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Mother," and was passed to abrogate the view that a child is either born a legitimate one or a bastard; at common law the theory being that "God alone can make the heir, not man."<sup>37</sup> It would seem that in view of the remedial purpose of the enactment, a liberal construction was intended, but not received.

There is no doubt but that the principal case in its liberal construction of the legitimation statute stands approved by an overwhelming majority. The view taken by North Carolina on this question stands alone and should be corrected by appropriate legislation.

R. I. LIPTON.

### Duress—Effect of Threats of Arrest and Imprisonment on Validity of Contracts

A recent Georgia case<sup>1</sup> raises one of the problems of duress which confront the courts. In that case the plaintiff was continually pressed for three hours to execute a deed to property for a price which she thought to be inadequate. Finally one of the defendants informed the plaintiff that she would have to sign the papers or go to jail. This statement greatly frightened the plaintiff, whereupon she signed the instrument, still insisting that it was against her will. In the plaintiff's petition to set aside the deed the court refused to do so, saying that mere empty threats to arrest, where neither warrant has been issued nor proceedings commenced, do not amount to duress.

Under the common law duress was divided into two classes: duress by imprisonment and duress *per minas*. Duress by imprisonment existed where an individual was deprived of his liberty, and duress *per minas* was present where there was a threat to life, limb, or liberty.<sup>2\*</sup>

It is usually held that what constitutes duress is a matter of law, but whether duress exists in a particular transaction is a matter of fact.<sup>3</sup> Under the old common law duress must have been such as would deprive a constant and courageous man of his free will, but the modern tendency is to include all such threats as would overcome the will of a person of only ordinary firmness.<sup>4</sup> Recently some of the courts are rejecting any objective standard and are simply inquiring whether the

<sup>37</sup> See Deák and Robbins, *The Familial Property Rights of Illegitimate Children: A Comparative Study* (1930) 30 COL. L. REV. 308 at 318.

<sup>1</sup> Hoover v. Mobley et al. — Ga. —, 31 S. E. (2d) 9 (1944).

<sup>2\*</sup> 1 BL. COMM.\* 131 (" . . . there are two sorts (of duress): duress of imprisonment, where a man actually loses his liberty . . . , and duress *per minas*, where the hardship is only threatened and impending."); 2 COKE INSTITUTES\* 483; see Hatter's Ex'r v. Greenlee, 1 Port. 222, 227, 26 Am. Dec. 370, 373 (Ala. 1834).

<sup>3</sup> Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417 (1900).

<sup>4</sup> Brown v. Pierce, 7 Wall. 214, 19 L. ed. 134 (U. S. 1869); Bane v. Detrick, 52 Ill. 19 (1869); Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010 (1892).

threat did in fact overcome the will of the person in question.<sup>5\*</sup> In any case, however, it is unnecessary to show, in order to establish the defense of duress, that actual violence was used, because consent is the very essence of contract; and, if there be physical compulsion, there can be no binding consent.<sup>6</sup> From this it is seen that there is no universally accepted legal standard of resistance which a person must come up to at the peril of being remediless for a wrong done to him, and no definite rule as to the sufficiency of facts to produce duress.<sup>7</sup> But there must be actual force or threats of force amounting to compulsion present, for "The law does not recognize duress by mere suggestions, advice, or persuasion, especially where the parties are at arm's length and representing opposing interests."<sup>8</sup> Duress will not ordinarily invalidate a contract entered into with full knowledge of all facts, and with ample time and opportunity for investigation, consultation, and reflection.<sup>9</sup> It is the person seeking to avoid a contract on the grounds of duress who has the burden of proof.<sup>10</sup>

The tort of duress should be clearly distinguished from the compounding of a felony. It is well accepted that money spent to suppress a crime cannot be recovered.<sup>11\*</sup> From this doctrine comes the rule that an action may not be maintained to recover money paid wholly or partly to compound a felony. The courts in civil cases based on compounding a felony hold the parties in *pari delicto*, and leave them in their present status.<sup>12\*</sup>

<sup>5\*</sup> *McClair v. Wilson*, 18 Colo. 82 (1892); *Williamson-Halsell, Frazier Co. v. Ackerson*, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484 (1908); *Sabinal State Bank v. Ebell*, 294 S. W. 226 (Tex. Civ. App. 1927); *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417 (1900); *RESTATEMENT, CONTRACTS* (1932) §493 ("Duress may be exercised by . . . (c) threats of physical injury, or of wrongful imprisonment or prosecution of a husband, wife, child, or other near relative . . . that compel a person to manifest assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction.").

<sup>6</sup> *See U. S., Lyon et al. v. Huckabee*, 16 Wall. 414, 431, 21 L. ed. 457, 463 (U. S. 1872).

<sup>7</sup> *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417 (1900).

<sup>8</sup> *Clement v. Buckley Mercantile Co.*, 172 Mich. 243, 253, 137 N. W. 657, 660 (1912).

<sup>9</sup> *Id.* at 257, 137 N. W. at 661.

<sup>10</sup> *Ibid.*

<sup>11\*</sup> *Collins v. Blantern*, 2 Wils. 341, 95 Eng. Rep. R. 847 (K. B. 1765) (Plaintiff had paid £700 to suppress a prosecution for perjury.).

<sup>12\*</sup> We have two important decisions on this point in the United States. In *Hayes v. Rudd*, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815 (1886) the plaintiff gave a note to the defendant to settle a claim against the plaintiff's son, who was in the employ of the defendant. This note was given to compound and settle a supposed felony and was extorted from the plaintiff by threats. The judge refused to charge, as requested by the defendant, ". . . that if the compounding of a felony entered into and formed a part of the consideration of the note, the plaintiff could not recover"; and also, ". . . that if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, he could not be entitled to recover." The New York Court of Appeals held this refusal to charge as requested to be error, saying that if the consideration of the note was in any way affected by the compounding of a felony, or if it entered into the

At one time in our legal history imprisonment was a generally permitted means to enforce an execution which could not be satisfied from the debtor's property. Therefore imprisonment for a valid debt by regular process, and *a fortiori* a threat of such imprisonment, did not amount to duress, unless accompanied with circumstances of unnecessary oppression or hardship. In such situations the courts laid down the rule: To constitute duress at law, the arrest must have been originally unlawful, or made so by a subsequent abuse of it.<sup>13\*</sup> Today in some jurisdictions certain civil claims may be enforced by arrest and imprisonment. In such case the old rule prevails.<sup>14\*</sup> But even in these jurisdictions, if the imprisonment is unlawful—or if lawful but improperly oppressive—an assent so obtained to a contract will amount to duress.<sup>15\*</sup>

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same, or such a motive actuated the plaintiff in any respect, then the contract was illegal and should not be upheld.

Another important decision is *Merwin v. Huntington*, 2 Conn. 209 (1817). In this case the plaintiff was indicted for violation of an embargo. The United States District Attorney accepted from him a sum of money totalling the estimated costs and expenses and turned it over to the public treasury, then dismissed the prosecution. The Connecticut Court refused recovery of the money, saying that since it was illegal for the Attorney to accept the money, it was equally illegal for the defendant to offer it. Hence the parties were in *pari delicto*, and the court left them as they stood.

See *Bertschinger v. Campbell*, 99 Wash. 142, 168 Pac. 977, L. R. A. 1918C, 65 (1917).

<sup>13\*</sup> *Crowell v. Gleason*, 1 Fairchild 325 (Me. 1833) (The court refused recovery of land conveyed to defendant by plaintiff to secure release under articles of peace, saying that there was a lawful arrest and no duress.); *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170 (1810) (If the deed be originally lawful, yet if the party obtaining the deed detain the prisoner unlawfully by covin with the jailer, this duress will avoid the deed. It is a general rule that imprisonment by order of law is not duress. To constitute duress by imprisonment, either the imprisonment or the duress after must be tortious.); *Richardson v. Duncan*, 3 N. H. 508 (1826) (The arrest was lawful, but the plaintiff was refused advice of counsel upon examination by the magistrate.); *cf. Stouffer v. Latshaw*, 2 Watts 165 (Pa. 1834) (Defendant was arrested on a *capias* and gave six notes for a valid debt to receive his release. The court held there was no evidence of any constraint.).

<sup>14\*</sup> *Jones v. Peterson*, 117 Ga. 58, 43 S. E. 417 (1903) (Defendant was charged with bastardy by the plaintiff and placed under lawful arrest. While in this state he and the mother reached an understanding whereby the defendant gave his note in settlement thereof. The court held this not to be duress.); *Prichard v. Sharp*, 51 Mich. 432, 16 N. W. 798 (1883) (Defendant was arrested on a *capias* and could not get bail. On giving the plaintiff a secured note, he was discharged. The arrest was caused in good faith for an injury which the plaintiff supposed had been done by the defendant, and the notes were taken in satisfaction of the injury. The court held that the notes could not be cancelled, since no duress was present on the facts.); *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76 (1885) (Defendant promised to pay \$9,000 as an accord and satisfaction for certain goods he had converted, belonging to the plaintiff. The court held that a mere threat to arrest in order to enforce the agreement did not constitute duress.).

<sup>15\*</sup> *Whitefield v. Longfellow*, 13 Me. 146 (1836) (The magistrate ordered the defendant, who was arrested under a bastardy proceeding, to settle with the plaintiff or go to jail, and also refused defendant's offer to produce bond. The court held that the jury should have been instructed that if the defendant did not execute the bond of settlement freely, but through fears of unlawful commitment, he acted under duress.).

If no warrant has been issued and proceedings have not commenced, the courts are split as to whether mere threats of criminal prosecution will constitute duress. In those jurisdictions which hold that there is no duress, a mere threat of indictment does not constitute duress if it is for a crime in another jurisdiction,<sup>16</sup> or if the threatened arrest is for an illegal payment,<sup>17\*</sup> or if the threat to arrest is made by a person who has no authority to make an arrest with or without a warrant.<sup>18\*</sup> "It is not duress for one who believes that he has been wronged to threaten the wrongdoer with a civil suit; and, if the wrong includes a violation of the criminal law, it is not duress to threaten him with criminal prosecution. It is not to be supposed that a man smarting under a sense of wrong and injury will not use some such threats."<sup>19</sup> To constitute duress the threat must be of imminent and immediate arrest. Hence, a threat of prosecution before the commencement of any legal proceedings does not necessarily include an arrest. It is no more than an assertion that proper steps will be taken to institute a legal process, and an ordinary person could not be put into fear thereby.<sup>20\*</sup>

In all cases a threat of arrest, imprisonment, and prosecution does not constitute duress unless the person so threatened is charged with having committed an act or acts constituting a crime or misdemeanor.<sup>21</sup> Hence a threat to sue is not duress.<sup>22</sup>

Some courts attempt to make a distinction between threats of lawful arrest or prosecution and similar threats of unlawful arrests and prosecution. One view is that the threat of lawful arrest or lawful imprisonment does not constitute duress so as to discharge a threatened person from liability on a contract which he has been induced to sign by means of such threat.<sup>23\*</sup> If there is an arrest under a warrant based on an

<sup>16</sup> *Phillips v. Henry*, 160 Pa. 24, 28 Atl. 477, 40 Am. St. Rep. 706 (1894).

<sup>17\*</sup> *Chaffin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54 (1863) (Collector threatened the plaintiffs with prosecution for dealing as merchants without licenses if the plaintiff did not pay a licensing tax, which was declared to be unconstitutional and void. The court held the payment to be voluntary since the parties knew the facts of the case.).

<sup>18\*</sup> *Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256 (1902) (County tax collector had no such powers.).

<sup>19</sup> *Hilborn v. Buckham*, 78 Me. 485, 487, 7 Atl. 272, 273, 57 Am. St. Rep. 816, 818 (1886).

<sup>20\*</sup> *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321 (1893) (Particularly true if the person threatened knew at the time that the persons making the threat had no present means of carrying it into execution.); see *Harmon v. Harmon*, 61 Me. 227, 230, 14 Am. Rep. 556, 558 (1873). [Why could not an ordinary person be put into fear if he were ignorant of the law? Ed.]

<sup>21</sup> *Bond v. Kidd*, 1 Ga. App. 198, 57 S. E. 944 (1907).

<sup>22</sup> *Jones v. Houghton*, 61 N. H. 51 (1881).

<sup>23\*</sup> *Smith v. Commercial Bank of Jasper*, 77 Fla. 163, 81 So. 154, 4 A. L. R. 862 (1919) (Threats of lawful arrest for an offense which has actually been committed does not constitute duress so as to discharge a mortgage entered into because of such threats where the mortgagee did not take part in the threats.); *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935 (1913) (A deed to property given

unfounded charge, there is no duress present if an agreement is entered into which is the result of a compromise.<sup>24\*</sup> Where a warrant is issued, it must be based on truth or probable cause; and this is a question wholly for the jury to determine.<sup>25</sup> If the warrant is legal, but was executed merely to compel payment of a debt not falling within the group mentioned in footnote 14, this would be an abuse of legal process; and a threat of arrest in such case constitutes duress.<sup>26</sup>

Where the threats of arrest would constitute unlawful imprisonment, duress is easily found.<sup>27\*</sup> In such case the courts make a distinction between threats of arrest to an innocent person and threats to a guilty one. Even here the decisions in different jurisdictions are in hopeless conflict. In deciding that a threat of prosecution and imprisonment made to an innocent person does not constitute duress, the Missouri Court has stated: "We do not think that a threat of prosecution addressed to a man conscious of innocence is such a threat as would induce in any man of ordinary firmness an overwhelming fear of immediate imprisonment."<sup>28</sup> The Colorado Court, holding directly contra, said in *Lighthall v. Moore*:<sup>29</sup> "The conduct of persons accused of crime, although they may be entirely innocent, is often most inexplicable. Such persons often magnify manifold the dangers that surround them. Under such circumstances their fears are easily wrought upon, and the law will not always require of them the exercise of that fear and accurate judgment that would otherwise be expected."<sup>30</sup>

Where the threatened person is guilty of a crime, he may avoid a

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in settlement of money misappropriated is not invalid on the ground of duress, although criminal prosecution was threatened.); *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335 (1891) (A promissory note taken in payment for money embezzled is not void by reason of duress because obtained on threats of criminal prosecution, and is held for good consideration, to wit, the money stolen.); *Eddy v. Herrin*, 17 Me. 338, 35 Am. Dec. 261 (1840) (Where the defendant was induced by the threats of a lawful imprisonment upon a warrant for an assault and battery upon plaintiff to submit to others the amount to be paid as satisfaction for the injury, and also to give a note for the amount thus ascertained, such note cannot be avoided for duress.).

<sup>24\*</sup> *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157 (1860) (Plaintiff had defendant arrested for appropriating plaintiff's money. While under arrest the defendant indorsed certain paper to the plaintiff. In a suit to recover on such paper the defendant set up the defense of duress and that no debt was due. The court held that imprisonment by order of law was no defense, and that an agreement to pay money in a compromise suit was valid, regardless of the validity of the plaintiff's claim.).

<sup>25</sup> See *Hatter v. Greenlee*, 1 Port. 222, 225, 26 Am. Dec. 370, 373, (Ala. 1834).

<sup>26</sup> See *Morrill v. Nightengale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207 (1892); *Hackett v. King*, 88 Mass. 58 (1863); *NOTE* (1938) 16 N. C. L. Rev. 277.

<sup>27\*</sup> *Bane v. Detrick*, 52 Ill. 19 (1896) (Arrest would have been illegal because the warrant was issued by a Justice of the Peace in one state for an arrest in another state.).

<sup>28</sup> *Buchanan v. Sahlein*, 9 Mo. App. 552, 558 (1882).

<sup>29</sup> 26 Colo. App. 554, 559, 31 Pac. 511, 512 (1892).

<sup>30</sup> Cf. *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297 (1890).

contract under duress in some jurisdictions and be held to it in others. In those jurisdictions which hold that there may be duress even though the threatened party is guilty,<sup>31</sup> duress is easily found if the threats of arrest and prosecution are for offenses not connected with the demand for which the prosecution is threatened.<sup>32</sup> Holding directly contra, the Illinois Court has said:<sup>33</sup> "Duress is not available as a defense against a note or other instrument executed by one who is, in fact, guilty of misappropriating the money of another, although the execution of the instrument is obtained by threatened prosecution for a debt honestly due. In such case the law regards the existence of a debt, and not the threatened prosecution, as the consideration."

The general rule is that the defense of duress is open only to the party upon whom the duress is imposed; and a third party who has become surety cannot avail himself of the plea, unless he signed the obligation without knowledge of the duress.<sup>34</sup> To this rule there is a well-established exception pertaining to close family relationships. Thus it has been held that duress exists where there is a threat of arrest and a contract is entered into by a member of a family to secure the release of the person threatened.<sup>35</sup> In these instances it has been held immaterial whether the threatened party is guilty or not, or whether he could have claimed duress or not.<sup>36</sup> But where there is a surety on a deed, such deed cannot be invalidated by showing that it was given to secure the grantor's release from distress.<sup>37</sup>

Perhaps the best rule is laid down in those courts which hold that whether or not a threat constitutes duress is a question of fact, depending upon the surrounding circumstances and the actual effect of such threats on the mind of the person acted upon. Under this rule if the threats of arrest and prosecution actually excite the mind of the person threatened and cause him to believe that he is in danger of imminent arrest, duress exists; and there can be no contract thereunder.<sup>38</sup> It is

<sup>31</sup> *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525 (1892).

<sup>32</sup> *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803 (1894); *Thompson v. Hicks*, 100 S. W. 357 (Tex. Civ. App. 1907).

<sup>33</sup> *Kronmeyer v. Buck*, 258 Ill. 586, 596, 101 N. E. 935, 939 (1913).

<sup>34</sup> *NOTES* (1923) 23 *COL. L. REV.* 72, (1927) 21 *ILL. L. REV.* 636, (1926) 33 *W. VA. L. Q.* 123.

<sup>35</sup> *Sharon v. Gager*, 46 Conn. 189 (1878) (Aunt and Nephew); *Jordan v. Beecher*, 143 Ga. 143, 84 S. E. 549, L. R. A. 1915D, 1122 (1915) (Husband and Wife); *Bradley v. Irish*, 42 Ill. App. 85 (1891) (Grandmother and Grandson); *Davis v. Luster*, 64 Mo. 43 (1876) (Brothers); *Merchant v. Cook*, 21 Wash. L. Rep. 83 ( ) (Parent and Child); *Davis v. London & P. Marine Ins. Co.*, 38 L. T. R. (N. S.) 478 (Ch. 1878) (Friend).

<sup>36</sup> *Koons v. Vauconsant*, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438 (1902); *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491 (1809).

<sup>37</sup> *Simms v. Barefoot's Ex'r*, 3 N. C. 402 (1806).

<sup>38</sup> *Cribbs v. Sowle*, 87 Mich. 340, 24 Am. St. Rep. 166 (1891); *Simmons v. Mann*, 92 N. C. 12 (1885); *Coon v. Metzler*, 161 Wis. 328, 154 N. W. 377, L. R. A. 1916 B, 677 (1915).

submitted that the Georgia Court might have reached a better result had they accepted this view.

CECIL J. HILL.

### Insurance—Torts—Liability of Agent for Failure to Insure

The plaintiff purchased from the defendants certain equipment under a conditional sales contract and installed it in his theatres. Defendants carried insurance on their interest in the property, and two years later agreed to provide the plaintiff with repair or replacement insurance for one year against loss by fire on equipment installed in one of plaintiff's theatres. Extended coverage arrangement was agreed on, and bills for premiums were rendered and paid at 90-day intervals. The defendants provided such insurance for the first three quarters of the year; but when the plaintiff's equipment was destroyed by fire 11 months later, it was discovered that no insurance had been provided for the last quarter. Defendants denied liability, but the jury returned a verdict for the plaintiff from which judgment thereon the defendants appealed. The Supreme Court *held* that when an agent or broker undertakes to procure insurance for another, affording protection against a designated risk, the law imposes upon him a duty, in the exercise of reasonable care, to perform the obligation which he has assumed, and within the amount of the proposed insurance, he may be held liable for the loss properly attributable to his negligent default.<sup>1</sup> In so holding, the court followed a long line of decisions, both in this jurisdiction,<sup>2</sup> and in other jurisdictions—domestic<sup>3</sup> and foreign.<sup>4</sup>

It is well settled that the law will not impose on one agreeing gratuitously to effect insurance the duty to perform his promise.<sup>5\*</sup> But where a person voluntarily takes steps toward effecting insurance, the law immediately imposes upon him a duty of care to carry out the

<sup>1</sup> Meiselman v. Wicker, 224 N. C. 417, 30 S. E. (2d) 317 (1944).

<sup>2</sup> Boney v. Central Mutual Ins. Co. of Chicago, 213 N. C. 563, 197 S. E. 122 (1938); Elam v. Smithdeal Realty & Ins. Co., 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210 (1921); see Mack International Motor Truck Corp. v. Wachovia Bank & T. Co., 200 N. C. 157, 164, 156 S. E. 787, 790 (1931); Case v. Ewbanks, Ewbanks & Co., 194 N. C. 775, 779, 140 S. E. 709, 711 (1927).

<sup>3</sup> Mayhew v. Glazier, 68 Col. 350, 189 Pac. 843 (1920); Mallery v. Frye, 21 App. D. C. 105 (1903); Criswell v. Riley, 5 Ind. 496, 30 N. E. 1101 (1892); Rezac v. Zima, 96 Kan. 752, 153 Pac. 500 (1915); Backus v. Ames, 79 Minn. 145, 81 N. W. 766 (1900); Milliken v. Woodward, 64 N. J. 444, 45 Atl. 796 (1900); Canfield v. Newman, 265 S. W. 1052 (Tex. Civ. App. 1924); Journal Co. v. General Acc. Fire & Life Assur. Corp. Ltd., 188 Wis. 140, 205 N. W. 800 (1925); Milwaukee Bedding Co. v. Graebner, 182 Wis. 171, 196 N. W. 533 (1923); see Cushinberry v. Grecian, 112 Kan. 778, 212 Pac. 681 (1923); Feldmeyer v. Engelhart, 54 S. D. 81, 222 N. W. 598, 599 (1928).

<sup>4</sup> Wilkinson v. Coverdale, 1 Esp. Rep. 75, 170 Eng. Rep. R. 284 (1793).

<sup>5\*</sup> Prescott v. Jones, 64 N. H. 305, 41 Atl. 352 (1898) ("While a gratuitous promise is binding in honor, it does not create a legal liability."); Thorne v. Deas, 4 Johns. 84 (N. Y. 1808); HUGHES, LAW OF INSURANCE (1828) 94.