Michigan Law Review

Volume 45 | Issue 5

1947

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Duress through the use of civil litigation provides a convenient starting point for an analysis of modern doctrines of economic duress. The propriety of this form of pressure, used alone or in conjunction with other means of coercion, may become an issue in a variety of situations in which relief for duress is asked. At the same time it is in this area that the extension of duress as a remedial principle has encountered the greatest resistance.

The concept of duress in Anglo-American law first appears as a by-product of the law of crime and tort and still retains some implications of violent or injurious wrongdoing. Conventional definitions still customarily require, as one of the essential elements of duress, a "wrongful" act or threat by the person exerting pressure.[1] This limitation has already been criticized elsewhere as an inaccurate and misleading survival, which fails to reflect the basic shifts of emphasis during the last century.[2] But its persistence cannot be explained merely through the power of legal ideas to maintain themselves through constant repetition. The strong flavor of moral disapproval that is still implied by the concept of duress is a result in part of the image portrayed by current social and economic theory, the image of a society whose ideal of "freedom" has been in large part realized and in which "coercion" is restricted to narrow areas of correctable maladjustment. If it is once recognized that coercion is universal in the exchange of goods and services under the conditions of individualism, the "freedom" contemplated by social and economic theory is seen as involving essentially a freedom to coerce. The ideal of "freedom" is not thereby

* An indebtedness of long standing is owed to Professor Edgar N. Durfee of the University of Michigan Law School, who first analyzed the subject here considered in his article, "Duress through Legal Proceedings," 15 MICH. L. REV. 228 (1917). The criticisms of the present article by Professor Roland J. Stanger of the Law School of Ohio State University have been drastic and most helpful.

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[1] 2 CONTRACTS RESTATEMENT, §492 (1932); 5 WILLISTON, CONTRACTS, rev. ed., §§1606-1607 (1936). It is interesting to note, however, that the RESTATEMENT in Comment g to section 492 finds it necessary to qualify the statements promulgated in black letter by the admission that "acts that involve abuse of legal remedies or that are wrongful in a moral sense" may constitute duress "within the meaning of this rule."

[2] Dawson, "Economic Duress—An Essay in Perspective," 45 MICH. L. REV. 253 (1947).

abandoned as the ideal most likely to produce an expansion of productive resources and the fullest expression of human capacities. But the problem of coercion becomes one, not of condemning coercive measures in all the forms they take, but of defining the permissible means and the limits within which they may be used. The stigma attached to coercion is then largely removed, the differences become differences of degree, and the way is cleared for a revaluation of legal doctrines in the light of their broader purposes.

An intensive study of coercion exercised through the forms of civil litigation involves certain difficulties. The first, though not the most serious, is the constant intrusion of policy considerations peculiar to this type of pressure, considerations which escape exact definition but which must nevertheless be taken into account. In this respect coercion through civil litigation differs only in degree from coercion of other types, since the application of duress doctrines at almost any point will encounter factors of policy not definable in any simple formula. A more serious difficulty arises from the fact that a separate study of duress through civil litigation involves an undue concentration on the specific means of pressure, divorced from the wider context in which those means must operate. Judicial remedies form an essential part of the whole system of legal and economic relationships through which the production and exchange of goods and services is organized; it is through the assurance of protection by civil remedies (supplemented at certain points by public prosecution or the police) that economic interests secure the reinforcement and definition that make them effective instruments in economic bargaining. Where pressure takes the immediate form of the start or threat of civil action, it is often necessary to look beyond the pressure inherent in the process itself to the conditions which give it special weight and multiply its effect. It is in fact the reluctance of courts thus to extend the range of inquiry that has chiefly restricted the growth of duress doctrines in the situations about to be examined.

Before the task of assembling reported cases is undertaken, certain general considerations applicable to all types of civil litigation will be reviewed. The reader should be warned that this branch of the discussion will seem more than somewhat abstract. One of the difficulties it encounters is the almost complete absence in reported opinions of any disclosure of judicial motives; particularly where relief for duress is denied it is customary to dispose of the claim of duress with such statements as: "It is not duress to threaten to do what there is a legal right to do." As the discussion will suggest, the factors of policy that

operate in this area are peculiarly complex and elusive. The first step is to try to identify them.

I

General Considerations

A contention that resort to civil litigation can constitute duress may seem at first sight almost paradoxical. The sanctions of civil procedure constitute a system of state-organized coercion, supplied to private individuals for the specific purpose of enabling them to effectuate their demands. Of all the forms of pressure available they seem clearly the most permissible. Furthermore, the threat of resort to civil remedies is by implication involved in a great variety of bargain transactions, as the ultimate recourse if other means of adjustment fail. The admission that such a threat, by being made specific, can provide ground for judicial relief may seem to involve contradiction and an attack on deeply ingrained ideas of legality.

But the problem takes on a different aspect when the purpose of relief for duress is recalled. It can be taken for granted, here as elsewhere, that any relief for duress will be limited to the excess over the amounts to which the coercing party is justly entitled; in other words, that the purpose of relief for duress will be solely to prevent the unjust enrichment of the party exerting pressure.[3] Whatever the form of litigation threatened, the threat involved is a threat of force, through an established procedure and limited in its application but calculated to be strong enough to overcome the type of resistance expected. If the individual who has invoked these sanctions has thereby secured a payment, transfer, or obligation without providing an equivalent (or for a counter-performance whose value is seriously inadequate), some reason should be suggested for refusing restitution of the excess received or cancellation of any obligation for the excess promised.

The normal case will be one in which the pressure produced by the start or threat of civil action has led to settlement out of court. The first line of defense to any reopening of the settlement will then consist of those factors of social policy that are usually summarized in the phrase, "security of transactions." But an appeal to the security of transactions provides only a partial answer. It is true that the phrase suggests a need for stability and continuity in human arrangements that

[3] This limitation on relief for duress is discussed by Dawson, id. at 282-288. Though a few cases have recognized a liability in damages for exercising duress, the damage remedy is so abnormal that it can be ignored for present purposes.

cannot be safely ignored. The movement of human affairs depends on uncountable decisions by individuals every day. Most of these decisions must stand, though risks may have been miscalculated or interests badly served. It is essentially the same need that has produced the doctrines of res judicata, aiming at finality in judicial decisions, and the elaborate system of modern legislation in the field of limitation of actions. On the other hand, if statistics cannot measure the precise weight to be given factors such as these, neither can statistics describe the results of ignoring them in particular instances. All that the concept of the "security of transactions" can contribute is a warning that large-scale judicial intervention, after settlement has been achieved, is unwise; that the frequency with which similar demands for intervention may be presented should be considered; and that the degree of probability of multiplied demands should be balanced against the degree of injustice anticipated in the particular case.

Where settlement has been effected under pressure of civil litigation, there enters a more specific factor which reinforces the warning provided by the concept of the "security of transactions." This factor is the desire to encourage private settlement of contested claims as an affirmative means of reducing congestion in the courts and preventing the waste and delay of litigation. This desire finds expression in doctrines of contract law that make an agreement not to sue a technical "consideration" even though the claim asserted is later shown to be unfounded, and in statements frequently made as to the "favor" with which agreements for compromise should be viewed. Again it is difficult to measure the weight that should be given this element. In some situations the creditor, deprived of the pressure of civil process as a means of enforcing his claim, would have available other means of coercion or persuasion. But on the whole it seems true that if relief for duress were so far extended that private settlement became quite unreliable, creditors would be induced to commence, rather than merely to threaten, litigation and to persist until final judgment when suit had been once begun. The seriousness of this consequence, in increasing the volume of litigation, would of course depend on the extent to which relief for duress was awarded, and in no event could it be precisely measured.

Reluctance to extend the scope of relief for duress can be further justified by a factor peculiar to duress through civil litigation, though its effect will vary with different types of civil remedy. The means of pressure employed may be one that is equally available to either party. The admission that threat of suit constitutes relievable duress may

make it possible for the positions of the parties to be reversed at a later stage; the creditor who has extracted a settlement may himself, when subjected to the same form of pressure, accede to the demand for revision and then seek relief for duress.[4] It is of course unlikely that successive settlements, each voidable for duress, would be agreed to by the interested parties if relief for duress were extended far enough for this danger to arise. On the contrary, the unreliability of any settlement would soon produce a strong incentive for prosecuting through to judgment any claim that either party might have against the other. The possibility that controversy might be indefinitely prolonged, in the manner suggested, thus adds merely some further emphasis, in a different form, to the arguments for finality and defines an outer limit beyond which relief for duress cannot be carried. Furthermore, this possibility will by no means exist in all types of case, since the creditor may not be subject to the same disadvantage in bargaining or may have employed initially a form of pressure (e.g., attachment, garnishment, or injunction) which would not be available when the positions are reversed and the party first placed under pressure seeks to overhaul the settlement on the ground of duress. But the danger is serious enough to suggest again that the elements of relievable duress must be carefully defined, to include either unusual severity in the process employed or unusual disadvantage in the party coerced. Limitations of this type are taken for granted in duress doctrines as conventionally framed. As broad limitations of the area within which duress doctrines can operate they seem unquestionably valid. As applied to duress through civil litigation, they narrow the range of inquiry and eliminate from consideration great masses of cases in which the process takes standard forms and resistance to pressure encounters no special handicap.

There remains the most difficult question, which lies well sub-

[4] The statement made by KEENER, QUASI-CONTRACTS 411 (1893) has been frequently quoted: "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 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."

merged in the cases though it goes to a crucial issue. This is the question whether extension of relief for duress would limit the "freedom" to litigate and the submission of disputes to adjudication. In duress through civil litigation it is characteristic that the pressure exerted is the by-product of an appeal to a court for decision. To describe such an appeal as improper may seem to attack the central functions of courts: "This is what courts are for."[5] From the point of view of the creditor who has employed (or threatened to employ) this means of reinforcing his claim, an attack on his conduct may seem to be aimed at restricting his privilege of access to the courts. It involves no exaggeration of the functions of the courts in the adjustment of social friction to concede that the privilege of appealing to decision by a court, where other means of adjustment fail, is an essential safeguard which our private as well as our public law should aim to preserve.

That this question is not wholly fanciful is indicated by the problems raised where other forms of control are attempted over vexatious or oppressive litigation. One alternative form of control is of course the tort remedy in damages for malicious prosecution, which originated in the area of criminal prosecution and has been extended everywhere to include at least some forms of civil action.[6] Despite the tendencies toward extension of tort liability, it remains basic in the tort remedy that the civil action must have been brought without probable cause and with "malice," and that the action "maliciously" prosecuted must have been terminated adversely to the plaintiff in that action. These restrictions on tort liability, inconvenient and burdensome as they may be in the administration of tort remedies, are repeatedly justified by the courts through their anxiety not to obstruct access to judicial remedies or to impose penalties on litigation brought in "good faith." Similar obstacles have hampered the development of the second main type of control over vexatious or oppressive litigation, the equity injunction. As will be indicated later, control through injunction has been undertaken in a variety of situations, though always with reluctance and within narrow limits. As compared with the damage remedy the injunction is flexible and has the important advantage of providing a clear guide to conduct before rather than after the event. On the other hand,

[5] Cf. Shockley v. Wickliffe, 150 S.C. 476 at 480, 148 S.E. 476 (1929): "But the threat of a lawsuit does not constitute coercion or oppression. It is the business of the Courts to settle disputes between litigants, and to hold that the threat of bringing suit for collection of a note is oppression would be to defeat the very purposes for which the Courts were established."

[6] PROSSER, TORTS, §97 (1941).

to the extent that the injunction aims, not to alter the mode of trial (as by consolidation), but to prevent litigation on the ground of its vexatious or oppressive character,[7] its effect in restricting access to judicial remedies is obviously more direct and severe than the damage remedy. It is not surprising that the injunction has been used with reluctance and that clear grounds for its issuance must be shown.

The crucial issue now raised is whether similar dangers exist in the extension of relief for duress. In order to deal with this issue it is necessary to recur again to the central purpose for which relief for duress is given and the limited recovery it provides. Unlike the damage remedy, which provides indemnity for losses incurred through "malicious" prosecution or abuse of process, relief for duress aims to cancel out a gain or advantage, not otherwise justified, that has been secured through exertion of pressure. Unlike the equity injunction, where used to prevent start or prosecution of vexatious litigation, relief for duress will not give specific prevention of threatened injury. The most that is sought is judicial review of a settlement, after surrender to the pressure. The object is neither to transfer nor to prevent losses but to cancel out the gain.

It is this basic connection of doctrines of duress with the prevention of unjust enrichment that traditional statements of doctrine have tended to obscure. For the immediate purpose it has a direct bearing, since it means that relief for duress will have no effect in reducing the availability of civil remedies either by penalizing (as through liability in damages) or destroying (as by injunction) the creditor's "freedom" to litigate. The issue raised is quite different—whether the "freedom" to litigate includes an unlimited power in the creditor to exert pressure through the forms of litigation, with a view to abandoning his action when settlement on his terms has been compelled. Broadly speaking, civil remedies are organized on the assumption that the means of pressure they supply will be directed and controlled, at least remotely, by a court; it is no doubt this assumption that makes the invocation of duress doctrines appear to be an attack on the judicial function itself. But in fact our system of civil remedies gives extensive control over the form and the timing of pressure to the litigant who employs them. The question can be put in its simplest terms—is he free to turn on *and turn off*

[7] Though the distinction is not sharply drawn in the equity cases, the prevention of "multiplicity of suits" by consolidation of trials can be taken to be the normal function of the bill of peace with multiple parties, while the total prevention of harmful or vexatious litigation is the object of the injunctive remedies referred to below, notes 10, 39 and 41.

the pressure so as to secure the maximum advantage in private bargaining with his antagonist? To set limits to the advantage he can thereby secure is not to deny him the privilege of litigating or penalize its use; he can sue through to judgment if he wishes and will then incur no added risk. To set limits to his advantage will deprive him of the "fruits" of his remedy only if it is assumed that the "fruits" include all the gains that private bargaining can extract with the aid of the means of pressure that civil remedies supply.

The argument to this point has been mainly concerned with describing the very substantial interests opposed to relief for duress. These interests appear on analysis to be of the most general nature, not measurable with any precision though no less weighty on that account. The interest in the "security of transactions" presents an obstacle, of course, to relief for any type of duress, or for mistake, misrepresentation, impossibility and the other broad grounds for revision and cancellation of bargain transactions. Equally formidable and more directly relevant to duress through civil litigation is the interest in preventing unnecessary and wasteful litigation where private settlement can provide means for adjustment. The warning against wholesale revision derives special force from the possibility that controversy may be indefinitely prolonged (or in the alternative that private settlements may be rendered wholly unreliable), where similar means of pressure are equally available to both parties in the dispute. But whatever interests may point toward finality, the basic question remains whether the price to be paid for finality will prove in the end too high. This is precisely the question that doctrines of duress are intended to raise, a question essentially of justice on which statistics again are no guide. Like most questions in the realm of moral values it must be phrased in quite general terms but it takes on real meaning in the context of particular cases, with their unlimited variations in detail.

The detailed analysis of reported decisions which must now be undertaken will be based primarily on the forms of civil remedy used as the means of pressure, classified according to the types of pressure they make available. This classification presents difficulties, since the same types of pressure recur in varying forms and in varying degrees in different types of civil action. For the present purpose, however, this mode of analysis seems most useful since the means of pressure used must remain an important factor in duress, however doctrines may be defined. Furthermore, it is only by this means that it is possible to suggest the varied aspects in which the problem of duress is presented by a procedural system employing so many forms.

II

ACTION FOR SIMPLE MONEY JUDGMENT

The clearest and simplest case is the action (or threat of action) for simple money judgment, without use of ancillary process such as arrest or attachment. At the outset it seems clear that a threat, or proposal, cast in this form can scarcely be described as improper and that any coercion implicit in the threat or proposal is completely legalized. The proposition that no relievable duress is involved seems at first sight to be scarcely debatable. Many cases assert it, usually with a statement no more illuminating than the statement that "It cannot be duress to threaten to do what there is a legal right to do."[8]

A result so widely accepted may be explained by the general considerations of policy already referred to, and particularly by the fact that in this situation the means of pressure employed are most clearly of the reversible type—equally available to either party so that a finding of duress in the first settlement might require a similar finding if the party coerced were to threaten suit for review of the settlement. The conclusion that relief for duress should be denied is further reinforced by an analysis of the form and mode of the pressure actually involved. Where the coercion consists of the start or the threat of an ordinary action for money judgment, without supplementary process prior to judgment, no pressure will be directly applied until judicial decision has established that such pressure is authorized and proper. If any elements of the creditor's claim are unjustified or excessive, those elements will be eliminated by judicial decision before execution process can operate, with full opportunity to litigate any disputed or doubtful

[8] Lundvall v. Hughes, 49 Ariz. 264, 65 P. (2d) 1377(1937); Ellis v. First Nat. Bank, 163 Ark. 471, 260 S.W. 714 (1924); Santa Ana Sugar Co. v. Smith, 116 Cal. App. 422, 2 P. (2d) 866(1931); Campbell v. Rainey, 127 Cal. App. 747, 16 P. (2d) 310(1932); Bestor v. Hickey, 71 Conn. 181, 41 A. 555(1898); Gray v. Shell Petroleum Co., 212 Iowa 825, 237 N.W. 460(1931); Kiler v. Wohletz, 79 Kan. 716, 101 P. 474(1909); United States Banking Co. v. Veale, 84 Kan. 385, 114 P. 229 (1911); Riney v. Doll, 116 Kan. 26, 225 P. 1059 (1924); Zwergel v. Zwergel, 224 Mich. 31, 194 N.W. 505 (1923); Kunkel Auto Supply Co. v. Leech, 139 Neb. 516, 298 N.W. 150(1941); Prudential Ins. Co. v. Fidelity Union Trust Co., 128 N.J. Eq. 327, 15 A. (2d) 888(1940); Jones v. Houghton, 61 N.H. 51(1881); Charlotte Bank and Trust Co. v. Smith, 193 N.C. 141, 136 S.E. 358(1926); First Nat. Bank v. Multnomah Lumber & Box Co., 125 Ore. 598, 268 P. 63(1928); Tugboat Indian Co. v. A./S Ivarans Rederi, 334 Pa. 15, 5 A. (2d) 153 (1939); Shockley v. Wickliffe, 150 S.C. 476, 148 S.E. 476(1929); Cleburne State Bank v. Ezell, (Tex. Civ. App. 1934) 78 S.W. (2d) 297; Burnham v. Town of Stafford, 53 Vt. 610(1881); Zent v. Lewis, 90 Wash. 651, 156 P. 848 (1916); T. F. Pagel Lumber Co. v. Webster, 231 Wis. 222, 285 N.W. 739 (1939).

issues. On this analysis, the threat to employ the sanctions of civil procedure, even in support of an unjustified or exorbitant demand, loses much of its menace. The pressure appears to be legalized, not only in general terms by established rules of procedure but specifically in its application to the individual case.

A contention that duress can be found in a threat of ordinary action for money judgment might seem most plausible where the claim advanced was known to be unfounded. A finding of duress would then involve no departure from tests of tort liability for malicious prosecution, as those tests have been developed by a majority of modern courts.[9] The controls developed through damage remedies find a parallel in the situation now considered, in the extension of injunctive relief to protect against harmful and vexatious litigation brought in "bad faith."[10] The same limitation of the creditor's privilege is sug-

[9] PROSSER, TORTS, §§97-98 (1941), referring also to the numerous decisions which refuse to permit recovery for malicious prosecution of a civil action in the absence of personal arrest, seizure of goods, or other ancillary process.

[10] The remedies of this type surviving in modern cases represent a modern derivative of the old equity bill of peace which aimed at preventing repeated relitigation of issues already adjudicated. Allowing injunctive relief, even where attachment, garnishment or other ancillary process was not employed by the creditor: Tarbox v. Hartenstein, 63 Tenn. 78 (1874), three actions brought and weekly actions threatened on claim for which suitor had fully recovered; Pratt v. Kendig, 128 Ill. 293, 21 N.E. 495(1889), title to land already adjudicated in five previous actions; Shevalier v. Stephenson, 92 Neb. 675, 139 N.W. 233(1912), decision in will contest, followed by three actions on same issues dismissed without trial; Cannon v. Hendrick, 5 Tex. 339 (1849); Engleman v. Mo., K. & T. Ry. Co., (Tex. Civ. App. 1909) 118 S.W. 1089; Shanks v. Calvert Mortgage and Deposit Co., 119 Va. 239, 89 S.E. 99 (1916); Moore v. Harkins, 179 N.C. 167, 101 S.E. 564(1919); Ellerd v. White, (Tex. Civ. App. 1923) 251 S.W. 274; Burdick v. Burdick, 148 Wash. 15, 267 P. 767(1928); Ackerman v. Kaufman, 41 Ariz. 110, 15 P. (2d) 966(1932); Laursen v. Lowe, 50 Ohio App. 103, 197 N.E. 597 (1935); Ebner v. Nall, (Tex. Civ. App. 1936) 95 S.W. (2d) 1004; Steinberg v. McKay, 295 Mass. 139, 3 N.E. (2d) 23(1936); Miller v. Ellis, 232 Iowa 558, 5 N.W. (2d) 828 (1942). Cf. Bartholomew v. Bartholomew, 56 Cal. App. (2d) 216, 132 P. (2d) 297(1942), and Plews v. Burrage, (C.C.A. 1st., 1920) 266 F. 347. A more specific application of the basic doctrine involved in these cases is the power asserted by modern courts of equity to protect their own adjudications by injunction, against even a single attempt in a later proceeding to relitigate the issues adjudicated, Sarson v. Maccia, 90 N.J. Eq. 433, 108 A. 109(1919); Hickey v. Johnson, (C.C.A. 8th, 1925) 9 F. (2d) 498; Mendel v. Berwyn Estates, 109 N.J. Eq. 11, 156 A. 824 (1931); Trees v. Glenn, 319 Pa. 487, 181 A. 579, 102 A.L.R. 304 at 308 (1935); Lane v. Rushmore, 125 N.J. Eq. 310, 4 A. (2d) 55 (1939); Borough of Milltown v. City of New Brunswick, (N.J. Eq. 1946) 49 A. (2d) 234. Cf. Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 62 S. Ct. 139 (1941), denying the propriety of this form of injunction by federal courts against state court proceedings.

While most of the decisions above referred to represent extreme examples of repeated and harassing litigation, they can all be explained as attempts through affirmative action to enforce the doctrine of res judicata. This element is not quite sufficient to

gested by familiar doctrines of consideration in the field of contract, which deny that consideration exists in the surrender of a claim asserted in "bad faith." Where privilege is eliminated by the creditor's knowledge that the claim is invalid and serious inconvenience has resulted to the party threatened with suit, the principal obstacles to a finding of duress would seem to have disappeared.

In fact there is almost no authority for relief for duress on the state of facts now assumed. On the contrary, prevailing attitudes suggest that review of any settlement induced by threat of an ordinary action for money judgment would almost always be refused, even in a case where a damage action for malicious prosecution, or preventive relief by equity injunction, might be available.[11] Still more unlikely is a finding of duress in a threat by a creditor to sue for money judgment, where some basis for his claim could be shown and his disbelief in its validity could not be proved.

However unanimous the conclusions in decided cases and however persuasive the reasons may seem, these results require further explana-

explain Benedict v. Hall Manufacturing Co., 211 Iowa 1312, 236 N.W. 92(1931), where five successive actions for money judgment were brought and dismissed without trial, but a sixth action brought by the plaintiff was successful, though recovery was for an amount much less than had originally been demanded. The injunction against further litigation was requested and granted under a counterclaim filed by defendant in a seventh action brought on the same cause of action. The conclusion that any further actions brought on the same issues would be brought in "bad faith" was apparently an inference from the voluntary dismissals of the first five actions brought. Without this record of repeated evasions, it seems unlikely that an injunction would have been given to prevent relitigation of issues settled by one adjudication *in favor* of the plaintiff.

[11] Sartwell v. Horton, 28 Vt. 370 (1856), is a case which allows recovery of money paid in settlement of a claim advanced through threat of civil action made in "bad faith," but the result may be explained in part by the implied threat of physical violence that was added to the threat of suit and by the fact that the plaintiff was "a simple minded man." Application of Gruen, 173 Misc. 765, 18 N.Y.S. (2d) 990 (1940), likewise finds duress in a threat of civil action, accompanied by perjury seriously harmful to reputation. Apart from these cases, the only support for a conclusion that a threat of action for money judgment can constitute duress, is the group in which elements of undue influence are also present (see note 19, infra). But see Harper v. Murray, infra, note 13, and the discussion in the text of Darling-Singer Lumber Co. v. Oriental Navigation Co., infra, note 20.

The point may be illustrated by Benedict v. Hall Manufacturing Co., supra, note 10, where the court described at length the injurious effects on the Hall Company of repeated actions for money judgments in large amounts, with impairment of the Company's credit and exploitation by competitors of the doubts produced as to the Company's solvency. These factors were persuasive reasons for the grant of an injunction. It seems most unlikely, however, that any court would consider them sufficient basis for a finding of duress if the Hall Company, to avoid further suits, had settled their adversary's claim.

tion, for the arguments so far reviewed do not tell the whole story. Even after the interests in finality of private settlements have been fully taken into account and after the coercion involved in a threat to sue for money judgment has been fully discounted, there remains a substantial residue of cases in which such a threat can produce disproportionate risk and serious inconvenience. The element of risk is inherent in any system of litigation whose rules of pleading, proof, and trial procedure rely so heavily on the initiative and astuteness of the litigants themselves, particularly where the ultimate decision rests with a jury of laymen. The uncertainties in such a system will frequently make it wise to settle at a discount after calculating the chances. To the risks of an uncertain outcome must be added the inconvenience which the plaintiff can produce through his control over time and place of trial.[12] In some instances the mere start of an action, at any time or place, will have injurious effects on credit or reputation that greatly magnify the threat as an effective form of pressure.[13] Where the person threatened with suit is in serious financial difficulties, the start of an ac-

[12] Trial court discretion to postpone or transfer place of trial can greatly mitigate this factor and provides no doubt a sufficient answer to the sort of contention that was advanced in Mills v. Forest Preserve District, 345 Ill. 503, 178 N.E. 126 (1931), that a threat to bring condemnation proceedings involved duress because the action would be tried while the land involved was under water and could be viewed by the jury only from boats. But it is difficult to imagine any means by which a trial court could relieve a defendant from the embarrassment anticipated in Van Alstine v. McAldon, 141 Ill. App. 27(1908), where an action to cancel a promissory note, with charges of fraud, was timed to coincide with an election for public office in which the defendant was a candidate. The court refused to review the settlement induced by the threat, relying on the "lawfulness" of the action threatened and the absence of any showing that the defendant was deprived of "freedom of will."

Perhaps the most serious results in modern procedure are those permitting free choice of the *place* of trial, limited only by rules of jurisdiction and venue which were developed in a very different historical setting and give insufficient weight to factors of convenience. Control through equity injunction, particularly in the interstate field, has been tentative and partial; alternative means of control have encountered serious difficulties. See Foster, "Place of Trial in Civil Actions," 43 HARV. L. REV. 1217 (1930); "Place of Trial—Interstate Application of Intrastate Methods of Adjustment," 44 HARV. L. REV. 41 (1930).

[13] Batavian Bank v. North, 114 Wis. 637, 90 N.W. 1016(1902), action on a check for $5600 executed by defendant under threat by the creditor to bring an action which would necessarily involve exposure of misconduct by defendant's brother in managing the family estate. The defense of duress was rejected, in part because the creditor's threat to sue could not be considered "wrongful."

But in Harper v. Murray, 184 Cal. 290, 193 P. 576(1920), a case much closer to the traditional conception of blackmail was held to involve duress. Here a husband manufactured evidence of adultery by his wife and threatened to file an affidavit based on this evidence in pending divorce proceedings. The court having found that the wife was innocent and that the charges were known by the husband to be false, cancellation was ordered of her agreement to release her claim to alimony.

tion may so aggravate his difficulties as to deprive him of effective choice.[14] However poor the prospects of ultimate collection,[15] few lawyers would deny the usefulness of the action for money judgment, without attachment of goods or other trimmings of any kind, as a bargaining instrument or weapon for attack. The frequency with which settlements are made of doubtful or even spurious claims is itself testimony to the presence of coercion.

The classic example of the coercive use of civil litigation is the "strike suit" of the corporate security holder. This may take any one of a number of forms, ranging from the suit for equity injunction to an action to compel opening of the corporate books for examination, though various types of actions for damages can also be used. Whatever the form, the power of extortion in this type of litigation depends principally on its effect in causing inconvenient or damaging publicity or on its interference with a carefully timed program in the issuance of new securities or in reorganization of the corporate financial structure. The possibilities of enormous gain through the use of this type of coercion have produced a professional class of "strike suit" specialists, some of whom are well known in the legal profession.[16] The methods chiefly used to control the "strike suit," through restrictions on the start or the prosecution of stockholders' remedies, have encountered extraordinary difficulty, since some actions of this type are undoubtedly meritorious and the accountability to minority interests that they enforce is a necessary restraint on the actions of management and of majority interest.[17]

[14] Atkinson v. Allen, (C.C.A. 8th, 1895) 71 F. 58; Alamo Amusement Co. v. Harcol Motion Picture Industries, Inc., (La. App. 1933) 147 S. 114; Donald v. Davis, 49 N.M. 313, 163 P. (2d) 270(1945); Irwin v. Weikel, 282 Pa. 259, 127 A. 612 (1925); Lilienthal v. George Bechtel Brewing Co., 118 App. Div. 205, 102 N.Y.S. 1051 (1907); in all of which relief for duress was denied.

[15] It will be recalled that the study sponsored by the New York Commission on the Administration of Justice, "The Collection of Money Judgments in New York," concluded that 75 per cent of the judgments recovered in the previous ten years had been uncollectible. From this the authors drew the conclusion that the sanctions for collection needed reinforcement through supplementary means of coercion, a conclusion with which it is difficult to disagree.

[16] Cf. the comment of Vice-Chancellor Bentley on one well-known artist of this type, in General Inv. Co. v. American Hide and Leather Co., 97 N.J. Eq. 214 at 227, 127 A. 529(1925): ". . . I can conceive of no monster of the jungle . . . that could [so] unsettle the nerves of a corporation director when engaged in rejuvenating an embarrassed company, as the appearance of Mr.Venner in search of information. . . ."

[17] See the excellent comment in 34 COL. L. REV. 1308 (1934), reviewing the various tests of motive that have been employed in this class of litigation, particularly as influenced by such factors as the date of acquisition of the stockholder's interest and the relative size of his holding.

More recently, express legislation imposing requirements of security for expenses, shortening the applicable periods of limitation, and regulating the classes of stockhold-

There are undoubtedly good practical reasons why relief for duress, to review settlements induced by this form of pressure, has not been sought in this type of case. Nevertheless, the obstacles to any restraint on the start or the prosecution of the minority stockholder's suit could scarcely be deemed to apply if relief for duress were requested. Such authority as so far exists for the use of duress doctrines is confined to a type of stockholder's remedy to be later considered, the suit for appointment of a receiver.[18] But the interests in finality of private settlement do not seem sufficiently strong to preclude relief for duress where the action brought or threatened, even though cast in the form of a claim for damages, would have drastic effects on the management of corporate interests and existing necessities were exploited to secure a disproportionate return.

In a wholly different class of cases it appears that the exercise of pressure through actions for ordinary money judgment will not always be exempted from judicial review. The doctrines developed by equity in the field of undue influence serve to qualify whatever general conclusions may be drawn as to duress through this or any other type of civil

ers authorized to bring suit, has had drastic effects in reducing the volume of litigation of this type, particularly in New York. Criticizing the methods of control thus instituted, the author of a recent article emphasizes the need for publicity and judicial control over settlements, as a preferable solution which would eliminate the principal abuses of the stockholder's suit while preserving its positive elements. Hornstein, "New Aspects of Stockholders' Derivative Suits," 47 COL. L. REV. 1 (1947).

[18] See infra, section 9, and particularly Rose v. Owen, 42 Ind. App. 137, 85 N.E. 129 (1908), note 108 (in the second installment of this article, in the April, 1947 issue).

The hostility toward use of duress doctrines in this area that is shown in Dannelley v. Bard, (Tex. Civ. App. 1933) 62 S.W. (2d) 301, may be symptomatic. Perhaps the plaintiffs' difficulties in that case were increased by the fact that their action was cast in the form of an action for damages for exercising duress, though the relief sought was cancellation of an agreement for surrender of some of their stock holdings and a transfer of the remainder under an arrangement for a voting trust. But the plaintiffs' complaint alleged an extremely oppressive use of the machinery of civil litigation in a dispute over the conduct of corporate affairs, including charges (which the defendants were alleged to have known to be false) of forgery in the execution of a contract in the corporation's name and threats of repeated actions in the form of stockholders' suits in every state in the country, for damages and for the purpose of setting aside the contract in question. It was alleged that plaintiffs had no funds with which to defend the threatened litigation, that any such suits were without probable cause, and that they would have destroyed altogether any prospect of realizing any profit on the company's operations. The court sustained a demurrer to the complaint, stating that a threat to bring civil actions was a threat of "rightful" conduct which could not constitute duress, that plaintiffs' lack of financial resources for defense of such actions was immaterial, and that plaintiffs could not have feared the loss of their interests in the corporation in view of the allegation in their complaint that the suits were without probable cause. The last point in particular seems a refinement of logic.

litigation. Concentrated primarily on fact situations in which a wide disparity in bargaining power results from the physical or mental weakness of one of the parties, equity doctrines of undue influence make immaterial the type of pressure used. It appears from several decisions that threats of civil litigation are just as improper as any other type of "influence" against persons exceptionally vulnerable, whether or not such threats would be "wrongful" under the law of crime or tort.[19]

In situations in which disadvantage relates to comparative economic position rather than mental or physical capacity, there is no inherent reason for refusal of relief for duress. An action for ordinary money judgment can take the form of a "strike suit" where any calculation of comparative risks or of the dangers of resisting the demand points clearly in the direction of settlement. If the pressure is viewed in its whole context, unwillingness to litigate at the time and in the manner proposed, will then reflect not timidity but the exercise of a reasonable business judgment.[20] The refusal to date to make room for such calcu-

[19] Parker v. Hill, 85 Ark. 363, 108 S.W. 208(1908); Walker v. Shepard, 210 Ill. 100, 71 N.E. 422(1904); Heinlein v. Imperial Life Ins. Co., 101 Mich. 250, 59 N.W. 615 (1894); Ring v. Ring, 127 App. Div. 411, 111 N.Y.S. 713(1908); Bumgardner v. Corey, 124 W.Va. 373, 21 S.E. (2d) 360(1942).

It is of course difficult to define the degree of disparity that will suffice for a finding of undue influence or its equivalent. There are numerous cases that can at least be quoted for the view that a debtor's extreme distaste for litigation or a considerable degree of nervousness or timidity do not prevent the creditor from asserting his claim with vigor. Wilson Sewing Machine Co. v. Curry, 126 Ind. 161, 25 N.E. 896(1890); Quigley v. Quigley, (Iowa 1908) 115 N.W. 1112; Evans v. Gale, 18 N.H. 397(1846); Whittaker v. Southwest Virginia Imp. Co., 34 W.Va. 217, 12 S.E. 507 (1890); Crookshanks v. Ransbarger, 80 W.Va. 21, 92 S.E. 78(1917).

[20] The point may be illustrated by Darling-Singer Lumber Co. v. Oriental Navigation Co., 127 Ore. 655, 259 P. 420, 272 P. 275(1929), where defendant steamship company agreed to transport 3,600,000 feet of lumber from Portland, Oregon to a South American port. A dispute arose as to the liability between the parties for delays that had occurred in loading the lumber, defendant claiming that plaintiff had become liable to a contractual penalty of 15 cents per ton per day because of failure to deliver the lumber to shipside in proper condition. In order to ensure shipment of the lumber with a clean bill of lading plaintiff paid the sum demanded and then sued for the excess over the amount due under the contract. In finding duress the court pointed out that the shipment of $90,000 worth of lumber was involved, that the sum of $1321.99 at most was in dispute, and that the failure to secure a clean bill of lading would have involved "difficulties, delays and possible litigation at the other end of the line." The nature of the litigation that might have been anticipated "at the other end of the line" was not specified by the court nor should it be decisive. A calculation of comparative risks, including not only the factor of delay but the inconvenience of suit in a foreign court, made submission to the demand the only practical course. There seems to be no reason why doctrines of duress should demand more.

Doernbecher v. Mutual Life Insurance Co., 16 Wash. (2d) 64, 132 P. (2d) 751 (1943), suggests a wholly different type of dilemma. Here the plaintiff's husband had

lations, where the pressure consists of an action for money judgment, cannot be considered the final word on the subject. It is true that in this form of action the pressure of civil process is reduced to its minimal form. It is also true that this type of pressure is made available in a wide variety of situations and is widely encountered in daily experience, making it difficult to express in a general formula the special elements in the debtor's position that would justify special treatment. But this latter difficulty is encountered in most of the situations with which the law of duress is concerned. This difficulty like the argument already considered as to the "reversibility" of the pressure, merely suggests that relief for duress should be confined to cases in which the process used was exceptionally severe or, if that element was wholly absent, to cases in which there existed a serious and unusual disadvantage in the party coerced. Relief for the type of coercion exercised by action for money judgment would then be rare; but there appears no reason why it should be wholly excluded.

III

PERSONAL ARREST PRIOR TO FINAL JUDGMENT

The nature of the problem is transformed in those classes of actions in which personal arrest is available at the inception of suit. By resort-

been examined by the insurance company's physician on the day that his application for a policy of life insurance was made. No physical defects were discovered. Fifteen days later another examination by another physician disclosed the presence of malignant cancer of the colon, which had clearly been present also at the time of the first examination. Some seven months later the insurance company demanded a surrender of the policy which had been issued in the interval. Plaintiff, wife of the insured, was advised by a physician that discovery by the insured of his condition would cause him great worry and "possibly" result in shortening his life. It appeared, after consultation with an attorney, that any contest of the insurance company's claim for cancellation would require disclosure to the insured of his condition, though the attorney advised that there was no ground for cancellation and the claim could be successfully resisted. The court refused to set aside for duress a surrender agreement that plaintiff and her husband finally executed, not long before his death. This conclusion was rested principally on the fact that the insurance company had threatened at most to bring a civil action, in "good faith," but apparently the court also concluded that the "kindly conspiracy" of silence that had been entered into on medical advice had no purpose other than that of "making the sufferer's months less burdensome." One wonders what the conclusion would have been if it had been clearly established by medical testimony that the wife was confronted with the alternative either of submitting to the claim of the insurance company or, by contest, causing her husband's immediate death.

Compare the very short shrift given in Secor v. Clark, 117 N.Y. 350 (1889), to the contention that duress could consist in factors of delay and risk through a debtor's resistance, through vigorous litigation, to the collection of a claim against him.

ing (or threatening to resort) to this form of pressure, the creditor reverses the order of events. Any opportunity to contest the merits of the claim before application of pressure is entirely withdrawn. The pressure itself takes a form sufficiently severe so that duress would be readily inferred if the arrest were accomplished without legal process.[21] The person arrested will ordinarily be allowed to secure his release by posting a bond; the creditor who instigates the arrest will likewise be required to post a bond to indemnify for wrongful arrest and will be liable for damages if the arrest is without probable cause and "malicious." The means thus provided for relieving the pressure and for penalizing its misuse merely alleviate in part the direct and immediate invasion of personal liberty involved in the process itself.

The problem here suggested is one that is implicit in all types of duress through resort to civil litigation but becomes particularly acute where supplementary means of pressure such as personal arrest or seizure of goods are made available. Such supplementary means of pressure involve coercion. They are known and intended to do so. The forms and limits of such coercion have been determined by a long historical process of compromise and adjustment, in which the interests asserted by plaintiffs have been balanced against the nature of the resistance to be overcome. In no area has the form of the compromise been more vigorously debated than in the area of personal arrest, the subject of political campaigns are well as intensive study by legislatures and courts. The powers of coercion thus deliberately conferred on private litigants are inherently capable of abuse. One form of abuse, through employment of these means to advance a claim known to be spurious or for a purpose known to be unauthorized, has already come within the prohibitions of the law of tort. The question now raised is whether the law of duress, operating merely to deprive the creditor of an advantage secured through private settlement, can be used more freely, as an indirect means of control, than damage remedies based on tort.

The tests for relievable duress have in general conformed to the tests of tort liability. In most cases the presence or absence of duress has been made to depend on the motive with which the claim was asserted. Where the creditor in fact believed, and had probable cause for believing, that the principal claim was well-founded and that it pro-

[21] If it is necessary to cite cases for the proposition that the personal arrest or detention without process can constitute duress, the following are illustrative: Griffith v. Sitgreaves, 90 Pa. 161(1879); Bennett v. Ford, 47 Ind. 264(1874).

vided a basis for personal arrest, relief has usually been denied.[22] On the other hand, where the principal claim was not believed to be valid or where the creditor employed the arrest process in a manner known to be unauthorized, relief for duress has been granted.[23] In some instances, it is true, a failure to adhere strictly to procedural formalities has led to a finding of duress, though without showing of improper motive.[24] This insistence on compliance with procedural formality, however, scarcely qualifies the broad proposition that where formality is complied with, motive provides the test.

The same transfer to the field of duress of the tests of damage liability for tort is implied in conventional statements of doctrine which include among the elements of duress a "wrongful" act, either done or threatened. As has already been indicated, the results in reported decisions do not conform to this test where coercion takes the form of an action, commenced or threatened, for ordinary money judgment. In the situation now considered, where process for personal arrest provides a much more immediate and direct form of pressure, it can be argued more seriously that the creditor's motive in advancing his claim has

[22] Meek v. Atkinson, 1 Bailey (S.C.) 84(1828); Stouffer v. Latshaw, 2 Watts (Pa.) 165(1834); Farmer v. Walter, 2 Edw. Ch. (N.Y.) 601(1835); Holmes v. Hill, 19 Mo. 159(1853); Prichard v. Sharp, 51 Mich. 432, 16 N.W. 798(1883); Dunham v. Griswold, 100 N.Y. 224, 3 N.E. 76(1885); Clark v. Turnbull, 47 N.J.L. 265(1885); Bianchi v. Leon, 138 App. Div. 215, 122 N.Y.S. 1004(1910). Similarly, Gunter v. Thomas, 36 N.C. 199(1840), ne exeat; Grimes v. Briggs, 110 Mass. 446(1872), and Bunker v. Steward, (Me. 1886) 4 A. 558, arrest in execution of final judgment.

Several cases have presented a similar issue and reached a similar conclusion in proceedings criminal in form but intended primarily as a means of securing civil satisfaction, such as bastardy proceedings. Mascolo v. Montesanto, 61 Conn. 50, 23 A. 714(1891); McCarthy v. Taniska, 84 Conn. 377, 80 A. 84(1911); Jones v. Peterson, 117 Ga. 58, 43 S.E. 417(1903); Heaps v. Dunham, 95 Ill. 583(1880); Crowell v. Gleason, 10 Me. 325(1833); Pflaum v. McClintock, 130 Pa. 369, 18 A. 734 (1889).

[23] Watkins v. Baird, 6 Mass. 506(1810); Duke of Cadaval v. Collins, 4 A. & E. 858(1836); Brownell v. Talcott, 47 Vt. 243(1875); Sweet v. Kimball, 166 Mass. 332, 44 N.E. 243(1896). Similarly, Mulholland v. Bartlett, 74 Ill. 58(1874), which rests the result on want of consideration for the settlement, still executory; Grainger v. Hill, 4 Bing. (n.c.) 212(1838), action for damages for abuse of process for suing out a capias with the object of forcing surrender of a vessel's register "through duress."

[24] Schuster v. Arena, 83 N.J.L. 79, 84 A. 723(1912), arrest without process in a proceeding in which arrest would have been authorized; Whitefield v. Longfellow, 13 Me. 146(1836), refusal to release defendant on bond as statute required; Watson v. Keebey, 175 Ark. 527, 299 S.W. 993(1927), bond in wrong form required for defendant's release from imprisonment; Guilleaume v. Rowe, 94 N.Y. 268(1883), civil arrest used in execution of judgment that did not authorize arrest.

nothing to do with the existence or degree of the coercion involved. The solution worked out in the damage remedy, with its emphasis on motive, represents a compromise between the desire to avoid undue interference with the actual start and prosecution of civil remedies and the desire to provide some protection against misuse of the power they confer. The terms of this compromise are by no means irrelevant for the law of duress; they suggest the point at which judicial intervention becomes hazardous and requires special justification. But if the remedies supplied by doctrines of duress do not obstruct or penalize the use of the creditor's remedies, except through retrieving an unjustified gain secured through extra-judicial settlement, a different question is presented. A finding of duress is a finding that the pressure of personal arrest, though applied in an authorized form, cannot be used without limit as leverage for private bargaining. Though the creditor will be left free to pursue his remedy, however harsh in its application,[25] it does not follow that the creditor has unlimited power over the person of the debtor, the power to arrest and release from arrest at such times and under such conditions as will produce the maximum advantage in a purely private settlement.

One line of advance is a redefinition of the "motive" which the decisions to date make decisive. It is in fact through closer analysis of motive that the modern tort of malicious abuse of process has been developed, alongside and as a supplement to the tort of malicious prosecution. Though the lines of distinction are not at all clear, modern decisions have quite clearly established that damage liability may exist where personal arrest is intentionally used, under process formally valid, to enforce a demand outside the immediate scope of the action in which arrest is secured.[26] *Behl v. Schuett*[27] suggests that duress doctrines may go somewhat further. In this case an action for damages

[25] Cf. American Security Co. v. Sealey, 173 Ga. 754, 161 S.E. 253(1931), refusing an injunction against the personal arrest of a debtor who claimed that he lacked funds with which to secure his release on bail.

[26] Sneeden v. Harris, 109 N.C. 349, 13 S.E. 920(1891), arrest in action for slander of title for purpose of dispossessing defendant from land whose title was in dispute; Brantley v. Rhodes-Haverty Furniture Co., 131 Ga. 276, 62 S.E. 222 (1908), arrest in action brought to recover possession of furniture used to enforce payment of personal debt; Foy v. Barry, 87 App. Div. 291, 84 N.Y.S. 335 (1903), arrest for purpose of compelling release of cause of action by father of arrested person.

The distinction in modern cases between the action for malicious prosecution and the action for malicious abuse of process is discussed by PROSSER, TORTS, § 98(1941), and 16 N.C. L. REV. 277(1938).

[27] 104 Wis. 76, 80 N.W. 73(1899).

was originally brought, with damages alleged in the amount of $20,000. The plaintiff instructed the arresting officer to demand $10,000 bail and to transport the defendant after his arrest to a city some distance from defendant's home. In affirming a finding that a settlement made to secure his release was voidable for duress, the court apparently concluded that the high bail demanded and the obstacles interposed to the securing of bail showed the primary motive to be that of "coercing a settlement," even though the original claim was believed by the creditor to be well-founded and the arrest process itself had been validly issued.[28]

It is of course unlikely that doctrines of duress will be invoked so freely in personal arrest cases that any settlement reached under this form of pressure will be subject to later review. If so drastic a result were desired, it would be possible to invoke the analogy of settlements made under pressure of criminal prosecution; however proper the proceedings when pursued through their normal course, their use for private advantage in an extra-judicial settlement could then be described as a misuse of power and an improper form of coercion.[29] The numerous cases already referred to which reject this analysis of civil arrest can be read as asserting that arrest is not merely reserved for judicial application, in proceedings carried through to final judgment, but that it has the secondary function of reinforcing the creditor's position in private bargaining. Certainly it appears that private compromise has useful functions to perform in claims enforceable by arrest as in other types of litigable claims. It is only where the pressure inherent in the process has been abnormally magnified, or has been used under unusual conditions of disadvantage to the debtor, that the broad interests in finality

[28] In the effort to fit the result into the formulae employed in damage remedies the court unfortunately used very obscure language. Defendants urged, in opposition to a finding of duress, that "there was no question" as to the good faith with which the original action, with arrest, was brought. The court replied "The principal question in the case was whether Behl was prosecuting the former action in good faith to collect damages, or whether he had brought it and secured Christian's arrest in bad faith and simply in order to coerce a settlement regardless of the fact whether he had any good cause of action or not. If such was his purpose, then the process of the court was abused, even though the process was valid on its face." Id at 79. Since there was no support for a finding that defendants had lacked belief, or ground for belief, in the validity of the claim or in the validity of the process issued, it is difficult to infer any motive other than that of "coercing" a settlement of a debt believed in "good faith" to be due (though later found not to be due).

[29] Numerous cases asserting the broad proposition that settlements induced by the threat of criminal prosecution are voidable for duress are referred to in 5 WILLISTON, CONTRACTS, rev. ed., §§1612-1616(1936).

of settlement can be expected to yield and doctrines of duress to apply.[30] But this is by no means the same thing as saying that doctrines of duress are coterminous with the tests of tort liability or that relief for unjust enrichment must depend on the law of tort.

Modern restrictions on the scope of civil arrest have confined it to claims of an aggravated character (claims resting on "fraud" or "breach of trust") or to limited classes of recalcitrant debtors (e.g., those who have evaded execution against property). The cases on civil arrest therefore raise less frequently than before the problem of duress and its relations to the problem of tort liability. More material is provided by cases involving interference with economic interests, which must be next considered.

IV

SEIZURE OF GOODS AND APPROPRIATION OF DEBTS PRIOR TO FINAL JUDGMENT

Ancillary process available in certain classes of actions for the seizure of goods or appropriation of debts at the inception of suit, through attachment, replevin, and garnishment, raises issues similar to those involved in personal arrest. Again the alleged debtor is deprived of the opportunity to litigate the merits of the dispute before application of pressure. Again it can be assumed that duress would be readily found if the forms of legal process were not employed.[31] Again the pressure will be somewhat alleviated by the bond which is usually required of the creditor to indemnify for losses through wrongful attachment and by the privilege of the debtor to secure discharge of the process by filing his own bond. It is nevertheless true that the process is aimed to and does produce added pressure, particularly in states which permit

[30] Smith v. Weeks, 60 Wis. 94, 18 N.W. 778(1884), for example, is a case in which it appeared that arrest process had been timed so as to take advantage of unusual necessities of the arrested person and had also been used in such a manner as to increase abnormally the effect of the pressure on him. Here the alleged debtor had been arrested in proceedings supplementary to execution under a final judgment. The arrest was held illegal because of failure to comply strictly with statutory formalities in the supporting documents, but the court went on to say that there was an "abuse of process" in arresting a locomotive engineer at night very shortly before his train was to leave the station and in placing him in a vermin-infested jail with ordinary criminals. While the question arose here in an action for damages for malicious abuse of process, it seems even more clear that these elements of aggravation would justify a finding of duress.

[31] The whole group of "duress of goods" cases can be invoked at this point, plus cases of extra-judicial distress such as Maskell v. Horner, [1915] 3 K.B. 106, Young v. Hoagland, (Cal. App. 1930) 292 P. 189; Quinnett v. Washington, 10 Mo. 53 (1846); and Siverson v. Clanton, 88 Ore. 261, 170 P. 933, 171 P. 1051(1918). To the same effect: Lightfoot v. Wallis, 75 Ky. 498(1877).

the creditor wide latitude in fixing the quantity of assets to be seized.[32]

The basic test used, as in personal arrest on mesne process, is the creditor's state of mind. Where the creditor instigating the proceeding cannot be shown to have known that the principal claim was spurious or that the process employed was not authorized, numerous cases have refused to find duress.[33] At times this conclusion is reinforced by the argument that the bond required of the plaintiff or defendant's own privilege of releasing the process by posting a bond will negative the existence of pressure in fact.[34] More often this latter suggestion is considered unnecessary and the absence of duress has been rested on the creditor's privilege to employ process within the limits defined by general rules of procedure. Conversely, where the element of improper motive justifies the conclusion that privilege has been exceeded, relief

[32] The statutory provisions regulating attachment and garnishment are reviewed by Sturges and Cooper, "Credit Administration and Wage Earner Bankruptcies," 42 YALE L.J. 487 at 503-508(1933). The comment in 38 YALE L.J. 376(1929), discusses particularly the provisions in effect in several New England states, under which no bond is required of the creditor and the amount demanded in the attachment proceeding is left largely to the discretion of the creditor's counsel. The study of Clark, "Fact Research in Law Administration," 2 CONN. B.J. 211 at 227-230(1928), reveals the high percentage of cases in which "grossly excessive" amounts are demanded in Connecticut and concludes, quite correctly, that "Undoubtedly this drastic remedy proves efficacious in collection matters where the defendant has property." As a restraint on abuse of this procedure there remains of course a possible liability for malicious abuse of process in suing out an attachment against assets greatly exceeding in value the amount believed to be due [Savage v. Brewer, 16 Pick. (33 Mass.) 453(1835); Zinn v. Rice, 154 Mass. 1, 27 N.E. 772(1891); Clark v. Nordholt, 121 Cal. 26, 53 P. 400(1898); Tamblyn v. Johnston, (C.C.A. 8th, 1903) 126 F. 267; Saliem v. Glovsky, 132 Me. 402, 172 A. 4(1934)], but it can be assumed here as elsewhere that difficulties of proof as to the creditor's state of mind will limit greatly the effectiveness of this form of control.

[33] Satchfield v. Laconia Levee District, 74 Ark. 270, 85 S.W. 409(1905); McClair v. Wilson, 18 Col. 82, 31 P. 502(1892); Remington Arms Union Metallic Cartridge Co. v. Feeney Tool Co., 97 Conn. 129, 115 A. 629, 18 A.L.R. 1230 at 1233 (1921); Dickerman v. Lord & Smith, 21 Iowa 338(1866); Paulson v. Barger, 132 Iowa 547, 109 N.W. 1081(1906); Myers v. Watson, 204 Iowa 635, 215 N.W. 634 (1927); New Orleans & N.E.R. Co. v. Louisiana Const. & Imp. Co., 109 La. 13, 33 S. 51(1902); Foster v. Clark, 19 Pick. (36 Mass.) 329(1837); Forbes v. Appleton, 59 Mass. (5 Cush.) 115(1849); Benson v. Monroe, 7 Cush. (61 Mass.) 125(1851); Turner v. Barber, 66 N.J.L. 496, 49 A. 676(1901); Adams v. Reeves, 68 N.C. 134(1873); Natcher v. Natcher, 47 Pa. 496(1864); Flack v. Nat. Bank of Commerce, 8 Utah 193, 30 P. 746(1892); Bolln v. Metcalf, 6 Wyo. 1, 42 P. 12, 44 P. 694 (1895); Clydesdale Bank v. Schröder & Co., [1913] 2 K.B. 1.

[34] Of the cases cited in note 33, Flack v. Nat. Bank of Commerce asserts that the remedy on the attaching creditor's bond is adequate, and the possibility of securing release of the attachment through filing defendant's bond is referred to in Remington Arms Union Metallic Cartridge Co. v. Feeney Tool Co., New Orleans & N.E.R. Co. v. Louisiana Const. & Imp. Co., and Turner v. Barber.

has been given for duress, at times without too close scrutiny of alternative means of relieving the pressure.[35]

The need for restrictions on the coercion authorized in this form of civil remedy is revealed by the development of the damage remedy for malicious abuse of process. Modern decisions have sought to restrict the objectives that can be realized through this form of pressure to those defined in the action in which the process was issued;[36] have penalized through liability in damages unnecessary injuries not strictly authorized by the process itself or essential to its purposes;[37] and have found the required "malice" in the creditor's knowledge that the process, though valid in form, was not in fact available in the particular case.[38] The development of controls through the damage remedy, for

[35] Duress found where process sued out for seizure of goods on a claim known to be unfounded: Moise Bros. Co. v. Jamison, 89 Colo. 278, 1 P. (2d) 925(1931), replevin; Fenwick Shipping Co. v. Clarke Bros., 133 Ga. 43, 65 S.E. 140 (1909), attachment; Spaids v. Barrett, 57 Ill. 289 (1870), attachment; Chandler v. Sanger, 114 Mass. 364(1874), attachment; Weber v. Kirkendall, 39 Neb. 193, 57 N.W. 1026 (1894), 44 Neb. 766, 63 N.W. 35(1895), threat of attachment; Clark v. Pearce, 80 Tex. 146, 15 S.W. 787(1891), attachment; Carpenter v. Gooley, 176 Wash. 67, 28 P. (2d) 264(1934), garnishment. Similarly, Lovejoy v. Lee, 35 Vt. 430(1862), sum paid to *attaching officer* to secure release of property attached. In all of these cases the oppressive results of the seizure were clear enough and in some it appeared that time did not permit filing of a bond by the defendant in the attachment proceedings. A strict test as to alternative means of relieving the pressure might have required a clearer showing in some of these cases of the inadequacy of money substitute, through action on the attaching creditor's bond.

[36] Malone v. Belcher, 216 Mass. 209, 103 N.E. 637(1913), attachment of land to prevent its sale and compel owner to sell to attaching creditor; and cases cited PROSSER, TORTS, § 98(1941).

[37] Closing up owner's place of business as an incident to attachment of goods located in the building: Bourisk v. Derry Lumber Co., 130 Me. 376, 156 A. 382(1931); Rossiter v. Minn. Bradner-Smith Paper Co., 37 Minn. 296, 33 N.W. 855 (1887); unnecessary violence: Murray v. Mace, 41 Neb. 60, 59 N.W. 387(1894); Casey v. Hanrick, 69 Tex. 44, 6 S.W. 405(1887). Cf. Bradshaw v. Frazier, 113 Iowa 579, 85 N.W. 752(1901), where damages for abuse of process were allowed for the eviction under writ of forcible entry and detainer of a young girl ill with measles on a cold day, resulting in her death.

[38] Garnishment of wages known to be exempt: King v. Yarbray, 136 Ga. 212, 71 S.E. 131(1911); Nix v. Goodhill, 95 Iowa 282, 63 N.W. 701(1895); Rustad v. Bishop, 80 Minn. 497, 83 N.W. 449(1900); attachment of goods known to be exempt: Grimestad v. Lofgren, 105 Minn. 286, 117 N.W. 515(1908); Friel v. Plumer, 69 N.H. 498, 43 A. 618(1898); attachment of goods where statutory grounds for attachment not present: Fortman v. Rottier, 8 Ohio St. 548(1858); attachment of goods owned by stranger to the suit: Railroad v. Hardware Co., 138 N.C. 174, 50 S.E. 571(1905), 143 N.C. 54, 55 S.E. 422(1906).

The extension of the tort remedy for abuse of process, in the cases referred to in notes 36-37, has of course been furthered by abandoning the requirement imposed in actions for malicious prosecution that the principal action be first determined in favor of the plaintiff. PROSSER, TORTS, § 98 (1941).

these heterogeneous purposes, is paralleled by an extension of the equity injunction. For the most part injunctive relief can be predicted only in cases in which "bad faith" can be inferred from the attempt to relitigate issues already settled by prior adjudication.[39] In some instances, however, injunctive relief is available against attachment or garnishment without proof on that difficult issue, the creditor's state of mind.[40]

The duress cases raise in its most insistent form the question whether the "freedom" to litigate should include an unlimited power to select a forum and a type of process that will exert a maximum degree of pressure. Liability in damages for "good faith" litigation has probably been carried to its maximum limits by decisions creating the modern tort of malicious abuse of process; liability in damages requires an absorption of losses incurred through resort to judicial remedies and in this sense imposes a penalty that may be unduly severe. Control through equity injunction, though more flexible than the damage remedy, involves a direct interference with the creditor's remedy. By comparison with the remedies in damages and through injunction, relief for duress is less drastic, since its object is merely to cancel an unjustified gain. It is true that this form of relief may jeopardize some larger interests, deserving attention though difficult to define with pre-

[39] Injunctive relief was given against repeated actions with attachment or garnishment in Seiver v. Union Pac. R.R. Co., 68 Neb. 91, 93 P. 943(1903); Lyons v. Importers' and Traders' Nat. Bank, 214 Pa. 428, 63 A. 827(1906); O'Haire v. Burns, 45 Colo. 432, 101 P. 755 (1909). Cases of this type represent an application of the old bill of peace principles referred to above, note 10.

[40] The chief illustration of injunctive relief against the creditor suing in "good faith" is provided in the group of cases stemming from Watson v. Sutherland, 5 Wall. (72 U.S.) 74(1866), in which injunction has been granted against seizure in execution of *final* judgment of goods owned by strangers to the original suit. See infra, note 63. There is nothing in the reasoning of these cases to preclude the use of the same remedy in cases of attachment or garnishment on mesne process, provided the third party could show the same elements of injury as were there held sufficient.

In Standard Roller Bearing Co. v. Crucible Steel Co., 71 N.J. Eq. 61, 63 A. 546 (1906), attachments had been instituted in three western states in actions by a New Jersey corporation against another New Jersey corporation whose business assets were concentrated in New Jersey and Pennsylvania. The court did not find that the claims were asserted without belief, or basis for belief, in their validity, but granted an injunction against the pending actions on the ground that attachment suits in remote states were necessarily harassing and oppressive and the intent to produce unnecessary inconvenience could therefore be inferred. But cf. Grover v. Woodward, 92 N.J. Eq. 227, 112 A. 412(1920), in which the New Jersey court refused to enjoin a single action brought with attachment of goods in Pennsylvania by one New Jersey resident against another New Jersey resident. The problem here involved rapidly fades into that larger and much debated issue as to control through equity injunction of inconvenient foreign litigation, discussed in comment, 31 MICH. L. REV. 88 (1932).

cision. But where the oppression is extreme and the resulting transaction clearly unjust, it is not surprising that at times the general interests in finality of private settlements should fade into the background.

The cases awarding relief for duress, without showing of improper motive in the creditor, reflect no consistent pattern and can scarcely be catalogued according to classes of oppression used. Wage garnishments, particularly through suit in foreign states, provide abundant opportunities for effective coercion; the limited control attempted through equity injunction can be matched with one decision awarding relief for duress.[41] Garnishment of other types has been held in two Michigan cases to constitute duress, without proof of improper motive; one of these may be explained as a special indulgence for the female sex, the other rests a finding of duress on the extreme financial necessities of the principal defendant which were known to the creditor and which made garnishment at that time particularly oppressive.[42] The timing of an

[41] Protection by equity injunction has been concentrated chiefly on the prevention of suit abroad with the result of evading wage exemptions allowed by the state of the debtor's residence. Wierse v. Thomas, 145 N.C. 261, 59 S.E. 58, 15 L.R.A. (N.S.) 1008(1907), provides one illustration out of many. Even without this element, repeated wage garnishments after an adjudication establishing that the employee's wages were exempt, were enjoined in Seiver v. Union Pac. R.R. Co., supra, note 39. But an employee may face difficulties of another type, particularly where the employer's policy is to discharge any employee against whom garnishment proceedings have been started because of the resulting expense and inconvenience to the employer. Bowen v. Morris, 219 Ala. 689, 123 S. 222(1929), recognizes the extreme disadvantage thereby produced for the employee and approves an injunction against garnishments aimed at extorting overpayments of the employee's debt. Similarly, Ferrell v. Greenway & Co., 157 Ga. 535, 122 S.E. 198(1924). But cf. Baxley v. Laster, 82 Ark. 236, 101 S.W. 755, 10 L.R.A. (N.S.) 983(1907), and Sturges v. Jackson, 88 Miss. 508, 40 S. 547 (1906), which restrict the employee to his damage remedies, and Straub v. First Mut. Bldg. & Loan Assn., 178 Ga. 672, 173 S.E. 714(1934), which holds adequate the employee's defense of payment in the garnishment proceedings.

The furthest extension of duress doctrines in this situation seems to be Kelley v. Osborn, 86 Mo. App. 239(1900), where a wage garnishment had been begun in Illinois against a wage earner resident of Missouri, who settled the action and then claimed that the wages were exempt and that the settlement was agreed to only because he could not afford to spend the time and money required to defend the action and feared discharge by his employer because the garnishment had been begun. Restitution of the money paid was held proper though the complaint at the same time was held defective as a claim for damages for malicious prosecution through failure to allege malice and want of probable cause.

The difficult issues of social and economic policy involved in the wage garnishment problem are discussed in detail by Fortas, "Wage Assignments in Chicago," 42 YALE L.J. 526(1933).

[42] In Welch v. Beeching, 193 Mich. 338, 159 N.W. 486(1916), discussed by Edgar Durfee in "Recovery of Money Paid under Duress of Legal Proceedings in Michigan," 15 MICH. L. REV. 228(1917), recovery was allowed by a married woman

attachment of goods so as to produce the maximum inconvenience to the owner of the goods attached would ordinarily be considered, no doubt, a legitimate pursuit of self-interest; a few cases have found the elements of relievable duress.[43]

Altogether it seems remarkable that so few decisions have given this recognition to the coercive results of the seizure of assets under mesne process in civil actions. The situation is closely analogous to the wrongful seizure or detention of personal property without legal process ("duress of goods") to which judicial thinking constantly recurs as the central type case of economic duress. That the creditor employing these means assumes some risk of error is shown by the liability in damages, either on his statutory bond or through direct statutory action for

of money paid in settlement of a debt owed by a banking partnership of which she was a member (though not liable for its debts). The court emphasized the fact that the plaintiff was a woman, "away from home" and "sick, nervous and frightened" when confronted with male antagonists who pressed for settlement and threatened garnishment of a debt owed her by a third person. The "good faith" of the creditor in believing plaintiff liable and in demanding payment was not questioned. The instructions of the trial judge, making decisive the question whether plaintiff had been deprived of "free agency" by the threat were approved.

In Vyne v. Glenn, 41 Mich. 112, 1 N.W. 997(1879), the duress consisted of a threat "to stop payment of money due to plaintiff from other parties" (id. at 113) through garnishment proceedings (the record confirms that no other type of interference was threatened). It was found by the referee below that defendant knew the financial embarrassments in which plaintiff was involved at the time and knew that unless the money due plaintiff from his debtors was paid plaintiff would be "ruined" financially. The court, in invalidating the settlement, emphasized the delays that would necessarily result from litigation with defendant and described defendant's conduct as a "wrong done . . . for the evident purpose of forcing a settlement not in accordance with the legal rights of the parties. . . ." (Id. at 115).

[43] Finding no duress through an attachment of goods immediately prior to, and aimed to interrupt, an auction sale already advertised by the owner, defendant in the attachment proceedings. Myers v. Watson, 204 Iowa 635, 215 N.W. 634(1927). Similarly, Shelby v. Bowman, 64 Kans. 879, 69 P. 1131(1902), threat to levy attachment on land so as to prevent the consummation of a sale then being negotiated; Pugh-Miller Drilling Co. v. Main Oil Co., 98 Cal. App. 297, 276 P. 1043(1929), threat to repossess drilling machinery urgently needed for drilling operations then in progress, because of default in payment of purchase price for machinery.

But in the early case of Collins v. Westbury, 2 Bay (S.C.) 211(1799), there was no allegation that the creditor was aware of any defect in his claim, in a plea of duress which was held good on demurrer, the duress consisting of an attachment of defendant's negroes while defendant was travelling in their company in strange country on the road from South Carolina to Georgia. And in Finch v. J. M. Cox Co., 19 Ga. App. 256, 91 S.E. 281 (1916), and Searle v. Gregg, 67 Kans. 1, 72 P. 544(1903), it was held that a wife could secure relief for duress where her goods had been threatened with seizure in satisfaction of her husband's debts under circumstances of unusual inconvenience.

wrongful attachment, where his action eventually fails.[44] But the creditor's liability in damages will frequently prove an illusory protection to the defendant whose assets are seized, either because rules of damages exclude recovery for lost economic opportunities in the absence of creditor's "malice" or because of the extreme difficulty in accurate assessment of their amount.[45] The need for remedial doctrines becomes especially clear if account is taken of the factors of risk and uncertainty which make continued resistance to pressure an unwise or dangerous course.[46] If these factors were adequately considered it would be easier to conclude that surrender to pressure is not necessarily a mark of hysteria or timidity but may be the prudent course for the ruggedest business man.[47]

[44] Direct statutory liability in damages is provided for the "wrongful" suing out of process, without any requirement of malice or want of probable cause in Ky. Rev. Stat. (1944) § 411.080 (distress and attachment); La. Code of Practice (Dart, 1942) Art. 375 (arrest, attachment, sequestration, provisional seizure and injunction); Miss. Code (1942) § 2716 (attachment).

In most other states, except for a few in New England, it appears clearly that liability on the creditor's statutory bond will arise merely from failure in the principal action or from a judgment releasing the assets from the attachment, with no showing of improper motive.

[45] Decisions restricting recovery for "lost profits" and interference with sale opportunities to cases in which "malice" is shown are referred to by McCORMICK, DAMAGES, § 109(1935), and in the annotation on injury to credit as an element of damages, in 54 A.L.R. 451 (1928).

[46] Young v. Hoagland, (Cal. App. 1930) 292 P. 189, supports only indirectly the suggestion made in the text, since that was a case in which the pressure took the form of a threat of extra-judicial sale of corporate stock. In holding that money paid to avoid such sale, on stock assessments that were unauthorized, the court said, at 191: "We think that, under modern conditions of business, where a man is constantly obliged to keep his credit good and unimpaired, and where stock is universally used for collateral for loans, etc., money paid on illegal assessments is involuntarily paid, and is payment which under modern conditions a reasonably prudent man finds that it is necessary to pay in order to preserve his property and protect his business interests. . . ." The argument here is clearly one which applies outside the area of extra-judicial seizure or sale and can be used with equal effect where the uncertainty of outcome in a judicial seizure makes payment the prudent course. This point will be raised again.

[47] An illustration is McGuire & Co. v. H. G. Vogel Co., 164 App. Div. 173, 149 N.Y.S. 756 (1914), where recovery was sought by a general building contractor of a sum paid to defendant under defendant's threat to replevy an automatic sprinkler system which defendant had installed in a large office building then under construction. The court considered it a fatal objection that the sum in question was first promised and then subsequently paid without any renewal of the threat. The court also pointed out that defendant's threat was merely of legal proceedings, that the building was in the "possession" of its owner and not of plaintiff, the building contractor, and that no relations existed between plaintiff and the owner "such as would give peculiar force to any threat" that defendant might make. "Both plaintiff and defendant were corporations

The limited use so far made in this area of the concept of duress can be in large part explained by the general considerations of policy already suggested, which quite rightly produce hesitation. In part, however, it appears to be due to the survival of older ideas, which associate duress with blackmail or even perhaps with mayhem, and which therefore inspire a search for some misconduct by the creditor to which disapproval can attach. In the future more decisions can be expected to support the broad proposition that where a sufficient degree of pressure is shown to exist in fact and the resulting transaction is sufficiently unjust, the means that are normally most legitimate can become an instrument of extortion.

(*To be continued.*)

and apparently free agents, and there is nothing to show that one was in any position to dominate or oppress the other." But it can be easily imagined that a threat of a subcontractor to tear out, through a replevin action, a sprinkler system already installed in a building nearing completion would exert a high degree of pressure on the contractor, and there is much to be said for the conclusion of the lower court in the same case [86 Misc. 22, 148 N.Y.S. 176 (1914)] that the prosecution of an unfounded claim in this manner was "extortion." The implication that duress cannot exist as between two "corporations" reminds one of the ridicule poured by the Missouri court on the suggestion that in a contest between "two modern giants of commerce" one of the participants should resort to "the womanish plea of duress." Wood v. Kansas City Home Telephone Co., 223 Mo. 537, 123 S.W. 6 (1909).