applied to the appellate court for an order to maintain the *status quo*, staying the running of the redemption period until the matter was finally adjudicated.¹⁷⁵ Plainly the only reason Ferguson did not secure such a restraining order was that he (and his attorney) did not know it was available or necessary; the payment was caused by a mistake of law. The layman Ferguson might well feel that

¹⁷³ *McClair v. Wilson et al.*, 18 Colo. 82, 31 Pac. 502 (1892); *Myers v. Watson*, 204 Iowa 635, 215 N. W. 634 (1927); compare the cases in note 153, above, where the debtor was in a financial crisis making defense impracticable, but there was less clear evidence of careful timing of the attack by the creditor.

¹⁷⁴ *Neilson v. M'Donald et al.*, 6 Johns. Ch. 201 (N. Y. 1822), *rev'd on other grounds*, 2 Cow. 139 (N. Y. 1823).

¹⁷⁵ *Manning v. Poling et al.*, 114 Iowa 20, 83 N. W. 895 (1900), *aff'd on rehearing*, 114 Iowa 20, 86 N. W. 30 (1901).

the court's decision was somewhat like calling a payment made at the point of a gun voluntary because the gun was not loaded. The other cases reached the same result on facts not significantly different.¹⁷⁶

Bringing an alleged debtor into court in another situation unusually burdensome for him has been condemned by the decisions finding relievable duress when the victim yielded to threats of litigation in a foreign jurisdiction where he would be seriously embarrassed in making his defense, or otherwise put at an unfair disadvantage. Mrs. Welch, a widow working to support her family went from her home in Indiana to Michigan to close a small business deal. Just as she was ready to collect her commission, she was faced with a garnishment proceeding based on a claim to which she had a complete defense; but she surrendered \$175 of her \$200 commission to the claimant. The court, in her action to recover the money thus paid, emphasized the facts that plaintiff was a woman, nervous, away from home, and argued that the subjective test of duress required a judgment for her.¹⁷⁷ A substantial group of decisions agree with this case in finding duress in threats of litigation against a victim embarrassed in making his defense good simply because he is not at home,¹⁷⁸ although a number take the other view.¹⁷⁹ Yet it may be doubted whether a defendant is in any weaker position to establish a meritorious defense simply because he is away from home in a sister state where the system of jurisprudence is the same as in his home state, than is a party sued at home at a time when a delay of a few weeks in establishing his rights will mean business collapse. The decisions refusing to find duress in the latter situation¹⁸⁰ seem fundamentally inconsistent with these cases based on suit in a foreign jurisdiction. Moreover the decisions finding duress do not refer to the fact that where parties reside in different states, either the plaintiff or the defendant will necessarily have to litigate in a foreign jurisdiction.

If the threat to sue is to be treated as basis for relievable duress, according to the formula which has been set out as the cornerstone thesis of this article, that threat must be wrongful in some sense. It is not an actionable wrong, in the absence of malice. We must keep the

¹⁷⁶ *Weaver v. Stacy et al.*, 93 Iowa 683, 62 N. W. 22 (1895); *Richardson v. Brown*, 260 Mass. 509, 157 N. E. 603 (1927).

¹⁷⁷ *Welch v. Beeching*, 193 Mich. 338, 159 N. W. 486 (1916).

¹⁷⁸ *Fenwick Shipping Co. v. Clarke Brothers*, 133 Ga. 43, 65 S. E. 140 (1909); *Mulholland v. Bartlett*, 74 Ill. 58 (1874) (contract signed under threat of suit in Canada on invalid claim while victim visiting there; held, contract defective for lack of consideration, no reference to duress); *Kelley v. Osborn et al.*, 86 Mo. App. 239 (1900); *Wright v. Tower*, 1 Browne App. 1 (Pa. 1801); *Collins v. Westbury et al.*, 2 Bay 211 (S. C. 1799).

¹⁷⁹ *Atkinson et al. v. Allen et al.*, 71 Fed. 58 (C. C. A. 8th, 1895) (part of claim admittedly due; victim in financial crisis); *Kohler v. Wells Fargo & Co.*, 26 Calif. 606 (1864); *Watson v. Cunningham*, 1 Blackf. 321 (Ind. 1824); *Dickerman v. Lord et al.*, 21 Iowa 338 (1866); *Waller v. Cralle*, 47 Ky. 11 (1847).

¹⁸⁰ See cases cited in notes 152-5 above.

judicial processes available to determine controversies, and have regarded this necessity as barring the imposition of a liability for damages on the plaintiff merely because he is defeated. This is certainly the reason that, where threat of a lawsuit has been put forward as duress the courts, as has been said, have frequently relied heavily on the statement that a threat to do what one has a legal right to do cannot be duress.¹⁸¹

But the problem needs more consideration than that statement indicates; "the word 'right' is one of the most deceptive of pitfalls. . . ."¹⁸² In the first place, in spite of the fact that no substantial penalty can result, it may be doubted whether one has a right, in the fullest sense of the word, to start a lawsuit which is not well founded. The determination at the end of the action is what the rights were at the beginning. Under our imperfect human institutions we cannot determine the rights of the parties until the matter has been adjudicated; therefore we must not restrict too severely the power to initiate litigation.¹⁸³ Hence the only penalty imposed for starting a lawsuit which proves to be without foundation is normally a liability for costs and disbursements. As a result, we are unable to give perfect protection to what must in reason be recognized as the right of a citizen in a civilized society to be free of annoyance by any unfounded legal proceeding. The conclusion indicated is that any threat to sue is wrongful, as the word is used in this analysis of duress, merely because the cause of action was one which would have failed.

It should be recognized that the ability which a member of an organized society has to start a lawsuit is not a right, but a power, which is capable of being put to improper ends; and that any abuse of that power is a wrong.¹⁸⁴ This is surely the correct analysis of the many cases of duress based on the threat of criminal prosecution used to force payment from a relative of the embezzler. The initiation of criminal proceedings against the guilty party would not be a wrong in any sense, certainly not an actionable wrong; but the power to initiate such proceedings used to collect private debts, is used wrongfully.¹⁸⁵ So the

¹⁸¹ See cases above, note 151; Durfee, *Recovery of Money Paid under Duress of Legal Proceedings in Michigan—Welch v. Beeching* (1917) 15 MICH. L. REV. 228, 234.

¹⁸² "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion." Mr. Justice Holmes in *American Bank & Trust Co. et al. v. Federal Reserve Bank of Atlanta et al.*, 256 U. S. 350, 358, 41 Sup. Ct. 499, 500, 65 L. ed. 983, 990 (1921).

¹⁸³ Durfee, *Recovery of Money Paid under Duress of Legal Proceedings in Michigan—Welch v. Beeching* (1917) 15 MICH. L. REV. 228, 234.

¹⁸⁴ See the classification of means by German legal writers into (a) means in themselves unlawful, (b) means which were quite lawful, and (c) means which were allowable until used to secure an unjustified advantage. Dawson, *Economic Duress and the Fair Exchange in French and German Law* (1937) 11 TUL. L. REV. 345, 363, n. 67.

¹⁸⁵ 5 WILLISTON, CONTRACTS (Rev. ed. 1937), §1611 citing cases.

son who tells his aged and somewhat weakened father that if the latter does not convey certain property to the son, an action will be started to appoint a guardian for the father, is not threatening to commit an actionable wrong. But according to the argument already set out, the son is using the power to initiate guardianship proceedings, not to preserve the alleged incompetent's estate, which is the purpose for which the power is given, but to secure what he wants for himself from the estate; the threat is wrongful because it looks to the abuse of the power to initiate litigation, and so is properly held relievable duress.¹⁸⁶ So where a lawsuit is threatened in bad faith, by one who is quite conscious that his position is insupportable, there is a deliberate use of the power to initiate litigation for a purpose quite foreign to its proper end; hence the courts here also find a wrongful threat, and duress such as calls for relief.¹⁸⁷

Even where there is no bad faith or other obvious ground for claiming abuse of the power to initiate litigation, still, as has been said, there is some element of injustice merely in starting an action which ultimately proves unfounded; the judgment for the defendant usually includes costs and disbursements, a nominal recognition of the defendant's right to some compensation for being required to defend himself against a baseless charge. The normal remedy available for redress of this injustice, in addition to collection of these costs and disbursements, is merely the establishment of a successful defense in the courtroom. But when the threat of litigation comes at a period of financial crisis such that it is not practicable for the victim to defend himself, this remedy may properly be called inadequate. To the contractor whose entire capital, equipment, and staff are tied up in one project, and who is charged with a serious breach of contract, it makes little difference what assurance he and his attorneys feel in the ultimate success of his defense, if in the several weeks or months while that defense is being established, he will suffer a heavier loss, by a complete blocking of all productive enterprise by his whole plant, than can be paid for by any judgment he can expect from the litigation. If the threatened defendant has in fact a good defense, but is caught in a situation where the delays or other disadvantages incident to litigation make it more burdensome to him to assert it in court than to surrender without a fight, he should be entitled to the protection of the doctrine of duress, at least in the absence of countervailing equities deserving of protection in the party making the threat, equities which I have not discovered in the cases so far.¹⁸⁸ This

¹⁸⁶ See above, p. 349.

¹⁸⁷ See above, p. 345.

¹⁸⁸ Interesting complications may arise. Suppose both parties are in a financial crisis, so that neither can afford to wait? In that case, the settlement reached between them before litigation might well be denied finality, and treated as merely tentative until the courts have passed on the controversy. No heavy penalty results,

is the only way to give him any effective protection in his right to assert his meritorious defense. If our rules force the victim, in order to present his defense, to suffer a larger loss than a successful defense will make good, we are simply taking away his defense.

K. THREAT TO REFUSE TO MAKE CONTRACT

A person who merely refused to expend his own money for the purchase of property, or for a loan, or who refused to sell goods or land which belonged to him, would hardly be accused of committing a wrong in any sense of the word. Except on the part of public utilities, we are not used to recognizing any obligation on one person to enter into contractual relations, on any terms whatsoever, with any other person. And, in England and America, it is generally considered that either party may attach to his assent any conditions he cares to insist upon. Yet in a surprising number of cases, relief from hard conditions in a contract has been sought on the theory that the opposite party was guilty of duress in refusing to make the contract on reasonable terms; but the argument has almost invariably failed. If the contract was a composition with creditors, and one creditor succeeded in getting a secret bonus for signing, he may be forced to refund it, and some of the decisions so holding refer to coercion;¹⁸⁹ but the fraud on the other creditors is probably the true justification for the rule. But refusal to furnish, on fair terms, capital¹⁹⁰ or merchandise¹⁹¹ or services¹⁹² necessary for continuance of a business enterprise is practically unanimously held not to be duress. The same holding has been reached in various

the settlement simply requiring the party who would have lost in the first place to carry the burden of ultimate defeat. But suppose he has relied upon the settlement reached and changed his position so as to create something like an estoppel? Then the courts might take this into consideration. Laches, in all events, would be fatal.

¹⁸⁹ *Breck v. Cole*, 4 Sandf. 79 (N. Y. 1850). In *Solinger v. Earle*, 82 N. Y. 393 (1880), the court denied recovery of money paid on note given by debtor's brother-in-law to induce a creditor to join in composition, saying the contract was illegal and the parties *in pari delicto*.

¹⁹⁰ See, for example, *Shriver v. Druid Realty Co.*, 149 Md. 385, 131 Atl. 815 (1926); *Willett et al. v. Herrick et al.*, 258 Mass. 585, 155 N. E. 589 (1927); *MacFarland v. Liberty National Bank of N. Y. et al.*, 166 N. Y. Supp. 393 (Sup. Ct. 1917); cf. *Administrators of Hough v. Hunt*, 2 Ohio 495 (1826).

¹⁹¹ *Dennehy et al. v. McNulta et al.*, 86 Fed. 825 (C. C. A. 7th, 1898); *Standard Box Co. v. National Biscuit Co.*, 10 Calif. App. 746, 103 Pac. 938 (1909). In *Smith v. Wm. Charlick, Ltd.*, 34 Austr. C. L. R. 38 (1924), the governmental wheat monopoly forced payment by a miller of a bonus for grain already sold and delivered, by threat to refuse to sell him any more grain; both the majority decision refusing any refund, and dissenting opinions, contain interesting discussions of the problem of duress in this type of situation.

¹⁹² *Deibel v. Jefferson Bank*, 200 Mo. App. 541, 207 S. W. 869 (1919) (services of clearing house association to bank); *Sylvan Mortgage Co., Inc. v. Stadler*, 115 Misc. Rep. 311, 188 N. Y. Supp. 165 (Sup. Ct. 1921) (apartment lease); *Metro-Goldwyn-Mayer Distributing Corp. v. Cocke*, 56 S. W. (2d) 489 (Tex. Civ. App. 1933) (film rentals).

other situations,¹⁹³ some of which involved great hardships on the victim. So the dominant partner in a profitable enterprise, whose control had been exercised by discharging the subordinate partner from employment and taking to himself a salary of \$7,500 a year for assuming the other's duties, threatened to continue this situation and not exercise the option to dissolve which the partnership contract gave him unless the co-partner ratified all of these acts. The agreement thus induced was held voidable for duress by the lower court,¹⁹⁴ but the appellate tribunal reversed and found no wrongful threat, and no duress.¹⁹⁵ These decisions, though not entirely palatable to one with a habitual sympathy for the under-dog, are yet probably sound unless we are ready to abandon the common law dogma that a "peppercorn" of consideration is sufficient to support any promise, for all the parties did in these cases was to extract what they considered a sufficient price for their contractual obligation.

Considered in the abstract, it seems almost too plain for argument or discussion that refusal to make a contract is not, could not be, relievable duress. But, as usual, study of more concrete instances will reveal that the generalization may be too broad. In a few cases, contract terms which seemed inequitable have been held relievable, or payments recoverable, where secured by such pressure, although duress is not always expressly referred to as a reason for the decision.

Three such cases were in equity. In the early 1800's a needy life-tenant in tail conveyed the estate, by suffering a recovery, for a price which was held inadequate, though apparently it was the only price available. The life-tenant "recoveree" having died, the transaction was set aside in equity in favor of the remainderman; the court explained its decision in this statement:

"With respect to value, mere inadequacy of price is of no more weight in equity than at law. If a man who meets his purchaser on equal terms, negligently sells his estate at an undervalue, he has no title to relief in equity. But a court of equity will inquire whether the parties really did meet on equal terms; and if it be found that the

¹⁹³ *Stott Realty Co. v. Detroit Savings Bank*, 274 Mich. 80, 264 N. W. 297 (1936) (judgment purchaser, after period for redemption had expired, extended the period 60 days for a cash payment of \$40,000, approved by receivership court; recovery of this payment for duress was denied); *Yousoupoff v. Widener*, 246 N. Y. 174, 158 N. E. 64 (1927) (sale of Rembrandt pictures allegedly worth £150,000 for £100,000 because of seller's dire needs; court said price paid was fair and also repudiated the seller's claim of duress); cf. *McNeill et al. v. Hall et al.*, 220 N. C. 73, 16 S. E. (2d) 456 (1941) (threat to refuse to buy from A in order to induce A not to sell to competitors, held not evidence of conspiracy; the court said there was no fraud, intimidation or coercion).

¹⁹⁴ *Shelton v. Trigg et al.*, 226 S. W. 761 (Tex. Civ. App. 1920) (rehearing denied 1921).

¹⁹⁵ *Trigg et al. v. Shelton*, 249 S. W. 209 (Tex. Com. App. 1923).

vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."¹⁹⁶

A few years later an Ohio court was presented with the reverse situation, a contract of purchase of land at an exorbitant overvaluation, forced by the vendor on the vendee as a condition of a loan to the vendee, who again was in desperate need of money. Before the contract was fully performed, the borrower vendee died; his administrator sought rescission in equity, and succeeded. In its discussion the court emphasized the fact that the vendee's necessities were consciously exploited by the vendor, but got no closer to duress than to say that equity would relieve from an unconscionable bargain, and that where there is such inadequacy of price that the mind revolts at it, the court will "lay hold on the slightest circumstances of oppression or advantage to rescind the contract."¹⁹⁷

In the third equity case duress is even further from the reasons assigned by the court for its decision, yet may well have played a controlling part. A banker offered to reveal the whereabouts of a \$25,000 bank-deposit if the depositor, an amnesia victim who had lost track of his holdings, would agree to pay \$10,000 for the service. The agreement was made, and the banker revealed the deposit in the bank of which he was himself an officer. The agreement was attacked in an action for an accounting, and held bad for constructive fraud, in concealment of the officer's relationship to the bank and securing an unfair advantage over the depositor. There was no reference to duress, but the court spoke of the "exorbitant and inconceivable bargain" as the obvious justification for its decision.¹⁹⁸ In Massachusetts, however, when the sole heir agreed to divide evenly with another relative of the decedent any assets in the estate discovered through information given by the latter, the court enforced the promise, rejecting the claim of duress, and the informant collected about \$1,300.¹⁹⁹

Economic compulsion was the avowed basis for the decision of a New York court requiring an employer to refund money received from his employee under an agreement for "kick-back" of part of the pretended wages named in the employment contract.²⁰⁰ Such agreements, in general, were illegal under a statute which, however, seems not to

¹⁹⁶ *Wood v. Abrey*, 3 Madd. 417, 56 Eng. Rep. 558 (1818). That inequality between contracting parties is sufficient to bring relief in equity, see dictum in *James v. Kerr*, 40 Ch. Div. 449 (1889).

¹⁹⁷ *Administrators of Hough v. Hunt*, 2 Ohio 495 (1826); cf. cases cited in note 190 above on refusal to lend money.

¹⁹⁸ *Gierth v. Fidelity Trust Co. et al.*, 93 N. J. Eq. 163, 115 Atl. 397 (1921).

¹⁹⁹ *Kaplan v. Suher*, 254 Mass. 180, 150 N. E. 9 (1926).

²⁰⁰ *Caivano v. Brill*, 171 Misc. Rep. 298, 11 N. Y. S. (2d) 498 (N. Y. City Ct. 1939).

have been applicable to the case before the court.²⁰¹ The court emphasized the inequality of bargaining power between the parties, and said the agreement was made and carried out under "economic pressure." The only possible threat involved was the threat to refuse a contract of employment unless the "kick-back" agreement was made, so the case clearly seems to hold that such a threat is relievable duress. Other authority can be found for the contention that an employer's threat of refusal to make agreements with his employees except on unreasonable terms may give the employees basis for claiming duress.²⁰²

A California court settled a troublesome case by reference to duress (among other reasons) in a situation where the only threat discussed was to refuse to enter into a proposed agreement modifying an earlier contract between the parties. A paving job, under a contract with a city, was worked on diligently under the constant supervision of city engineers who never made any objection to the progress being made, yet it became apparent that it could not be completed by the date set in the agreement. It was shown that when there was no complaint as to the performance of such contracts, any extensions of time reasonably necessary were customarily granted as a matter of course. The city officers in this case, however, refused any extension unless the contractor would lease to the city certain valuable business property for ten years at a nominal rental. The contractor was staggered at the proposal, and protested, but was jauntily told by the city fathers ". . . you will have to be a good dog. We got you where we want you. . . ." The contractor signed the lease, but the courts later refused to enforce it. The decision might have been placed on the ground that the original contract included an implied agreement for any extension of time that proved to be reasonably necessary; but "compulsion and the employment of coercive methods" was one of the reasons specified by the court for relieving the contractor, along with lack of consideration and a vague reference to public policy.²⁰³ This case illustrates another point that should be mentioned, the difficulty of classifying the threat used in a particular situation. The California court talked about the threat to refuse to make the extension agreement. But that threat may possibly have gained its force because of an implied threat in the background to sue for breach of the contract. Or the court might have seen it as a threat to break the original contract, if it was an implied term of that contract that reasonable extensions of time should be allowed.

²⁰¹ *People v. Brill*, 255 App. Div. 452, 7 N. Y. S. (2d) 949 (1st Dep't 1938) seems to involve the same employment contract.

²⁰² *Mitchell v. Pratt*, 17 Fed. Cas., No. 9668 at 516 (C. C. Md. 1841); see *State ex rel. Smith v. Daniels*, 118 Minn. 155, 161, 136 N. W. 584, 586 (1912).

²⁰³ *Oswald v. City of El Centro*, 211 Calif. 45, 292 Pac. 1073 (1930).

A similar difficulty in classifying the threat used is instanced by two other decisions, where the language of the courts suggests pressure exerted by refusal to enter into an agreement, but some would have described the situation as involving a threat to disregard a pre-existing implied contractual obligation. In each case a person with a partial interest, or a merely nominal interest, in the proceeds of an insurance policy, was in a position to block all recovery by refusing to sign a receipt, until he received or was promised an excessive share of the payment. One dispute was between lessor and lessee, both named as insured in a fire policy; the lessor, apparently in good faith, claimed what the court called a disproportionate share of the insurance money, and refused to sign any proofs of loss or receipt until his demands were met. The lessee surrendered because his business was waiting on re-building; the court required repayment, saying that the lessor prevailed by duress.²⁰⁴ The other case arose between the assignor and assignee of a life policy. The insurer refused payment, at maturity, because the beneficiary-assignor had not signed the receipt form on the back of the policy, and the beneficiary refused to sign any receipt until she was promised about a third of the proceeds of the policy. The court said the beneficiary was not legally obligated to sign the receipt; but enforcement of the assignee's promise was refused.²⁰⁵ The two judges sitting on the case on appeal gave different reasons for their conclusion; one talked of extortion and oppression, while the other said the promise was "wholly without consideration, or perhaps I might more properly say wholly without any substantial consideration."²⁰⁶

So, in a few instances, the mere use of unequal bargaining power to force a person in an unusually distressing situation to agree to hard contract terms is treated as duress. It is certainly not typical of our system of law to treat any refusal to contract as a wrong involving the slightest legal consequences; but these decisions depart from that tradition. It is to be noted that when the courts in such cases find a wrong serious enough to deserve relief, there is no need to consider adequacy of remedy. The remedy is always inadequate, for, aside from the doctrine of duress, there is no legal remedy whatsoever available to the victim of this type of wrong; except in the case of public utilities, no obligation to make contracts on reasonable terms exists in our laws.

These cases, where refusal to make a contract on what the court considers reasonable terms is treated as coercion, bring out sharply the conflict between this new extension of the doctrine of duress and the

²⁰⁴ *Guetzkow Bros. Co. v. Breese et al.*, 96 Wis. 591, 72 N. W. 45 (1897).

²⁰⁵ *Caplice v. Kelley et al.*, 27 Kan. 359 (1882); on appeal from earlier trial, *Kelley et al. v. Caplice*, 23 Kan. 474 (1880).

²⁰⁶ 27 Kan. 359, 374.

axiom of our law that inequality of consideration is immaterial to the validity of an agreement. In these decisions we have taken a step away from this fundamental thesis of Anglo-American contract law toward the continental view that an enforceable contract should be a reasonable exchange of values. The whole idea of duress by economic pressure fits beautifully into a system which normally treats the reasonableness of contract terms as a matter of concern for the courts; and, as has been said, in German law, economic duress is a means of implementing an avowed policy of blocking enforcement of contracts which call for an unreasonably disproportionate exchange of values.²⁰⁷

In spite of its effect on our doctrine of consideration, there is considerable force in the argument against the enforceability of a contract to pay \$10,000 merely for revealing information which has come to the payee by chance of the whereabouts of \$25,000 belonging to the payor. Where a transfusion of a peculiar type of blood was necessary to save a life, a rule which would block collection of such an exorbitant price for the service as to impoverish the sick man and his family, would render substantial benefit to society. If the ethics of the medical profession had not, to a large extent, attained the same end by other means, it is probable that physicians would have imposed on them by law the obligation to render services for reasonable rates. In such cases the doctrine of economic coercion would meet a social need; the question is whether the doctrine can be so limited as not to interfere unduly with the idea in our law that individuals should be left to fix the terms of their own contracts. Experience with more cases may show the practicability of such limitations. If not, the doctrine is unlikely to see much extension in this field, and the cases calling refusal to make contracts on reasonable terms relievable duress will probably remain, as they are now, decidedly in the minority. Another possibility is that the age of individually negotiated contracts is passing. The tendency of the last few years for government to interfere in the contracting process so as to control especially prices has been much accentuated within the past few months, since December 7, 1941. We hope these interferences are temporary only; but some permanent effect on our whole idea of freedom of contract will surely result. And as our veneration for the freely negotiated contract wanes, the doctrine of duress by threat to refuse to make a contract is very likely to grow.

L. CONCLUSIONS

1. *Wrongfulness of the Threat*

If duress is based upon a wrongful threat under such circumstances that other normal legal remedies do not offer adequate protection, some

²⁰⁷ Dawson, *Economic Duress and the Fair Exchange in French and German Law* (1937) 11 TUL. L. REV. 345, 363.

attempt at definition of the two major concepts in the formula must be made; and this in spite of the fact that it is dangerous to draw conclusions because the doctrine is still in process of development.

It seems a safe generalization that wherever a court finds duress, economic or otherwise, the finding is based on a threat which the court feels is wrongful in some sense. This is one of those abstractions so plainly self-evident and axiomatic that its very obviousness suggests suspicion as to its infallibility; but it appears to stand up under scrutiny. A finding of duress is a means to the overturning of a transaction (it may be a contract or a payment), because the retention of the benefit would be unjustifiable as between the parties. The controlling element in the case, and the only element which could make the retention unjustifiable, is the pressure by which the benefit was secured; so the finding of duress is necessarily a disapproval of that pressure, an expression of the feeling that the threat, or the use made of it, is to be condemned as in some degree anti-social, wrongful.

Plenty of authority can be found indicating that the threat must be to commit an actionable wrong.²⁰⁸ Certainly where the courts have found duress, physical or economic, there has generally been a threat of actionable wrong. Many decisions state flatly that it cannot be duress to threaten to do what one has a right to do,²⁰⁹ which is probably intended to mean that a threat to commit an actionable wrong is essential.

Although this definition of "wrongful" seems to me, as set out more than once already, much too narrow, to many it will appear too broad. Some will feel it is especially unfair to describe a threat as wrongful simply because it is later shown to have been a threat to commit an actionable wrong, taking the position that the threat should not be condemned unless uttered in bad faith, by one who knows, or at least should reasonably know, that he is threatening to commit an actionable wrong. The party making the threat may be acting in perfect innocence, having confident advice from able attorneys, with good ground for believing that he is proposing simply to enforce his contract (or other legal right). If it later develops, after litigation, that the course he was threatening to take would have been a breach of contract it may seem hard to find him guilty of duress for thus asserting what he, with reason, believed to be his right. But the good faith of the party would not have protected him from liability if the threat had been carried out; and the threat itself should be judged, for present purposes, by its social significance, with as little regard for the motive behind it as if we were

²⁰⁸ Of course this need not be taken to mean that the utterance of the threat itself constituted an actionable wrong, but simply that the utterance of the threat was an evil practice which should be discouraged at least by requiring the return of benefits so secured.

²⁰⁹ See for instance cases cited in note 151 above.

judging the execution of the threat. This is particularly true since the only effect of the finding of duress is not to impose any burden of damages on the dominant party, but simply to force him to return that which he forced from his victim by means of the threat to commit a wrong; in the light of this result, describing the threat as wrongful does not appear so hard even from the viewpoint of the party uttering it. So the insurer who denies the disability of his insured and threatened to forfeit the policy, in spite of a disability premium waiver clause, unless premiums are kept up, is acting in perfect good faith;²¹⁰ the existence of such disability is a most troublesome question of fact. But the insured, if denied recourse to the doctrine of duress, is in a dilemma where he cannot escape a risk of heavy loss; while he is litigating his claim of disability, he must either default on the premiums and risk losing his whole investment in the policy if the lawsuit goes against him, or he must pay the premiums and lose all claim to that money even though he wins the lawsuit. On the other hand, the doctrine of duress protects quite effectively the rights not of the victim alone but of *both parties* without undue risk to either; for the only risk imposed on the insurer by such litigation is, not the danger of a liability for damages, but simply the possibility that it will have to return the premiums which it secured by the wrongful pressure.

In other words, a finding of duress does not impose any legal forfeiture on anyone, but simply requires a return of that which was improperly taken. This is a point often overlooked which, properly understood, seriously weakens, not only the argument that *mala fides* is essential to duress, but the whole position that there must be a threat of an actionable wrong.

In working out the rules applicable to duress it is to be remembered that we are dealing not with retributive nor even compensatory justice so much as with restoratory justice. A judgment based on duress simply requires the specific restitution of property to its former possessor, or the annulment of an executory contract, so as to undo a transaction which should not have taken place. No affirmative liability or heavy penalty of any sort is imposed on the guilty party²¹¹ and the standard by which the wrong is measured may be correspondingly lighter than that applied to the ordinary cases involving tort or breach

²¹⁰ See Part I, pp. 273-4.

²¹¹ 5 WILLISTON, CONTRACTS (rev. ed. 1937) §1626; WOODWARD, QUASI-CONTRACTS (1913) §211. But if other remedies are inadequate, an affirmative liability is sometimes recognized; Note (1925) 39 HARV. L. REV. 108. In *News Publishing Co. v. Associated Press et al.*, 114 Ill. App. 241 (1904), liability for damages was imposed on the Associated Press, which was regarded as a public utility. Recovery of damages for duress was also allowed in *White v. McCoy Land Co.*, 229 Mo. App. 1019, 87 S. W. (2d) 672 (1935), *aff'd sub. nom.*, *White v. Scarritt*, 341 Mo. 1004, 111 S. W. (2d) 18 (1937).

of contract.²¹² Considering this fact, and the decisions in cases where threats of criminal prosecution or of guardianship proceedings were used to attain personal ends as already discussed above²¹³ it does not seem sufficient to define a wrongful threat simply as one to commit an actionable wrong. The term must include any threat to do an act which, though quite lawful by technical legal standards, is yet an abuse of the powers of the party making the threat; that is, any threat the purpose of which was not to achieve the end for which the right, power, or privilege was given.²¹⁴

It has been suggested above that a threat to sue on a claim which is unfounded but asserted in good faith may be wrongful, as the term is here used. Will the test worked out in the preceding paragraph support that conclusion? Is a claimant who sincerely believes in an invalid claim and who threatens to take it into court, threatening to abuse his power to sue? Under the test just stated, that depends upon just how we define the purpose of our judicial system. If its true purpose is to furnish all *bona fide* litigants a means of having their rights determined, then the starting of an action in sincere though mistaken belief in the cause asserted is not a misuse of the courts nor an abuse of the power to sue. But the only reason we open the courts to any plaintiff who has no claim is that we cannot determine what his rights are until he has come into court. The truly basic purpose of our judicial system is to make possible the enforcement of just claims,²¹⁵ so that the threat of litigation where the opposite party has a meritorious defense is used for an improper purpose; there is an abuse of power, though possibly in perfect good faith. As pointed out above, the result is not the imposition of any penalty on the party exercising the duress, but simply the requirement that he restore that which he secured by the unjust pressure. And since duress will be found only where the normal remedy, resort to the law courts before the making of the contract or payment, was practically beyond the reach of the victim, this application of the doctrine enables the courts to right a wrong which, otherwise, would probably not be set right at all.

The question of what is such a wrongful threat as to justify a finding of duress has been, and will probably continue to be, settled by our courts in accord with much more vague non-legal concepts than any discussed so far. In fixing upon a measure of right and wrong for the

²¹² See Justice Holmes's discussion of the difference between the standards to be applied in an action for damages, and an action for annulment of a contract for duress, in *Silsbee v. Webber*, 171 Mass. 378, 380, 50 N. E. 555, 556 (1898).

²¹³ See above, p. 349.

²¹⁴ Note (1928) 42 HARV. L. REV. 274.

²¹⁵ Even the modern declaratory judgment is fundamentally directed toward this purpose, though it aims to achieve this end by action in advance of the breach of obligation.

present purpose, it is easy to consult too closely the rules governing the technical rights of litigants in the normal tort and contract actions and the "moral sense of the community" not enough.²¹⁶ So the mere fact that the dominant party did not insist upon an immediate decision, but allowed the other time to consider his course of action,²¹⁷ or the reasonableness of the payment demanded on an unliquidated claim,²¹⁸ may be a factor aiding the court to find no duress. When an employer found his clerk had been embezzling his money, and got a mortgage from the young man's mother simply by threatening to tell the father, who was neurotic and in danger of insanity according to the evidence, the Massachusetts court held the claim of duress should go to the jury. Mr. Justice Holmes explained that, though telling the father would not be an actionable wrong, it was a "brutal and wicked" means used to get the money; the basis of duress was defined in these broad terms:

"If a party obtains a contract *by creating a motive from which the other party ought to be free*, and which in fact is and is known to be sufficient to produce the results. . . ."²¹⁹ (Italics not in original.)

The following statement from a Columbia Law Review note published twenty years ago, is even more appropriate today:

" . . . the soundest way . . . to explain such cases (of duress by threat of litigation) is on the ground that the doctrine of duress is still in process of development, and that the *prevailing notions of what constitutes equitable and decent conduct furnish the basis for the legal definition of duress.*"²²⁰ (Italics not in original.)

Very likely all the elements in the transaction will be considered and the pressure used will be compared with what the court thinks is decent conduct, which probably means that the standards generally prevailing in the community will control.

But even this broad statement will not satisfactorily dispose of all the cases, for the "moral sense of the community" would not condemn a claimant who, believing he was asserting his rights, threatened to sue

²¹⁶ " . . . the practical end of the administration of justice according to law, is such adjustment of the relations of men to each other and to society as conforms to the moral sense of the community." Pound, *The Need of a Sociological Jurisprudence* (1907) 19 GREEN BAG 607, 612.

²¹⁷ The conduct of the dominant party in allowing time for consideration or consultation with others apparently aided the courts in holding the transaction voluntary in *Cummins v. Carter et al.*, 17 Hawaii 71 (1905); *Prichard v. Sharp*, 51 Mich. 432, 16 N. W. 798 (1883); *Cornwall v. Anderson et al.*, 85 Wash. 369, 148 Pac. 1 (1915).

²¹⁸ *McCrary Stores Corp. et al. v. S. M. Braunstein, Inc.*, 99 N. J. L. 166, 122 Atl. 814 (1923).

²¹⁹ *Silsbee v. Webber*, 171 Mass. 378, 50 N. E. 555 (1898). Justice Holmes explained that the court trusts its power of investigation for the purpose of restoring the parties to the position they were in before the threat was made, but not to the extent of enforcing an affirmative penalty or obligation on one of the parties.

²²⁰ Note (1920) 20 COL. L. REV. 80, 83.

on an invalid claim; yet, if the present analysis is correct, sometimes justice requires that such a threat be treated as sufficiently wrongful to form a basis for a finding of duress. Though there is no moral taint attached to the use of such a threat, it does place the victim under a pressure from which he is entitled to be free,²²¹ and the use is therefore improper. The motives of the party using the threat may be above reproach, but he does a real injustice to his adversary.

To the problem of what threats should be held wrongful within the duress formula suggested, I find no answer which is even reasonably definite and satisfactory. The only approach to a solution which my analysis has reached suggests that any one of several different reasons may be applied to make a threat so unjustifiable as to form a basis for a claim of duress. Though there are probably exceptions, I believe the cases and discussion indicate that, generally, a threat should be held wrongful for the present purpose if it fits within any one of the following descriptions:

- (1) a threat to commit an actionable wrong;²²²
- (2) a threat to misuse a legal power given for other legitimate ends;
- (3) a threat to maintain a lawsuit or defense which ultimately proves to be unsustainable;
- (4) a threat to violate the standards of decent conduct in the community.

But, of course, in all these cases, such wrongfulness of the threat does not of itself establish the claim of duress; inadequacy of remedy must also be shown. And it is especially important here not to forget that, even if the above statement does set out the substance of the present law as to one element of non-physical duress, innovation is to be expected as the ideas of bench, bar, and laity develop in this comparatively new field.

This wrongful threat must be a substantial factor, if not the controlling factor, in inducing the agreement or payment by the victim. Occasionally the facts indicate a threat, but indicate also that the victim's conduct was influenced primarily by factors other than the threat. So, although a Tennessee conveyance was delivered for the Confederate

²²¹ See quotation from Mr. Justice Holmes's decision in *Silsbee v. Webber* above, p. 365.

²²² Some courts would probably refuse to call wrongful the threat to break a contract in the face of unforeseeable difficulties developing in the course of performance; at any rate, modifications of the original contract secured by such a threat have been enforced in some cases, though they have generally been discussed as problems in consideration. *Linz v. Schuck*, 106 Md. 220, 67 Atl. 286 (1907). Here the alternative remedy available to the promisee threatened with a breach might well be inadequate for delay, and if the threat is wrongful the doctrine of duress would apply. Or possibly the promise is to be interpreted as subject to an implied condition excusing the promisor if such difficulties arise, in which case there is no threat of breach.

currency which was backed by threats from the controlling Confederate regime of imprisonment for one rejecting it, the deed was held valid and not given under duress for the reason that this form of money was in general use in the community at the time; the court declared it found no evidence that the threat was a controlling factor with the vendor.²²³ Some courts assume the same conclusion is justifiable where a license fee is collected by a municipality under an invalid ordinance, and the question is whether the mere existence in the ordinance of a penal provision is sufficient to indicate that the payment was induced by a threat,²²⁴ although an implied threat seems clearly controlling; when a citizen pays a license fee to government officials, it is surely reasonable to assume that he is influenced largely by the fear that disobedience of the law will involve some unpleasant personal consequences.

2. *Inadequacy of Normal Legal Remedy*

Even when the threat used was grievously wrongful, still relief for economic duress is not generally given where such relief is not a practical necessity. The victim is expected to use any legal remedies open to him against the threatened wrong which give his rights adequate protection, rather than yield to the threat and later ask the courts for a finding of duress. It is not an aid to clarity of expression to pick up an old phrase already overloaded with technical connotations in other fields, and use it in quite new surroundings, where its purpose and therefore its meaning, are likely to be different from anything heretofore connected with it; but "inadequacy of remedy" seems, in spite of objections, the best phrase available to describe this element of duress.

The courts are understandably reluctant to approve new law in cases where the old law, properly used, would have given practical justice, and this is certainly one reason that "inadequacy of remedy" is often regarded as essential to the application of this and other newly developing legal doctrines. Aside from the innate conservatism of the judiciary, there is some good reason for the limitation in dealing with duress problems. For one thing, we quite justifiably like to have individuals settle their business affairs finally between themselves without litigation whenever possible, and this makes us hesitate to overturn any particular contract or payment under attack for duress. But it must be admitted that the limitation here discussed, refusing relief for duress because another remedy was available, in its effect on future business

²²³ *Wilkerson v. Bishop et al.*, 47 Tenn. (7 Cold.) 24 (1869) (decision may have been controlled by politics of the period just after the Civil War); *accord*, *Yates v. Royal Ins. Co.*, 200 Ill. 202, 65 N. E. 726 (1902), discussed in Part I, p. 251.

²²⁴ *Conley v. Buffalo*, 65 Misc. Rep. 100, 119 N. Y. Supp. 87 (Sup. Ct. 1909). *Contra*: *Hill v. District of Columbia*, 18 D. C. (7 Mackey) 481 (1889); *American Steamship Co. v. Young*, 89 Pa. 186 (1879).

practices, will not so much restrict litigation as encourage resort to the alternative available remedy, which will generally involve court action; the only difference will be that the courts will be asked to intervene before rather than after compliance with the demand.

A better reason for the limitation is that the victim who first surrenders to the threat and later seeks to annul the transaction for duress is asking the court to disregard and set aside his own acts, done with the deliberate intent that the other party should perform and rely on them, after there has been such reliance. There may have been serious wrong in the threat; but there is also something objectionable in the shift of position by the victim between the time he yields to the pressure and makes promise or payment and the time he subsequently attacks the transaction in the courts for duress.²²⁵ If this inconsistency is not forced upon the victim by the necessities of the situation as the only means of self-protection, if readily available legal processes would have prevented the execution of the threat or redressed appropriately the wrong suffered, it is better to require the use of such other legal processes. If the holder of a note with ample security takes a few shares of worthless stock in settlement simply because the maker refused to make any other payment, a later attack on the settlement agreement as voidable for duress does not deserve much sympathy. The holder of the note gave a full discharge and allowed the maker to rely on it as final; it should be final unless there were some further circumstances making it impracticable for the holder to use his other remedy, some plausible reason why he should hesitate to collect out of his security. Similarly, the payment of a fine after conviction under an unconstitutional statute was held not induced by duress for the reason that the victim had available a right of appeal, which he did not use.²²⁶

Many decisions apply the doctrine of economic compulsion without making any express reference to inadequacy of remedy as an essential element. Many others refuse to apply the doctrine although there was plainly a wrongful threat and the remedy would be called inadequate by almost any standard, as when a partner for a term threatened to dissolve the partnership in breach of the agreement, a breach for which damages would almost certainly be inadequate compensation.²²⁷ Professor Williston is opposed to designating inadequacy of remedy as essential to relief for duress, though he says it is always a matter for pertinent inquiry.²²⁸

²²⁵ See on p. 382, below, discussion of protest, which is intended to limit the right of the prevailing party to rely on the finality of the transaction.

²²⁶ *Blumenthal v. United States*, 4 F. (2d) 808 (S. D. Calif. 1925).

²²⁷ *Taylor v. Ford*, 131 Calif. 440, 63 Pac. 770 (1901).

²²⁸ 5 WILLISTON CONTRACTS (rev. ed. 1937), §1605, n. 2, §1620. See quotation and discussion below, pp. 380-1.

The facts and holdings in the cases discussed in the preceding pages, however, in my opinion, point to the sound rule as making inadequacy of remedy an essential element, though often the decisions are silent on the point. Many carefully phrased definitions of duress support the same conclusion. The United States Supreme Court, in an opinion which has had considerable influence on later decisions, said:

"To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary . . . there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, *from which the latter has no other means of immediate relief than by making the payment.*" (Italics not in original.)²²⁹

Practically the same language is used to define duress in Woodward's *The Law of Quasi Contracts*,²³⁰ and the same idea is expressed in other decisions²³¹ and comments.²³²

There are also a number of decisions which deny relief for duress because the victim of a wrongful threat did not have to rely on the normal common law remedy, but had ready to his hand an extraordinary remedy which would have been an effective shield against the threat. The lessee of the Marshall Field property in Chicago who yielded to the lessor's unjustifiable threat to cancel the lease if the lessee did not pay a part of the lessor's income tax, could, according to the court, have secured an injunction; for that reason the court refused to find duress.²³³ The possibility of relief from a harassing threat of attachment or other claim by posting a security bond has been treated as affording sufficient means of protection to defeat an action based on duress.²³⁴ These cases suggest that the development of a more effective civil procedure hereafter might eliminate the necessity for the doctrine

²²⁹ Radich v. Hutchins, 95 U. S. 210 213, 24 L. ed. 409, 410 (1877).

²³⁰ (1913) p. 337, §212.

²³¹ The following decisions are notable among many which expressly recognize this factor as of controlling importance. *Strange v. Franklin et al.*, 126 Ga. 715, 55 S. E. 943 (1906); *Manning v. Poling et al.*, 114 Iowa 20, 83 N. W. 895 (1900), *aff'd on rehearing*, 114 Iowa 20, 86 N. W. 30 (1901); *Jones v. Sherwood Distilling Co.*, 150 Md. 24, 132 Atl. 278 (1926) (forceful discussion of adequacy of remedy); *Wessel v. D. S. B. Johnston Land & Mtge. Co.*, 3 N. D. 160, 54 N. W. 922 (1893); *Minneapolis, St. Paul & S. Ste. Marie Ry. v. Railroad Commission of Wisconsin*, 183 Wis. 47, 197 N. W. 352 (1924).

²³² Notes (1937) 15 N. C. L. REV. 413, (1916) 3 VA. L. REV. 309, (1937) 3 U. OF PITTS. L. REV. 241. Inadequacy of remedy is an essential element of duress in German law (or was, when the article cited was written); Dawson, *Economic Duress and the Fair Exchange in French and German Law* (1937) 12 TUL. L. REV. 42, 62.

²³³ *Illinois Merchants Trust Co. v. Harvey*, 335 Ill. 284, 167 N. E. 69 (1929), case discussed Part I, p. 270.

²³⁴ *Remington Arms Union Metallic Cartridge Co. v. Feeney Tool Co.*, 97 Conn. 129, 115 Atl. 629 (1921); *Forbes v. Appleton*, 59 Mass. (5 Cush.) 115 (1849); *Flack et al. v. National Bank of Commerce*, 8 Utah 193, 30 Pac. 746 (1892).

of economic compulsion in some situations, and so might narrow the field to which it is applied.

(a) *Delay as Inadequacy of Remedy*

The alternative remedy available generally involves litigation, and litigation always involves delay; such delay is the common reason for that inadequacy of remedy which completes a case of economic duress. Usually months, and not uncommonly years, are consumed in getting a final judgment and enforcing it. Probably the reason that economic compulsion was earliest recognized in duress of goods cases,²³⁵ and where utility services were refused,²³⁶ was partly because those were the cases in which it was most obviously unreasonable to expect the victim to suspend the enjoyment of his rights until the courts had passed upon them. Where such daily necessities as utility services were in question, it was plain to the courts a hundred years ago that the mere loss of the service for the time necessary to establish the right thereto in court would be a substantial injustice legally irretrievable, and consequently that if this right was to be effectively protected the obligee must be allowed to surrender to any conditions enforced by threat to withhold the service, and to recover later on a claim of duress.²³⁷

Nowadays, a wait of even a few weeks in collecting on a contract claim is sometimes serious or fatal for an enterprise at a crisis in its history. The business of a creditor in financial straits is at the mercy of an unscrupulous debtor, who need only suggest that if the creditor does not care to settle on the debtor's own hard terms, he can sue. This situation, in which promptness in payment is vastly more important than even approximate justice in the settlement terms, is too common in modern business relations to be ignored by society and the courts.

The sale of land may depend upon immediate termination of an outstanding interest or encumbrance held by one already under contract with the proposed vendor, but who refuses performance thereunder unless some bonus is paid him.²³⁸ An employee whose wages have been wrongfully garnisheed may face loss of employment unless the claim is promptly settled.²³⁹ A debtor may refuse timely payment of money imperatively necessary to enable the creditor to meet his own pressing obligations.²⁴⁰ The threat may be to refuse delivery on a

²³⁵ Part I, p. 241.

²³⁶ Part I, p. 243.

²³⁷ Part I, p. 245.

²³⁸ Bonus to vendor held collected by duress: *Pemberton v. Williams*, 87 Ill. 15 (1877); see *Congdon v. Preston*, 49 Mich. 204, 206, 13 N. W. 516, 517 (1882). *Contra*: *Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712 (1927). Bonus to mortgagee held collected by duress: *Wells v. Adams et al.*, 88 Mo. App. 220 (1901); *First National Bank v. Sargeant*, 65 Neb. 594, 91 N. W. 595 (1902). *Contra*: *Crittenden v. Royce*, 100 Conn. 617, 124 Atl. 215 (1924).

²³⁹ *Kelley v. Osborn et al.*, 86 Mo. App. 239 (1900).

²⁴⁰ *Winget v. Rockwood et al.*, 69 F. (2d) 326 (C. C. A. 8th, 1934); *Thomas*

contract for goods necessary to continuance of the buyer's business.²⁴¹ An attorney may threaten to abandon his client in the midst of litigation,²⁴² or an actor may refuse to proceed with a performance already advertised.²⁴³ Submission may be necessary to enable the victim to carry out plans for an important shipment of merchandise.²⁴⁴ A payment of an illegal head tax on immigrants before they were landed from the payor's ship was held involuntary; but the same court on the same day held such a payment made *after* the immigrants were landed was voluntary, giving as a reason that the danger of the payor's ship being held up by litigation over the tax was eliminated.²⁴⁵ Even in the absence of unusual circumstances, making any delay abnormally costly, if the delay attending court action promises to be of unusual length, it may involve sufficient hardship to make the remedy inadequate.²⁴⁶

(b) *Uncertainty of Remedy as Inadequacy*

Not only the delay involved in securing court action, but sometimes the mere uncertainty as to what the court action will be makes it unreasonable to expect the victim to rely exclusively on the courts for protection.²⁴⁷ The excessive fee collected by the Missouri Public Service Commission for its approval of a railroad bond issue was ordered refunded, in a case already discussed, because the United States Supreme Court felt the railroad was under no obligation to take the risk of an unfavorable decision;²⁴⁸ the danger involved in proceeding without the

et al. v. Brown, 116 Va. 233, 81 S. E. 56 (1914); see other cases discussed Part I, pp. 255 ff.

²⁴¹ *Pittsburgh Steel Co. v. Hollingshead & Blei*, 202 Ill. App. 177 (1916); *Secor v. Ardsley Ice Co.*, 133 App. Div. 136, 117 N. Y. Supp. 414 (2d Dep't 1900), *aff'd mem.*, 201 N. Y. 603, 95 N. E. 1139 (1911) (by implication). *Contra*: *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284 (1882); and other cases discussed Part I, pp. 262 ff.

²⁴² *Cooley et al. v. Buie et ux.*, 284 S. W. 702 (Tex. Civ. App. 1926), *rev'd* 291 S. W. 876 (Tex. Com. App. 1927) (upper court found no proof of threat to abandon case).

²⁴³ *Dana v. Kemble*, 34 Mass. (17 Pick.) 545 (1836).

²⁴⁴ *Darling-Singer Lumber Co. v. Oriental Navigating Co.*, 127 Ore. 155, 259 Pac. 420 (1928), *reh'ring denied*, 127 Ore. 155, 272 Pac. 275 (1929); *Jones v. Sherwood Distilling Co.*, 150 Md. 24, 132 Atl. 278 (1926).

²⁴⁵ *Cunningham v. Munroe*, 81 Mass. (15 Gray) 471 (1860) (paid before landing; held, duress); *Cunningham v. Boston*, 81 Mass. (15 Gray) 468 (1860) (paid after landing; held, no duress). *Contra*: *Benson et al. v. Monroe*, 61 Mass. (7 Cush.) 125 (1851).

²⁴⁶ *James Shewan & Sons, Inc. v. United States*, 73 Ct. Cl. 49 (1931) (court emphasized long delay involved in securing enabling act giving court jurisdiction, and a delay of some years before case could be heard, as showing inadequacy of alternative remedy). In *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), the court refused relief in a similar situation, partly because there was no showing that the delay would be disastrous, and partly because of defective pleading.

²⁴⁷ 5 WILLISTON, CONTRACTS (rev. ed. 1937) §1620, p. 4531, n. 7 and cases cited.

²⁴⁸ *Union Pacific R. v. Public Service Commission of Missouri*, 248 U. S. 67, 39 S. Ct. 24, 63 L. ed. 131 (1918), discussed in Part I, pp. 248-9.

formal approval and relying on successful litigation to settle the legality of the bond issue was so great as to make that course impracticable—an inadequate remedy. The same court gave the same reason for allowing recovery of taxes paid under an invalid statute which provided that defaulting corporations would forfeit the right to do business in the state.²⁴⁹ Stockholders who paid an assessment under protest, claiming it illegal, were held entitled to recovery because the court said they acted reasonably to avoid loss of the stock.²⁵⁰ A shipment of wax, rejected by a purchaser as not meeting contract specifications, was returned to the seller with a draft attached to the bill of lading for a sum claimed by the purchaser as damages for breach of the sale contract. To get possession and prevent loss of the wax, which was perishable, the seller paid the draft, and brought suit to force refund from the buyer. The court held the payment involuntary and allowed recovery, saying there was no breach of contract by the seller, but he did not have to permit destruction of the goods and risk all his investment in the transaction on ability to prove that fact in court.²⁵¹

Of course uncertainty, even in a high degree, as to the outcome of a lawsuit, does not always make that remedy inadequate. Rather it is so only in the abnormal situation where a much heavier risk of loss in case of unfavorable outcome is carried by one party than by the other; a heavier risk of loss, that is, not in that the chances of loss are greater on the one side than on the other, but in that the penalty paid by one party if he loses will be much greater than the penalty imposed on the other party if the other party loses. Though the courts do not all agree, an apparently perfect example of such uncertainty is found in those cases already referred to involving disputes over the obligation to pay insurance premiums. The insured alleges disability and relies on a premium waiver clause, while the insurer threatens cancellation for default. Suppose the individual is stubborn, refuses payment, and resorts to a lawsuit. If the insurer loses the case, it will have to perform its insurance contract, without any increase of liability because of the lawsuit. But if the individual loses he will have lost, not only his hope of escaping the payment of the premiums, but also all chance of protecting his investment by performing the contract. Practically all his long accumulated rights in the insurance policy will have been forfeited by the delay,²⁵² and this may be just at a time when his illness or partial

²⁴⁹ *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U. S. 280, 32 S. Ct. 216, 56 L. ed. 436 (1912).

²⁵⁰ *Young v. Hoagland et al.*, 212 Calif. 426, 298 Pac. 996 (1931).

²⁵¹ *Carhill Petroleum Co., Inc. v. Ennis-Bayard Petroleum Co.*, 81 Pa. Super. 486 (1923).

²⁵² Under modern policy forms, extended insurance or a small paid-up policy or cash surrender value would be left.

disability has made it impossible for him to secure insurance protection elsewhere.²⁵³ So if the right of the Missouri Public Service Commission to the excessive fee for authorizing a railroad bond issue had been litigated before payment, the railroad would have risked much more in the action than the commission; failure to collect the fee would not have mattered greatly to the state, but a finding against the legality of the large bond issue, or the delay of the issue pending the litigation, might have been ruinous for the railroad. The Illinois court in the case already referred to, involving the leasehold on the Marshall Field store property in Chicago, indicated it would have found duress were it not for the availability of an injunction as a protection to the lessee against forfeiture.²⁵⁴ Assuming that a temporary restraining order would be procurable to preserve the *status quo* in the dispute and prevent loss pending the decision of the injunction suit, it seems fair to conclude that the Illinois lessee's remedy was sufficient to protect him. This suggests that uncertainty of remedy is merely a special phase of delay in litigation as a basis for claiming inadequacy of the remedy.

The idea that uncertainty of the remedy makes it inadequate is contrary to the implications of many decisions and has been expressly repudiated in some. A stockholder paid a bonus, not legally collectible, to participate in a new issue of stock by his corporation; his suit, fifty years ago, to force a refund failed.

"We may concede that the action of the company placed him in a 'dilemma'; he had to choose between two roads, neither of which he may have regarded as safe. In other words, he was uncertain as to his legal rights under the scheme proposed by the company. The 'dilemma' was the uncertainty of the law. . . . However great the uncertainty of the law may be in particular cases, it has never been supposed to amount to duress of person or goods."²⁵⁵

More recently the New Jersey court refused relief to a lessee who had paid money not properly due on demand of the lessor rather than risk forfeiture of the valuable leasehold on determination of a doubtful issue, the tax liability of the lessee, in a lower court trial subject to somewhat narrowly limited right of review.²⁵⁶ But these decisions appear to have little to recommend them except adherence to tradition. The rule which

²⁵³ Part I, pp. 273-4.

²⁵⁴ *Illinois Merchants Trust Co. v. Harvey*, 335 Ill. 284, 167 N. E. 69 (1929), discussed in Part I, pp. 269-70.

²⁵⁵ *De La Cuesta v. Insurance Co. of N. A.*, 136 Pa. 62, 83, 20 Atl. 505, 508 (1890). The court did point out a remedy which would have protected the stockholder's rights here, suit against the corporation for market value of the stock; so the statement quoted in the text above may be dictum. Another case expressly repudiating the idea that uncertainty means inadequacy of remedy is *Wessel v. D. S. B. Johnston Land & Mtge. Co.*, 3 N. D. 160, 54 N. W. 922 (1893).

²⁵⁶ *McCrory Stores Corp. et al. v. S. M. Braunstein, Inc.*, 99 N. J. L. 166, 122 Atl. 814 (1923).

treats uncertainty as inadequacy in accord with the decisions referred to above will probably appeal to the courts as a means of avoiding excessive risks for either party while giving reasonable protection to both.

(c) *Compromise Agreements and Economic Duress*

The last few paragraphs bring sharply into the foreground the fact that the doctrine of economic compulsion is not always easy to reconcile with our traditional policy favoring compromise agreements made to avoid lawsuits. Finality of settlement, especially without the trouble and expense of litigation, is often more important to society and to the parties than attaining a perfect balance in the scales of justice. And it is precisely where there is uncertainty about the rights of the parties that compromise settlements are particularly to be encouraged as most satisfactory to courts and disputants; yet the preceding paragraphs have put forward the proposition that the uncertainty of the rights of the parties may be one reason for overturning the agreement made in advance of litigation.

The recognition of duress by economic pressure in most cases does appear inconsistent with the doctrine that a settlement of a dispute negotiated with full knowledge of the facts should be treated as final. Of course there must be a *bona fide* difference of opinion as to the rights involved; if the dominant party urged his claim knowing it was invalid, he is practicing blackmail, and the resulting agreement will not be protected by the courts as a compromise.²⁵⁷ In many of the cases the rule as to compromises might seem inapplicable because the transaction under attack is not the result of mutual concessions; one party finds he can, and does, enforce his demand one hundred per cent. In conversational English we would not call such a settlement a compromise, but the law does not seem to require any "give and take" from both sides in a settlement agreement to make it final;²⁵⁸ the essential thing is the consent of the parties with knowledge of the facts. It is true the agreement must be "voluntary"; but to call such an agreement

²⁵⁷ 1 WILLISTON, CONTRACTS (rev. ed. 1937) §135.

²⁵⁸ In the following cases the court rejected the claim of duress largely because the settlement under attack was entitled to protection as a compromise, though there was no concession from the prevailing party. *Craig v. Frauenthal*, 145 Ark. 185, 224 S. W. 434 (1920); *Springfield & Memphis R. R. v. Allen*, 46 Ark. 217 (1885); *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038 (1901). Some peppercorn, if not a reasonably substantial concession, might well be required before the settlement is entitled to protection, as a compromise, against the claim of duress. If there was no diminution of his claim, the prevailing party has been quite blind to any possible element of reason in his adversary's position, has had, at the time of the settlement, such complete confidence in the righteousness and strength of his own case as to refuse to make any concession. That being so, is it so hard on him, in the later action on duress, to restrict his argument to the merits of his original claim, refusing him recourse to the theory of compromises?

involuntary simply because one party threatened to do what he thought he had a right to do would be, as many courts see the problem, to unsettle all compromise agreements, making it practically impossible for parties to settle their differences out of court. This attitude, that the argument of duress must fail because the transaction was a settlement made with full knowledge of the facts, is often expressed²⁵⁹ and in many other cases a matter of more or less subconscious implication.

But economic duress can be recognized without affecting settlements properly negotiated. Compromise agreements are not untouchably sacred; they are subject to the same defenses as other contracts—fraud, mistake, and duress.²⁶⁰ It is closing our eyes to plain fact to deny that, like other contracts, they may be secured either by pressure which is quite unobjectionable or, on the other hand, by unfair, anti-social pressure. Our deep-rooted partiality for compromises is sound, for the parties making them are usually influenced simply by the risks of going to trial, risks which are substantially equal for both except as they are affected by the respective merits of the opposing contentions, and that inequality is unobjectionable. This pressure does not indicate economic duress, and should be allowed its full influence. We want disputants to turn to the courts only as a last resort; we want them to weigh their chances, the possibility of success and the possibility of defeat, and to try to settle their disputes by a payment suitably proportioned to those chances. This does not mean that we have to support a compromise settlement secured by exploiting the abnormal type of uncertainty described above,²⁶¹ where the risk of loss is disproportionately heavy on one party, not because of the merits of the controversy, but because the one party stands to lose a considerable property right if unsuccessful, while the other would lose very little if the decision went against him. The rule favoring compromises should not be pushed to the point of encouraging one party to take advantage of a situation

²⁵⁹ (Where this argument was made in spite of inadequacy of remedy, as that phrase is here used, the fact is noted.) *McKenzie-Hague Co. v. Carbide & Carbon Chemicals Corp.*, 73 F. (2d) 78 (C. C. A. 8th, 1934) (remedy inadequate); *Manigault v. S. M. Ward & Co. et al.*, 123 Fed. 707, 718 (C. C. S. C. 1903); *Shirey v. Beard*, 62 Ark. 621, 37 S. W. 309 (1896); *Stover v. Mitchell*, 45 Ill. 213 (1867); *Kiler v. Wohletz*, 79 Kan. 716, 101 Pac. 474 (1909); *Shelby v. Bowman*, 64 Kan. 879, 68 Pac. 1131 (1902) (remedy inadequate); *Prichard v. Sharp*, 51 Mich. 432, 16 N. W. 798 (1883); *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115 (1883); *State ex rel. Order of United Commercial Travelers of America v. Shain et al.*, 98 S. W. (2d) 597 (Mo. 1936) (remedy inadequate); *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038 (1901) (remedy inadequate); *Wolfe et al. v. Marshall et al.*, 52 Mo. 167 (1873) (remedy inadequate); *Pearl v. Whitehouse*, 52 N. H. 254 (1872); *Gunter v. Thomas*, 36 N. C. 199 (1840); *Heysham v. Dettre*, 89 Pa. 506 (1879); *Natcher v. Natcher*, 47 Pa. 496 (1864); see *Secor et al. v. Clark*, 117 N. Y. 350, 354, 22 N. E. 754, 755 (1889). See also cases cited in note 258 above.

²⁶⁰ KEENER, QUASI-CONTRACTS (1893) 30.

²⁶¹ See above, p. 372.

where he has comparatively little to lose, whatever the outcome of the lawsuit, while his adversary runs a chance of forfeiting a large capital investment; or a situation in which he could wait comfortably several months or years if necessary for the court to pass on the claim, while a delay of a few weeks would cause his adversary a large loss.

Attempted settlements of tort claims sometimes exemplify the use of means which should be condemned on some theory, and which fit nicely into the definition of economic duress. After a railroad wreck, the company's adjuster hurries around and reaches the injured party while he is still in a hospital far from home, to offer him his choice between payment of hospital expenses incurred, transportation home, and a generous extra hundred dollars or so, or being left with his right to sue the company, but without immediate resources, separated from all his family, on a hospital bed, until the management, as the adjuster remarks, puts him out for non-payment of bills. In the case described, the court said the jury might find duress.²⁶² This is plainly a *bona fide* dispute; the liability of the railroad is unliquidated and uncertain, and they may quite honestly deny owing the passenger any money. If this uncertainty as to the recovery on a suit against the company had been the only factor which led the passenger to consent to the settlement, it should not be interfered with. But the facts made it plain that the company was able to push the agreement through on its own terms because the injured party could not wait for court action; that remedy would not meet his pressing need for immediate funds. The same reason for putting aside the settlement reached in this and some other tort cases²⁶³ is applicable with as much logical force, though with less emotional appeal, to settlements of contract claims where the pressure was not limited to the usual uncertainty as to what a court of law will do to the parties, but there was also in the picture the fact that one party was much better situated to wait for the court to pass on the dispute than was the other.²⁶⁴

²⁶² *Buford v. Louisville & Nashville R. R.*, 82 Ky. 286 (1884) (court said contract might be voidable, not for "technical duress," but because victim's distress interfered with free exercise of his judgment). *Contra*: *State ex rel. Order of United Commercial Travelers of America v. Shain et al.*, 98 S. W. (2d) 597 (Mo. 1936) (settlement of insurance claim). In *McCoy v. James T. McMahon Construction Co.*, 216 S. W. 270 (Mo. 1919), the court said there was no duress in a settlement thus secured, and also that spending the money after the victim had left the hospital would have affirmed the release if it had been voidable for duress.

²⁶³ *Whitney v. Eager*, 29 Fed. Cas., No. 17584, at 1073 (E. D. Pa. 1841); *Thomas v. McDaniel*, 14 Johns. 185 (N. Y. 1817). Both of the above decisions refused to recognize releases of tort claims, forced from seamen at time of discharge. Admiralty courts have long recognized the necessity of protecting the common seaman against the ship's master, who was liable to abuse his power.

²⁶⁴ See, for example, *Pittsburgh Steel Co. v. Hollingshead & Blei*, 202 Ill. App. 177 (1916); *First National Bank v. Sargeant*, 65 Neb. 594, 91 N. W. 595 (1902); *Darling-Singer Lumber Co. v. Oriental Navigating Co.*, 127 Ore. 655, 272 Pac. 275

Humanitarian considerations are not all in favor of overturning these tort settlements and other agreements attacked for duress where the threat was to refuse payment of money owed, or performance of some other affirmative obligation, and the remedial inadequacy is based partly on delay. If the tort-feasor had not made the settlement in question but had taken the course our conclusion tends to encourage, leaving the claim to be asserted in the normal lawsuit, the immediate hardship on the victim would probably have been greatly increased. He would suffer all the delays of litigation without any alleviation at all by even a partial earlier payment. The tort-feasor who forces a cheap settlement on its victim and then defends it on the ground that it paid a small part of its debt promptly rather than waiting to be sued for the whole, does not deserve much sympathy from the court in its own behalf. But the effect of the rule upon future practices is a distinct and troublesome problem; the precedent finding duress serves as notice to tort-feasors to make no settlement until after the victim's pressing need for money is past. This does not seem sensible; our jurisprudence must recognize the instability of modern life, abounding in situations where a few hours or days are worth many thousands of dollars. What we need is a rule or code that will encourage settlements reasonable in the time of payment as well as in the other terms insisted upon, or a more speedy remedial system, or both. We cannot now set up any more definite standard than that of reasonableness; the best we can do is to ask our courts to test compromise agreements entered into in a time of stress for one of the parties by that uncertain measure. A settlement which is fair and reasonable to both parties, considering not only the amount paid but the promptness of the payment, should not be overturned for duress, any more than payments actually owed are recoverable for duress.²⁶⁵ On the other hand, the obligor should not be allowed to take advantage of the proverbial delays of legal procedure, i.e., of the inadequacy of the only remedy available, in order to force consent to an unreasonably low settlement figure.²⁶⁶

(d) *Other Bases for Claiming Remedy Inadequate*

Delay and uncertainty are the principal reasons given for inadequacy of the normal legal remedy, but not the only ones. The damages collectible if a threat to break a contract or other obligation is carried out may be so limited by established rules as not to be even reasonably

(1929). Practically all findings of duress involve the overthrow of an agreement made with full knowledge of the facts.

²⁶⁵ RESTATEMENT, CONTRACTS (1932) §495, Comment a.

²⁶⁶ Possibly something could be done to encourage reasonably prompt settlements by allowing higher interest, or even punitive damages, in the discretion of the court, where the victim was left in severe hardship because of delay.

compensatory.²⁶⁷ Or it may be that the wrongdoer is judgment proof so that no collection could be expected even if a judgment were obtained.²⁶⁸ Or a particular remedy might be effective enough, but beyond the reach of the victim because of the expense involved. This last suggestion was advanced as a basis for inadequacy in a Texas court, but held insufficient to show duress.²⁶⁹ And there are a number of cases where the courts have called a remedy which involved posting a surety bond adequate, without any reference to evidence that the victim had the means to secure such a bond.²⁷⁰ Yet in many of the cases where delay was treated as making the normal remedy inadequate, the only reason the delay was serious was because the victim was in a financial crisis,²⁷¹ which is but another way of saying his means were so limited that he could not afford to wait. There is good authority, then, that the adequacy of the remedy is dependent partly on the financial position of the victim of the threat.

(e) *Definition of Inadequacy of Remedy*

The sensible view recognized by inference at least in many of the decisions referred to above, is that a remedy which is not practicable for the victim of the threat is not adequate; if resort to the ordinary lawsuit will not "do his business," to use the trenchant phrase of the early decision on duress of goods,²⁷² he should not be expected to rely on it. Inequality of economic or bargaining power is often mentioned by the courts as an element in this type of duress;²⁷³ and such inequality

²⁶⁷ *Hazelhurst Oil Mill & Fertilizing Co. v. United States*, 42 F. (2d) 331 (Ct. Cl. 1930); *Niedermeyer v. Curators of the University of Missouri*, 61 Mo. App. 654 (1895). If economic duress be regarded as an innovation at the common law, it might be asked why the innovation might not as well come by liberalizing the rules as to measure of damages. Probably we should protect the victim and not make him gamble on which innovation the court would approve, that is, make both remedies available, at least until one or the other is well-established law.

²⁶⁸ *Miller v. Eisele et al.*, 111 N. J. L. 268, 168 Atl. 426 (1933). In *Domenico et al. v. Alaska Packers' Ass'n*, 112 Fed. 554 (N. D. Calif. 1901), the argument was made that the victim yielded to the demands which were backed up by threat of breach of contract because he feared the wrongdoers would not be able to pay damages for the breach; and this point the court uses to support its conclusion that the promise of a bonus thus secured was reasonable and should be enforced.

²⁶⁹ *Sanborn v. Bush et al.*, 41 Tex. Civ. App. 24, 91 S. W. 883 (1906).

²⁷⁰ See cases cited in note 234 above. An Arkansas complaint alleging threat to sue on an illegal claim when the victim did not have the money necessary to secure a bond and resist the litigation, was held insufficient to set up a cause of action for recovery of money paid under duress; *Satchfield v. Laconia Levee District*, 74 Ark. 270, 85 S. W. 409 (1905).

²⁷¹ See cases cited above, notes 157, 158, and 240.

²⁷² *Astley v. Reynolds*, 2 Strange 915, 93 Eng. Rep. 939 (K. B. 1732), discussed in Part I, p. 241.

²⁷³ *Marshall v. Lovell*, 19 F. (2d) 751 (C. C. A. 8th, 1927); *Mobile and Montgomery Ry. v. Steiner, McGehee & Co.*, 61 Ala. 559 (1878); *New Orleans & North-eastern R. R. v. Louisiana Construction & Improvement Co.*, 109 La. 13, 33 So. 51 (1902). See also cases cited in Part I, p. 247, n. 32; Note (1927) 27 Col. L. Rev. 430.

is usually traceable to the inability of the victim to defend himself immediately against the threatened wrong by court action. If the bargaining powers of the parties do show a marked inequality, not because of the merits of their respective claims, but because the only legal remedy presently available to one is seriously disadvantageous to him under the existing conditions, the remedy should be called inadequate.

A number of decisions, especially on collection of illegal license fees, hold there is no duress where penalties are not collectible without suit, which is to say that defense in ordinary litigation is always an adequate protection against the wrongful threat;²⁷⁴ these decisions are plainly inconsistent with the theory here advanced. It is the business of our legal system to give effective protection against any wrong; assuring a hearing in court before ultimate determination of a dispute is important, but not always sufficient, to that end. Any limitation of remedies by preconceived arbitrary rules designed to meet general situations smacks of the technicality of the old common law. The law prescribing the type of relief available to the victim of a wrong should be not fixed and arbitrary, but flexible, as flexible and adaptable to unusual situations as is human ingenuity in devising new means of exerting pressure on other humans.

There is no danger of going too far in this matter of remedial adequacy. We shall have to be careful in determining what threats are wrongful; for in this we are setting a limitation on individual freedom of contract, which we still hope to protect in large part. It is good to raise our standards of business conduct, so long as we do not lower the standard of reward for honest individual industry. But so far as this second element in the problem is concerned, it is difficult to see how we can make the remedy for a wrong too effective. Granted a wrong is threatened, it should be prevented or remedied as effectively as our ingenuity can be made to operate to that end. The legal remedy then, to be adequate, should be effective and practicable, as efficient a means of protection against the wrong as the remedy based on duress.²⁷⁵

(f) *Adequacy of Remedy and the Subjective Theory of Duress*

We have congratulated ourselves on the liberal trend toward what we called a subjective rather than the old objective test for duress;

²⁷⁴ *Craig v. Frauenthal*, 145 Ark. 185, 224 S. W. 434 (1920); *City of Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185 (1876); *Mayor and City Council of Baltimore v. Lefferman*, 4 Gill 425 (Md. 1846); *Cook et al. v. Boston*, 91 Mass. (9 Allen) 393 (1864).

²⁷⁵ The closest approach to this standard I have found is in a decision refusing to find any duress because no threat was proved to have been made. The court said, however, "In order to recover back on the ground of . . . duress, compliance with the illegal demand must be the more effective and practical remedy of the party," *Hadley v. Farmers' National Bank of Oklahoma City*, 125 Okla. 250, 252, 257 Pac. 1101, 1102 (1927).

most courts look now not for such pressure as would overcome the will of ordinary firmness, but simply for pressure which did overcome the will of the victim in the transaction under scrutiny. Objections to the underlying theorem, that the normal contract results from a will that is quite free, have been set out in the opening paragraphs of this article.²⁷⁶ It is this same liberalizing tendency which established the subjective test, which has pushed judicial opinion toward recognition of duress by economic pressure.²⁷⁷ Yet according to the present analysis, one of the essential elements of relievable economic duress is an "inadequate remedy"; and that phrase certainly sounds very impersonal and objective, like a reversion away from the modern subjective standard. So the leading treatise on contract law includes this statement about inadequacy of remedy as an essential element in duress:

"Analogous to the idea that threats must be such as to terrify a man of ordinary firmness is a rule not infrequently stated that if the law provides adequate redress or compensation for the injury threatened, the threat will not amount to duress. Indeed, the only reason which could be given for such a rule is that a threat of this sort should not terrify a person of resolution. But, though such statements are still repeated, the rule is artificial, and, so far as it would require a person threatened with injury necessarily to endure the injury because the law provides a remedy for it, cannot be accepted."²⁷⁸

Thus Professor Williston uses language which seems directly opposed to the present analysis of the problem, directly opposed to "inadequacy of remedy" as a factor in duress of any type. Yet the whole body of case-law, in the decisions, for instance, on duress of goods,²⁷⁹ and duress by public utilities,²⁸⁰ where the doctrine of economic duress is well established, leaves no doubt even on a casual reading that the court has almost always been influenced by the inability of the victim to secure reasonable relief against the threatened wrong except through some theory of duress.

If Professor Williston's statement quoted above be studied in its context, however, it will appear to refer to remedial inadequacy tested objectively, tested without regard to the situation of the individual concerned. His objection is that if we deny relief for duress where there is an adequate remedy available, we add a limitation so impersonal and objective as practically to nullify the subjective test of duress. But whether it has that effect depends on the meaning given to the phrase. If we test adequacy of the remedy by its effectiveness to meet the needs

²⁷⁶ Part I, pp. 238-40.

²⁷⁷ Durfee, *Recovery of Money Paid under Duress of Legal Proceedings in Michigan—Welch v. Beeching* (1917) 15 MICH. L. REV. 228, 238; note (1934) 3 WIS. L. REV. 59, 61-62.

²⁷⁸ 5 WILLISTON, CONTRACTS (rev. ed. 1937) 4529, §1620; see also *id.* §1605, n. 2.

²⁷⁹ Part I, pp. 241-3.

²⁸⁰ Part I, pp. 243-6.

of the particular individual in question, it becomes very personal and subjective; and that is exactly what the better decisions do. Professor Williston's later statements in the same section quoted above are consistent with the theory that the courts should, and generally do, deny relief for duress where a remedy adequate by a personalized subjective test was available. The sentence immediately following the statement quoted above reads:

"The inquiry must always be pertinent whether under all the circumstances of each case the remedy is adequate, and the mere fact that it cannot be made effective immediately will often make it inadequate."²⁸¹

Consequently the better rule in such cases is that delay makes the remedy inadequate, if the victim is in such a situation that he will suffer irreparable injury while waiting for the courts to act;²⁸² and this seems to give a subjective definition to the phrase "adequate remedy." A few sentences later in the same section, Professor Williston says:

"Even where the remedy at law would be fully adequate were the payor sure of his rights, there may be duress in the very uncertainty of his position. Thus where an insurance contract relieves the insured from paying premiums when he is totally disabled, and there is dispute as to the extent of his injury, payment of the premiums under threat of forfeiture of his policy is made under duress, even though he would be fully protected if he refused to make the payments and rested on his questionable legal rights."²⁸³

If this uncertainty is recognized as making the remedy inadequate—and that seems a reasonable explanation of some decisions²⁸⁴—then we are again simply testing the remedy by the needs of the individual concerned. In the same section, Professor Williston states that there is a degree of remedial adequacy which will suffice to bar the claim of duress.

"The case may be distinguished where the law will not simply give compensation for a wrong, but will prevent it."²⁸⁵

It seems to come down to a question of definition of adequacy of remedy; when the phrase is broadened out much beyond the old chancery definition, somewhat along the lines suggested in Williston's treatise and in the preceding pages, it may be used in the definition of duress, as set out above, quite consistently with the subjective theory of duress.

One difficulty has not been dealt with in the cases to any large extent; suppose a threatened victim has an adequate remedy but does not know it? The defect in such a case would not be in the remedy

²⁸¹ 5 WILLISTON, *CONTRACTS* (rev. ed. 1937) 4529, §1620.

²⁸² See above, p. 370.

²⁸³ 5 WILLISTON, *CONTRACTS* (rev. ed. 1937) 4531, §1620.

²⁸⁴ See above, p. 371.

²⁸⁵ 5 WILLISTON, *CONTRACTS* (rev. ed. 1937) 4532, §1620.

but in the victim's knowledge of it; so the remedy could not be called inadequate; but among the few decisions which seem to have dealt with such a situation, several have allowed relief for duress.²⁸⁶ Certainly a mere personal dislike of litigation is not likely to be held sufficient to justify the court in giving relief or in calling the remedy inadequate; the subjective test of inadequacy would hardly be carried to that point.²⁸⁷

M. PROTEST AND LACHES

There are other factors which should be given some consideration in duress problems, but which are seldom of much importance. Protest, or lack of it, is generally a secondary matter, when referred to at all.²⁸⁸ Express protest, especially in cases where the victim's reluctance is not otherwise obvious, strengthens the claim of duress by giving notice to the prevailing party that the victim submitted because of the pressure put upon him, which may be treated as timely implied notice that the transaction is not to be relied on as final. But protest must not be required, because the same pressure which forces payment or promise may also force the withdrawal or omission of an express protest. It would also be a mistake to rely too heavily on an expression of protest as indicating duress, because such expression may become a mere formality. In border line cases, protest may play an important part; the more wrongful the threat, and the more obvious the reluctance of the victim, the less reason there is in the dominant party's reliance on the victim's acquiescence as voluntary and final, and so the weaker the argument for requiring protest as a condition of relief.²⁸⁹

It is also true that the more promptly a claim is asserted after the pressure is relieved, the better its chance of success. If the remedy sought is equitable, or probably if it is quasi-contractual,²⁹⁰ delay raises

²⁸⁶ *Hollingsworth v. Stone*, 90 Ind. 244 (1883); *Link et al. v. Aiple-Hemmelman Real Estate Co.*, 182 Mo. App. 531, 165 S. W. 832 (1914); *Fraser et al. v. Pendlebury*, 31 L. J. C. P. (N. S.) 1 (1861). *Contra*: *Illinois Merchants Trust Co. v. Harvey*, 335 Ill. 284, 167 N. E. 69 (1929); *Manning v. Poling et al.*, 114 Iowa 20, 83 N. W. 95 (1900), *aff'd on rehearing*, 114 Iowa 20, 86 N. W. 30 (1901).

²⁸⁷ See cases cited above, note 148.

²⁸⁸ Protest has played a larger part in cases involving claims against governmental units, such as tax cases and excessive license fee cases, than in duress cases generally. See the discussion in Part I, p. 252. It has been referred to as evidence, not conclusive, of duress; *Koewing v. Town of West Orange*, 89 N. J. L. 539, 99 Atl. 203 (1916); *Miller v. Eisele et al.*, 111 N. J. L. 268, 168 Atl. 426 (1933). In *White v. T. W. Little Co. et al.*, 118 Wash. 582, 204 Pac. 186 (1922), relief for duress was denied because of lack of protest; and protest influenced the court to find duress in *Maskell v. Horner* [1915] 3 K. B. 106.

²⁸⁹ See the discussion in 5 WILLISTON, *CONTRACTS* (rev. ed. 1937) §1623; also cases cited holding protest not necessary, in Part I of this article, p. 252, note 52.

²⁹⁰ See the nature of the remedy discussed in 5 WILLISTON, *CONTRACTS* (Rev. ed. 1937) §§1626, 1627B. That laches is a defense to quasi-contractual claims generally, see *WOODWARD, QUASI-CONTRACTS* (1913) §31. In *News Publishing Co. v. Associated Press et al.*, 114 Ill. App. 241 (1904), the victim succeeded in avoiding the dominant party's claim of laches by bringing an action for damages for duress—an unusual form of relief.

the possibility of laches as a defense,²⁹¹ especially if there has been a change of position by the other party in reliance on the finality of the transaction.²⁹² On this issue also an express protest to the dominant party will be a substantial help to the duress claim; for probably after such a notice it would take a longer delay to constitute fatal laches.

N. EFFECT OF DOCTRINE ON LITIGATION

The argument has been made by conservative courts that litigation will be increased by extending the concept of duress to include economic compulsion.²⁹³ Prediction either way on this point is absolutely safe, quite unrestrained by any danger of being proved erroneous; the forces involved cannot be measured even after the event. But the denial of relief for economic compulsion will not always operate to prevent litigation;²⁹⁴ it will serve to increase the pressure on the victim to resist to the utmost when the threat is made, and such resistance will frequently mean litigation at that time. Many of the disputes concerned in these cases are such that final settlement is hardly to be expected without court action, in any event; and the only question is whether the lawsuit will come before or after submission to the threat. A clear approval of either rule by the courts tends to reduce litigation by enabling one party or the other to see in advance the futility of court action. In the final analysis, it is probably the certainty and objectivity of the applicable law which tends most markedly to cut down litigation; and it is probably true that the rule denying relief for economic compulsion is susceptible of much more definite and objective delimitation than is the rule allowing relief. To this extent the argument that the doctrine will increase litigation is justified; and we shall have to determine whether such increase of litigation pays for itself as set out in the preceding pages, in an increase in effective remedies against wrong, which is the purpose for which our courts and judicial processes exist.

Obviously the doctrine does tend to postpone the parties' resort to judicial tribunals until after a temporary submission by the victim, and this effect has been urged as a serious argument against the whole concept of economic duress. Courts have said that it would be most unjust to permit the victim of a threat to surrender for a time, and then subsequently take the case into court, because that would allow him to select his own time for the court action.²⁹⁵ But a denial of the doctrine

²⁹¹ *Oregon Pacific R. R. v. Forrest et al.*, 128 N. Y. 83, 28 N. E. 137 (1891); *Farmers' State Bank v. Day et al.*, 226 S. W. 595 (Mo. App. 1920); Notes (1937) 3 U. OF PITTS. L. REV. 241, (1934) 8 WASH. L. REV. 140.

²⁹² *Taylor v. Board of Health*, 31 Pa. 73 (1855).

²⁹³ *De La Cuesta v. Insurance Co. of N. A.*, 136 Pa. 62, 20 Atl. 505 (1890).

²⁹⁴ Note (1934) 47 HARV. L. REV. 1413, 1419.

²⁹⁵ *Town Council of Cahaba v. Burnett*, 34 Ala. 400 (1859); *New York Life Ins. Co. v. Lecks*, 122 Fla. 127, 165 So. 50 (1936); *Paulson v. Barger*, 132 Iowa

puts the same power into the hands of the other party, and the claim of duress frequently arises because the alleged creditor has been canny enough to time his attack at the strategic moment when the other party is unable to avail himself of any defense, however meritorious, as for instance by attachment of an ice company's wagons just as they are about to start on the daily delivery service.²⁹⁰ A mortgage secured by threat to sue just when the alleged debtor was fighting off impending bankruptcy proceedings, was enforced by the Indiana court without any investigation of the rightfulness of the demand.²⁹⁷ It would be fairer to both parties to deny either the advantage derived by such inequitable tactics. In determining whether delay in litigating a dispute should be allowed, the possible loss of evidence, and the interests of both parties, not simply of the original claimant, should be consulted.

O. RELATIONSHIP BETWEEN PROBLEMS OF ECONOMIC DURESS AND CONSIDERATION

The problem of economic duress is closely related to that of consideration. Both are concerned with an attack on the motivation leading to a contract, and it is often difficult to decide whether the attack is based on the absence of any motivation which the law recognizes as consideration, or on the presence of that wrongful motivation which the law calls duress. This confusion is exhibited at several points in the decisions; one of those leading cases on duress from Michigan, *Hackley v. Headley*,²⁹⁸ upholding a settlement against the claim of economic duress, was followed by a new trial and another appeal which, on evidence simply described by the court as "substantially the same," overturned the same transaction for lack of consideration; and the language used in the latter decision sounds at some points like an approval of the argument of duress.²⁹⁹ So, in a Kansas case, the court agreed the contract was defective, but split evenly over the question of whether the defect was duress or lack of consideration.³⁰⁰ Often it makes no difference in the rights of the parties which defect is established, though this would not be true in all cases.³⁰¹

547, 109 N. W. 1081 (1906); see *Parker v. Lancaster et al.*, 84 Me. 512, 515, 24 Atl. 952 (1892).

²⁹⁰ *Chandler v. Sanger et al.*, 114 Mass. 364 (1874); problem discussed above p. 351.

²⁹⁷ *Snyder et ux. v. Braden*, 58 Ind. 143 (1877).

²⁹⁸ 45 Mich. 569, 8 N. W. 511 (1881), discussed in Part 1, pp. 256-8.

²⁹⁹ "All the authorities admit that when one of the parties to a transaction sets it up against the other as an effective compromise, the latter may hinder it from operating in that sense and with that force by showing that his opponent acted unfairly or oppressively and asserted claims which he knew to be void of right with the design of getting the terms which were nominally assented to." *Headley v. Hackley*, 50 Mich. 43, 45, 14 N. W. 693 (1893).

³⁰⁰ *Caplice v. Kelley et al.*, 27 Kan. 359 (1882).

³⁰¹ If the attack is on an executory contract, lack of consideration makes the

In Germany and France, where our doctrine of consideration is strange, and the courts do concern themselves with the equivalence of values bargained for in a contract, the law of economic duress has been recognized and has become "primarily an instrument for insuring a fair exchange of values in private contracts."³⁰² It may not arouse much enthusiasm in our Anglo-American courts for the theory of economic compulsion to point out that it seems to fit with perfect consistency into the foreign system of contract law where the courts are not so shocked as are our tribunals at the idea of making contracts for the parties.

But a little thought suggests that recognition of economic compulsion is more essential to our system of contract law than to the European system. Our idea that individuals must be left to fix the terms of their own bargains and to exchange a peppercorn for Blackacre if they see fit to make that sort of an agreement, is defensible, as a means of promoting industry and energy in the people; but if we are to refuse to inquire into the values agreed to be exchanged, it is all the more important that we inquire with the utmost care into the pressures that brought about the agreement. We can justifiably leave the individual to protect himself from unreasonable terms by refusing to enter into the contract only if we are sure that he was not subjected to improper forces when he did contract. In Europe, where contracts which call for an exchange of markedly disproportionate values may be interfered with by the courts for that reason, the law of economic compulsion is, possibly, not superfluous, but at least simply an additional tool to the same end. The common law contract for an obviously unequal exchange procured by wrongful pressure must be enforced unless we either modify our views on consideration, or else extend the doctrine of duress. There are indications that some courts are inclined to disregard the "peppercorn theory" of consideration.³⁰³ Many of the cases looking in that direction could be satisfactorily dealt with as cases of economic duress, with considerable support in existing precedents. Probably we shall see further development of the idea of economic duress, and this may remove the pressure on the old doctrine of consideration; or it may be

contract void (unless there is a consideration-substitute such as promisory estoppel or a seal) RESTATEMENT, CONTRACTS (1932) §19; while duress makes the contract merely voidable, 5 WILLISTON, CONTRACTS (rev. ed. 1937) §1626, save in some exceptional cases of physical control of the victim, *id.* at §1624. If the attempt is to recover money paid, duress is a basis for recovery, but lack of consideration is immaterial, 1 WILLISTON, CONTRACTS (rev. ed. 1936) 367.

³⁰² Dawson, *Economic Duress and the Fair Exchange in French and German Law* (1937) 11 TUL. L. REV. 345, 363.

³⁰³ Notes (1935) 35 COL. L. REV. 1090, (1927) 27 COL. L. REV. 430, (1927) 27 COL. L. REV. 178. See cases discussed above, p. 360.

that a liberalization of the common law ideas on both subjects is on the way.

Of late years we have seen freedom of contract severely limited even in America. Today most of us accept as beneficial or indispensable many governmental interferences in private contractual transactions which, fifteen years ago, we would have dismissed from consideration on the merits simply by labelling them communistic. Leaving aside the effects of emergency measures, those supposed to be effective during the war only, we see now price regulations on an increasing list of commodities, obligatory collective bargaining, restrictions on unfair labor practices, wage and hour legislation, compulsory registration of securities to be sold, and many other limitations on the individual's right to deal with his neighbor on his own terms. In other words, our legislatures have seen that

"In law, as in politics, the control of economic power has emerged as the central problem of modern times."³⁰⁴

The extension of the doctrine of duress to cover objectionable economic pressure is a parallel indication that our courts, or some of them, recognize this same problem. It is not a problem which appears likely to be solved in our time; but two hundred years of precedents on duress by non-physical pressure since *Astley v. Reynolds* have helped toward the solution. The doctrine is already sufficiently developed so that it can be an efficient weapon against many economic wrongs; more use, further development, and increased effectiveness in the future may be regarded as inevitable.

³⁰⁴ Dawson, *supra* note 302, at 345.