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RECOVERY OF MONEY PAID UNDER DURESS OF LEGAL PROCEEDINGS IN MICHIGAN— *WELCH* V. *BEECHING.*

THE case of *Welch* v. *Beeching,*[1] recently decided by the Supreme Court of Michigan, raises puzzling problems concerning the recovery of money paid under pressure of legal proceedings. It is the purpose of this paper to give that case a more adequate setting, in relation to the whole field of law to which it pertains, than was provided by the brief opinion of the court. We shall not attempt to exhaust the authorities, nor to present a rounded treatment of the whole subject touched upon.

It is a general rule of law that money paid upon a claim of right cannot be recovered, even though the claim was unfounded; to which we admit exceptions, as when the payment was made under duress or mistake. The rule is more often, but less accurately, stated, that voluntary payments cannot be recovered.[2] The rule is founded upon principles of policy like those behind the statutes of limitations and the common law presumption of payment, and, indeed, not unrelated to the many rules of law, in various departments, which make transactions irrevocable upon the mere ground of inequality, as, for example, the rule that adequacy of consideration will not be inquired into. In the case under consideration, we permit the payee to defend against the suit for recovery without going into the merits of the original claim, and we do this because there are meritorious interests, individual and social, in the security of transactions, which would be infringed by a promiscuous overhauling of transactions to inquire into their absolute fairness: and, particularly, because the payee, supposing the matter to be closed, will, perhaps at once, fall into a state of unpreparedness for legal battle upon the original issue. If the payment was made without *any* moving cause, the plaintiff has only his own folly to answer to this substantial defense. If he acted under some degree of constraint, the problem involves a nice balancing of interests and equities, but it is clear that we may reasonably require plaintiff to show some *substantial* moving cause for the payment ere we compel the defendant to go into the merits of the original claim.

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[1] 159 N. W. 486. (September, 1916).

[2] This form of statement seems objectionable because it uses the word "voluntary" in a very artificial sense, embracing the negation not only of duress but of all the other grounds for recovery of money paid, a use of the term which is liable to misunderstanding.

The older authorities required the complaining party to show constraint of a certain form and of a certain degree. BLACKSTONE says that duress consists in unlawful imprisonment or in threats of loss of life or limb, and that the apprehension engendered must not be that of a foolish and fearful man, but such as a courageous man may be susceptible of.[3] Since BLACKSTONE'S day, a radical revision of this definition has been made, and is still making. The doctrine of duress has been extended from one form of contraint to another, until, finally, some courts have professed to discard all *qualitative* distinctions between various *forms* of constraint and to say that the test of duress lies in the effect of the conduct. "The inequity of the act consists in compelling a person to do what he does not want to do * * * and I do not think the law should make any distinctions between means that are adopted in order to secure such ends."[4] At the same time, the old *quantitative* requirement of acts which would overcome the will of a man of courage, or of an ordinary man, has been going by the board. "Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves."[5] The tendency, then, is toward a definition of duress as the overcoming of the will of another. That position is inviting, both because of its simplicity and because of its adequacy from the point of view of the person constrained. But the position is attended with difficulties. If it is logically developed, the only test of duress is the reluctance of the affected party to do what he does. "It is sufficient that they [the acts of the other] do in fact compel the person to do an act which otherwise he would not have done."[6] But this is a *reductio ad absurdam,* for it would include within its condemnation effective persuasion, even good salesmanship. So far as concerns acts which are independently unlawful, the doctrine may be acceptable. But we cannot properly confine duress to acts which are independently

[3] I Bl. Com. 131, 136. But see Astley v. Reynolds (1731), 2 Strange 915. There has been a curious tendency to treat the subject of duress, as a defense to an action upon a contract, as distinct from the subject of duress as the ground for recovery of money paid, the former to be controlled by the old and narrow doctrines of contract law, the latter, involving the newer "equitable" obligation of quasi contract, to be free from those limitations, and to be governed, rather, by the doctrines of equity. See Pollock, Contracts, 596-599. But that distinction seems to have been obliterated in the later American cases.

[4] Thayer, J., in Parmentier v. Pater, 13 Ore. 121, 126.

[5] Ib., at p. 130.

[6] Holcomb, J., in First Bank v. Sargeant, 65 Neb. 594, 601, quoting the head note from Parmentier v. Pater, supra. Neither case required any such extreme doctrine to support the decision.

unlawful.[7] We can, of course, say that duress must be a *wrongful* exercise of power over another,[8] but this is merely saying that not every exercise of constraint upon another is duress. Hence, we are driven to the position that the modern tendency in the development of the law of duress cannot be carried to its logical conclusion.

The Supreme Court of Michigan has clearly recognized the difficulty in the way of acceptance of the purely subjective definition of duress in the case of *Hackley* v. *Headley*, decided in 1881. In that case, COOLEY, J., said[9]: "In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendant's conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need."

With this rather elaborate introduction, we may turn to the

[7] See, for example, Silsbee v. Webber, 171 Mass. 378, where the defendant threatened to tell the plaintiff's sick husband that their son had committed a crime. And see the cases, hereinafter discussed, of the use of criminal proceedings, instituted upon probable cause, for the purpose of compelling satisfaction of a private claim.

[8] It is probably in this sense of the word "unlawful" that Justice Cooley says, in Hackley v. Headley, 45 Mich. 569, 574, "Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will." This is clearly Mr. Pound's use of the term, when he says, "It is required that the pressure be unlawful because if, to secure some other interest, the law recognizes the pressure as legal, then, in a weighing of interests, the individual interest in freedom of will may have to give way." Interests of Personality, 28 Harv. L. Rev. 343, 358. In Dickerman v. Lord, 21 Ia. 338, Dillon, J., said, "the compulsion must have been illegal, unjust or oppressive."

[9] 45 Mich. 569, 576. See note 8, supra.

topic indicated by the title of this paper, DURESS OF LEGAL PROCEEDINGS. It must be obvious that, while the general principles concerning duress apply, peculiar principles of policy here enter. The machinery of the law has been devised for the accomplishment of certain ends, and no question touching the use or abuse of that machinery, whether raised directly or collaterally, should be determined without a reference to those ends. The elaboration of these principles, as well as the analysis of the authorities, requires a classification of cases.

We will first touch upon the case of money received in satisfaction of a judgment. When the judgment has been reversed, the money may be recovered in the action of assumpsit.[10] If, on the other hand, money is received upon a judgment which has not been reversed or vacated, an action to recover it is usually regarded as a collateral attack upon the judgment, which, under the general rule, cannot be maintained unless the judgment is void. Clearly mere error in the judgment will not found such a suit, and in several cases recovery was denied although mistake or misconduct in obtaining the judgment was shown.[11] These cases go, of course, upon policy, *ut sit finis litium*. But equity, to prevent an unjust use of the machinery of the law, often enjoins the enforcement of a valid judgment obtained by improper means, or even through innocent mistake, and the practice has not been found as disastrous as some of the appeals to the sanctity of judgments might lead one to expect. If, then, we may overhaul the judgment before satisfaction and prevent its enforcement, why may we not under similar limitations overhaul it after satisfaction and compel restitution? The one can be no more disastrous in its practical results than the other, and, so far as the technical distinction between direct and colateral attack is concerned, the difference in the kind of relief required would seem to be immaterial. This conclusion finds support in several cases.[12] The conflict in the cases is not surprising in view

[10] It has been held that, unless execution had issued or was immediately threatened, the payment was voluntary, but the law would seem to stultify itself in declaring that a judgment of a court does not, of itself, exercise compulsion upon the judgment debtor. In Kalmbach v. Foote, 79 Mich. 236, there was a threat of immediate levy, but only in default of paying a certain sum less than the whole judgment, whereupon the whole judgment was paid and here recovered. For other cases, see Woodward, Quasi Contracts, § 232.

[11] Marriot v. Hampton, 7 T. R. 269, is the leading case. Homer v. Fish, 1 Pick. 435, and Walker v. Ames, 2 Cow. 428, are cases of fraud in the procuring of judgment, but the actions were trespass on the case for fraud, not actions for restitution. For other cases, see Woodward, Quasi Contracts, § 229. The dicta supporting this position are numerous.

[12] Ward v. Wallis, L. R. (1900) 1 Q. B. 675 (assumpsit, judgment fraudulently obtained); Rogers v. Porter, 37 New Brunswick 235 (same); Ellis v. Kelley, 8 Bush. 621

of the conflict of principles involved, a conflict which can only be worked out by compromise.[13]

We may next advert briefly to the case of money paid under pressure of imprisonment (or threat of imprisonment) on criminal process. In the case of *Cribbs* v. *Sowle*,[14] it was held that there should be a recovery of money paid upon a claim of civil damages, under a threat of "unlawful" arrest upon a criminal charge (where there was no probable cause, and bad faith) which overcame the will of the victim. The argument that when no warrant had been issued or proceedings begun, and there was no ground for the arrest, the party could not be put in fear, was rejected by the court, because it did not have "any regard to the condition of the mind of the person acted upon by the threat."[15] It has sometimes been said that the imprisonment must be without probable cause, but the convincing answer is found in *Seiber* v. *Price*,[16] where GRAVES, J., says, "An arrest by legal warrant on a criminal charge to compel the satisfaction of a mere private civil demand, is a misuse of process, a fraud upon the law, and an illegal arrest as respects the party who knowingly and purposely perverts the machinery of the law in that way. And papers obtained under the pressure of such a proceeding by the party promoting it, are at least voidable as against him at the election of the party thus constrained to make them." On the other hand, the use of criminal process in good faith for the purpose for which it was devised, even though a civil claim arises out of the same transaction and is being pressed at the same time, cannot be called duress, even though the pendency of the criminal proceeding actually exerts pressure upon the defendant to discharge the civil claim.[17] Analogous to the perversion of criminal

(restitution in equity, fraud in obtaining judgment). If restitution in value, as distinguished from restitution of specific property, is to be obtained, the cause of action would seem to be legal (quasi-contractual) rather than equitable.

[13] See article on Collateral Attack upon Judgments on the Ground of Fraud, by G. C. Woodward, 65 U. of Pa. L. Rev. 103, Dec. 1916.

[14] 87 Mich. 340.

[15] But see Betts v. Village of Reading, 93 Mich. 77; Wolf v. Troxell, 94 Mich. 573; Beath v. Chapoton, 115 Mich. 506. The last two cases also involve the proposition that, if the obligation was actually owed, duress is immaterial; and the second of these, following Briggs v. Withey, 24 Mich. 136, rules that, if part was due, the excess only is affected. In the case of abuse of criminal process difficulty has been countered in the doctrine that courts will not grant relief from an illegal transaction—the illegality here being compounding crime. But the sufficient answer would seem to be that, because of duress, the plaintiff is not in pari delicto. Woodward, Quasi Contracts, § 141. The question of illegality is touched in Wolf v. Troxell, supra.

[16] 26 Mich. 518.

[17] Seiber v. Price, supra; Briggs v. Withey, 24 Mich. 136. Of course, the courts must be vigilant to detect abuse of the process by indirection, (See Briggs v. Withey, supra; Williams v. Bayley, L. R. 1 H. L. 200), but to go further, under modern conditions,

process to private ends, is the similar use of proceedings for the subjection of the insane to guardianship.[18] The scope of the principle is obvious.

Both the subjects touched upon offer analogies to the remaining problem, that which arises when money is paid upon a claim, under pressure of an action designed to reduce that claim to judgment but which has not arrived at judgment, or, further back, under threat of such action. Mr. KEENER says,[19] "As a rule, if one after action brought, whether before or after judgment, pays a claim made upon him by the plaintiff therein, he cannot afterwards make that payment the basis of an action against the party to whom the money was paid. This rule is founded both upon common sense and public policy. The payment would be an idle ceremony if the only effect thereof were to reverse the position of the parties as plaintiff and defendant. Not only would the payment be an idle ceremony, but injustice would be done the party to whom the money was paid, since it would subject him to an action to be instituted at such time and place as might be deemed desirable by the party making the payment. Furthermore, if payments made in such circumstances can be recovered, the litigation between the parties could be made almost interminable. If the defendant paying in the first action can make that payment the basis of an action, the defendant in the second action has, of course, the same privilege."

It may be said of the reasons advanced by the learned author that they all seem to contemplate the case of a payment made voluntarily and with full knowledge of the facts, not the case where payment is made under the influence of fraud, duress or mistake.[20] And it must be admitted, in spite of some authorities looking the other way, that the case of payment *pendente lite* cannot be assimilated exactly to the case of payment after judgment. This must be especially true as regards the case where the action is brought in bad faith, or fraud or improper pressure is exercised collateral to

would be unreasonable. In England, under the earlier authorities, a civil wrong involved in a felony was merged in the higher offense against society, and, according to the later authorities, the civil remedy is suspended until the termination of a criminal prosecution. The latter doctrine obtained some recognition in this country, but today is overwhelmingly rejected. Boston Ry. v. Dana, 1 Gray 83; McClain, Criminal Law, § 11.

[18] See Foote v. De Poy, 126 Ia. 366.

[19] Quasi Contracts, 411.

[20] This seems to be the position of Mr. Woodward, who, after canvassing these reasons, says, "A more fundamental reason would seem to be that, since a mere resort to legal process will not, under ordinary circumstances, influence the conduct of a man of average intelligence and will, the payment is not regarded as made under compulsion." Quasi Contracts, § 228. This is all that needs to be said to support the case of Vereycken v. Vanden Brooks, 102 Mich. 119. This is, however, inadequate as an explanation of many cases. In Moore v. Vestry of Fulham, [1895] 1 Q. B. 399, and in Watson v.

the proceeding.[21] It is submitted that all that can be said upon this head is that the law favors settlement of disputes and that it favors them particularly when made *pendente lite,* upon the same general principles of policy which lie behind the rule of *res judicata.*[22]

Assuming that we cannot apply the doctrine of *res judicata* to the case of a payment made before judgment, the question remains whether the pressure exerted by a private action or threat of action can be counted upon as duress. It is submitted with confidence that we must say that the constraint which may inhere in the use of the judicial machinery is constraint which is affirmatively legalized in all cases where the legal machinery is properly used—in other words that it can only be made the basis of a recovery when the process is abused. To this extent, we are following the analogy of the law regarding constraint by criminal proceedings. But to the question: What is abuse of process? the answer must be quite different for the two classes of cases. In the one it inheres in the use of the process for the purpose of enforcing a private claim. In the other, the process is provided for the very purpose of enforcing such private claims. But, it is said, the action is only provided for him who has a cause of action—a meritorious claim. It may be conceded that the primary purpose of the judicial machinery is the providing of remedies where there are rights; but, because of the difficulties of ascertaining in advance of litigation precisely what facts can be developed therein and what principles of law the court will apply, the judicial machinery, in order to fulfill its primary purpose, must be available to anyone who believes, in good faith, that he has a cause of action; from which it follows that in the bringing of suit, with or without the use of auxiliary process such as attachment or garnishment, in good faith for the purpose of enforcing a claim believed to be meritorious, we cannot find that wrong-

Cunningham, 1 Blackf. 321, recovery was denied although the payment was made under mistake of fact. (But see Rheel v. Hicks, 25 N. Y. 289). And see cases cited in note 23 below. See also Joannin v. Ogilvie, 49 Minn. 564. The dicta assimilating payment pendente lite to the case of payment after judgment are numerous.

[21] See notes 24 and 25 below. In the case of judgment there is doubt, the authorities favoring the unassailability of the judgment, but in the other case the authorities stand clearly the other way.

[22] The Supreme Court of Michigan has gone far in the favoring of settlement of disputes. The case of McArthur v. Luce, 43 Mich. 435, though difficult to interpret, seems to stand for the proposition that when a dispute has arisen—when an issue has been framed—the parties are bound to make final investigation and the settlement made cannot be overhauled on the ground of mistake. There is certainly some virtue in the distinction between inadvertant mistake in the ordinary course of business, and mistake in the settlement of disputes, and the virtue is especially clear when the dispute has reached the stage of suit. But the position is by no means free from difficulty, and the force of McArthur v. Luce is somewhat shaken by State Bank v. Buhl, 129 Mich. 193.

fulness which is essential to duress.[23] On the other hand, we may predicate duress upon the use of such process by one who knows that he has no cause of action, where pressure results.[24] And it would seem that we might predicate it upon unreasonable and vexatious use of process,[25] though used in good faith in the sense that the plaintiff believed he had a meritorious cause of action, as we clearly may upon fraud or wrongful use of pressure entirely collateral to the process.[26] But for the latter propositions the writer knows no direct authority unless it is to be found in the case which is the occasion for this article.

In *Welch* v. *Beeching,* decided in September last, the defendant Beeching was a creditor of a banking partnership, in which sup-

[23] Hamlet v. Richardson, 9 Bing. 644 (compulsion assumed to have existed; Dickerman v. Lord, 21 Ia. 338 (attachment in a state foreign to the now plaintiff's residence: "It will not do to hold that a payment, secured by none but the means provided by the law itself, is a compulsory or coerced one, there being no element of fraud or other ingredient of oppression in the case"); Benson v. Monroe, 7 Cush, 125 (attachment of ship: "if a party, with full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust"); Turner v. Barber, 66 N. J. L. 496 (libel of boat: "the libellant * * * had a right to test its liability in a competent tribunal of his own selection"); Wheatley v. Waldo, 36 Vt. 237 (attachment of goods; the point not necessary to the decision).

[24] Cadaval v. Collins, 4 Ad. & El. 858 (arrest on capias); Fenwick Co. v. Clarke, 133 Ga. 43 (attachment of goods); Watkins v. Baird, 6 Mass. 516 (arrest on capias; held duress avoiding deed of release); Chandler v. Sanger, 114 Mass. 364 (attachment of goods); Adams v. Reeves, 68 N. C. 134 (attachment of goods). The most troublesome question which can arise under this head is that concerning the status of the man who knew all the facts upon which his claim was founded but mistook the law. A similar question has often arisen in cases of malicious prosecution. There, most cases are disposed of by the practical rule that one who acts in good faith on the advice of counsel is protected, but this leaves unsettled the case of one who acts in good faith without counsel, and of the lawyer who acts upon his own advice, as to which see 21 Harv. L. Rev. 149; LeClear v. Perkins, 103 Mich. 131, cases cited. The problem has not yet arisen in an action for restitution, unless it should be said to have been necessarily involved in the case which is the subject of this paper. It is submitted that the problem should be disposed of on the basis of practical expediency, and that this basis is not the exploded dogma that every man is presumed to know the law, but, rather, that a layman is bound to know that he does not know enough law to furnish a safe guide in the institution of legal proceedings and therefore acts at his peril if he acts without professional advice, but that he is entitled to rely on professional advice; and that a lawyer is bound to exercise reasonable skill and care but is not further responsible.

[25] See Turner v. Barber, 66 N. J. L. 496; Dickerman v. Lord, 21 Ia. 338; Adams v. Reeves, 68 N. C. 134. And see authorities on Malicious Abuse of Process gathered in Cooley, Torts (3d ed.), 354 ff; and in article "Process," 32 Cyc. 412, 541 ff.

[26] The only question arising here is whether, and how far, the case of a payment pending suit is to be assimiliated to the case of payment after judgment, discussed above. See note 20, and dicta in cases cited in notes 23 and 24. In considering whether a good faith claimant has been guilty of wrongful conduct, it is submitted that it should be assumed that his claim was not only made in good faith but that it was well founded, although, of course, in the latter case wrongful conduct would not ground restitution. See note 15.

posedly the plaintiff, Mrs. Welch, and her husband were partners, with others. The bank had gone into receivership. Later plaintiff negotiated a sale of real estate from one Thornburg to one Crankshaw, for the sum of $800, of which $200 was, by agreement between her and the seller, to be loaned to her, and to be taken by her out of the first payments upon the purchase. Defendant Burhans, an attorney at law, was employed by Crankshaw in connection with the purchase. Acting upon the information thus obtained, Burhans brought a suit for Beeching against Mrs. Welch upon the indebtedness of the bank to him, and a garnishment suit against the purchaser Crankshaw. Burhans then brought together this plaintiff, Mrs. Welch, the purchaser, Crankshaw, the sheriff armed with process, and himself. According to plaintiff's evidence, Burhans asserted that she was liable for the debts of the bank and threatened to levy the garnishment upon Crankshaw and take the whole sum which was coming to her, and that, when she suggested calling the whole deal off, he said she could not do that; and that at another time he asserted the right to take the whole purchase price, charging that Mrs. Welch was the real owner of the land.[27] Her evidence also showed that she was in great need of the money, was in poor health, was far away from home and anxious to return, and was very nervous and frightened, and that Burhans had notice of these circumstances. She admitted that Burhans advised her to get counsel, and she admitted having talked, either before or after her payment, about fighting his suit. The upshot of the matter was that the purchaser made several checks to this plaintiff for the aggregate sum which was then coming to her, and she endorsed $150 of this to Burhans. She then brought suit (just how soon does not appear, but it must have been promptly, for the final decision was made within fourteen months of the time of the payment) to recover the sum of $150 so paid to defendant Burhans. It was proved that defendant Burhans was entitled, as between himself and Beeching, to part of this fund for his services, and that he retained the balance in his hands, because of notice from plaintiff's attorney that he would be held responsible to her for the whole amount. The defendant admitted at the trial that plaintiff was not responsible for the debts of the bank. The trial court instructed the jury, *inter alia*:

> "The question is, Did he, through Attorney Burhans, coerce Mrs. Welch; that is, put her under duress so she was

[27] Record, pp. 18, 19, 32, 39, including testimony of defendant Burhans.

not able to exercise her own free will and agency, and thereby was the payment rendered involuntary? * * * if by unlawful acts Mrs. Welch was induced to pay over the money under circumstances which deprived her of the exercise of free will, then I instruct you that the same was such duress as entitles her to maintain this action.

"If you find from the evidence that the defendant Burhans did not do anything or say anything which tended to frighten Mrs. Welch or give her cause to think that her person was in danger, or that her property or rights were in danger, but if, on the other hand, he only told her he had a claim for Mr. Beeching and had started a suit thereon, and would have a summons served on her and garnishment served on Dr. Crankshaw, and if he did not urge her to pay or to make settlement, but, on the contrary, told her he could not advise her, and that there was no hurry in the matter, and she had better take time and get counsel and advice, and she paid the money rather than take time and get counsel or to avoid notoriety and publicity, or the trouble and expense of a lawsuit, then she cannot claim to have been coerced, or that the payment was involuntary, and your verdict must be for the defendant.

"Finally, the question here is one of fact, namely, under the evidence, if Mrs. Welch exercised a free agency in what she did in the doctor's office when the check for $150 was signed by her in the office of Dr. Crankshaw whereby the money went to defendant, if she had an opportunity to consider the matter, was advised of her rights, and knew and understood what she could do, and then chose the course taken as a result of a free agency, of her own volition, of her own free will, then plaintiff cannot recover, and you will return a verdict in favor of the defendant of no cause of action.

"Upon the other hand, gentlemen, if you find under the evidence there was a want of free agency, in what Mrs. Welch did in the doctor's office when the check for $150 was signed by her whereby the money went to defendant, she having no opportunity to consider the matter, that she was not advised of her rights, and did not know or understand her rights, and as a result she was deprived of a free agency, and the act done was not the exercise of a free volition, her

own free will, then plaintiff is entitled to recover, and you will so say by your verdict."[28]

Verdict and judgment went for the plaintiff against both defendants. They appealed, assigning error upon the refusal to direct a verdict and upon the instructions.

The evidence and instructions have been set out at length because the Supreme Court gives us little more than an affirmance of the judgment. The Court quotes a number of general definitions of "Duress," including some which would seem to establish the purely subjective test discussed in the opening part of this paper. Of the cases relied upon, none involve duress of legal proceedings, other than abuse of criminal process for the enforcement of private claims, and the related case of abuse of guardianship proceedings, except the case of *Adams* v. *Reeves*,[29] which seems to make the test for a case of this sort whether "one knowing that he has no claim upon another, sues out legal process against him," though it may give some countenance to the idea that improper practices in the use of process sued out in good faith can constitute duress.

The decision, then, looks very much like an acceptance of the purely subjective test of duress for cases of this type. If it is not this, it is difficult to say what it is. The writer feels regret that it was not put distinctly upon the ground of pressure collateral to the process. The case as it came to the Supreme Court, could not have been put upon that ground under the old rules of procedure, since the instructions in the court below, with some contradications, fairly left the case to the jury upon the subjective test of duress. But, under the JUDICATURE ACT, it would seem that the court might have held that the evidence showed improper practices on the part of the defendant attorney, collateral to the process, (not immoral or illegal practices, necessarily, but practices "unethical" and exercising pressure foreign to the process), and hence that it did not appear that there had been a miscarriage of justice.[30] And, though the court did not take that course, it is respectfully submitted that we must interpret the case as standing only for this, not for the

[28] The plaintiff also asked to have the case submitted on the theory of mistake. As she knew all the facts, her mistake was solely one of law, not the familiar case of mistake as to a conclusion of law and fact, the facts not being known. The court did not submit this theory and, as the case went, this phase of it was not presented to the Supreme Court. The legal points involved are not stated in the report, and the writer suppreses all discussion of them in order that the reader may come with a fresh mind to the question whether the defendants should have known the law. The question of the good faith of the defendants was not put to the jury, though it clearly should have been.

[29] 68 N. C. 134, cited in notes 24 and 25 above.

[30] This provision of the Judicature Act was made useful in Barras v. Barras, 159 N. W. 147. It should be of constant service.

proposition that the pressure of suit, prosecuted in good faith and without improper practices, may, because of the peculiarly vulnerable situation of the defendant, be regarded as duress.[31]

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[31] One is tempted to put this case upon the admission, made at the trial, that the original claim was unfounded, though believed by the defendants to have been well founded at the time when it was paid. But for the injustice and inexpediency of requiring the payee to try the merits of his original claim, we might lay down a rule that a payment can always be recovered upon proof that it was not due, without any showing of mistake or duress. Therefore, if the invalidity of the claim is admitted, why not compel restitution upon that ground alone? But, as between the payee who frankly admits this point, the payee who denies it without reason, the payee who denies it upon reasonable grounds though mistakenly, and the payee who denies it with truth, distinctions cannot be taken without infringing the principles discussed in the opening of this paper and overthrowing the repeated declarations of our courts. It should be borne in mind that the admission is urged, not merely as a substitute for other evidence, but as a ground of recovery. But the point admitted is one which, as a matter of substantive law, is not a ground of recovery except in conjunction with other circumstances such as mistake or duress.