Michigan Law Review

Volume 45 | Issue 6

1947

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John P. Dawson
University of Michigan Law School

Recommended Citation

John P. Dawson, *DURESS THROUGH CIVIL LITIGATION: II*, 45 MICH. L. REV. 679 (1947).
Available at: https://repository.law.umich.edu/mlr/vol45/iss6/3

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John P. Dawson†

V

EXECUTION UNDER FINAL MONEY JUDGMENT

WHERE litigation has progressed to the stage of a final judgment under which execution is immediately available, the initial obstacles already suggested to relief for duress appear to exist in magnified form. The judgment itself establishes the legitimacy of the original demand. Though the coercion threatened is immediate, it has been supplied by general rules of procedure for the specific purpose of compelling satisfaction. It appears from numerous decisions and is even more frequently assumed that a settlement induced by threat of immediate issuance of execution under a valid, final money judgment cannot be duress, whatever the nature of the assets against which process will operate (land, goods, or debts).[48]

The first qualification, implicit in the conclusion itself, is that duress may exist where the judgment whose execution is threatened is wholly void, for want of jurisdiction in the court that rendered it or for similar basic defects. Recovery of payments made to avoid execution may be prevented, as in other duress situations, by evidence that the money paid was independently due.[49] Some showing may be required that the settlement made was motivated by the pressure used and not by some other factor.[50] But the pressure need not be severe, through special elements making the timing or the form of process unusually

* The first installment of this article appeared in the March issue, 45 MICH. L. REV. 571 (1947).—*Ed.*

† Professor of Law, University of Michigan.—*Ed.*

[48] Wilcox v. Howland, 23 Pick. (40 Mass.) 167 (1839); Dispeau v. First Nat. Bank, 24 R. I. 508, 53 A. 868 (1902); Davidson v. Citizens' Bank, 171 Ga. 81, 154 S.E. 775 (1930); Kaylor v. Central Trust Co., 154 Pa. Super. 633, 36 A. (2d) 825 (1944). 5 WILLISTON, CONTRACTS, rev. ed., § 1619 (1937) collects numerous cases which assert the same proposition in broader terms and related situations.

[49] West v. Brown, 165 Ga. 187, 140 S.E. 500 (1927), involving a threatened levy on a retailer's stock of goods with the prospect of serious disruption to his business. Restitution of money paid to prevent the levy was refused, in part because no duress was said to be present but, it would seem, principally because the amount sued for was due in any event. See also Strange v. Franklin, 126 Ga. 715, 55 S.E. 943 (1906); McBride v. Lathrop, 24 Neb. 93, 38 N.W. 32 (1888).

[50] Blumenthal v. United States, (D.C. Cal. 1925) 4 F. (2d) 808; Elston v. City of Chicago, 40 Ill. 514 (1866).

oppressive; it is not even required that process be actually issued if its issuance at a future date could normally be expected.[51]

A similar qualification has been readily accepted as to judgments subsequently vacated or reversed, by action either of the issuing court or of a higher court on appeal. If prior to vacation or reversal the judgment has been complied with, through a transfer made or an obligation assumed, doctrines of res judicata clearly present no obstacle to restitution or cancellation. Where reversal occurs by action of an appellate court, the rules of appellate procedure will usually provide for restitution of payments made or assets transferred in the interval, but remedies provided in this form are in general not exclusive and common law doctrines of duress may be invoked.[52] Again the problem arises whether restitution should be refused if the obligation can be shown to exist independently of the judgment, but here the peculiar shape in which the problem arises has led most courts to exclude this issue from an action brought independently of the original proceeding.[53] Again it is not required that the pressure be severe. Compulsion is inferred from the prospect that execution would issue in normal course; no important interest is thought to require that the judgment debtor postpone his compliance until execution has issued or seizure of land or goods is immediately threatened.[54]

Even where the judgment is unimpeached, the coercive effects of execution under a final money judgment have been recognized in other situations, in which no interests of general policy stand opposed to relief for duress. It seems clear, for example, that a levy on land or

[51] Hopkinson v. Sears, 14 Vt. 494 (1842); Snell v. State, 43 Ind. 359 (1873); Simmons v. Simmons, 91 W.Va. 32, 112 S.E. 189 (1922). See also Hollingsworth v. Stone, 90 Ind. 244 (1883).

In Kaiser v. Barron, 153 Cal. 474, 95 P. 879 (1908), execution had already issued against land which the owner "desired to sell," but no emphasis was placed by the court on this element of inconvenience in concluding that money paid to release the levy was recoverable.

[52] 5 WILLISTON, CONTRACTS, rev. ed., § 1619 (1937). But cf. D'Aloia v. City of Summit, 89 N.J.L. 154, 97 A. 722 (1916).

[53] WOODWARD, QUASI-CONTRACTS, § 236 (1913); Reporters' Notes to RESTITUTION RESTATEMENT, § 74, comment c. (1937).

[54] Judgments reversed on appeal: Florence Cotton and Iron Co. v. Louisville Banking Co., 138 Ala. 588, 36 S. 456 (1903); Chicago & S.E. Ry. Co. v. Adams, 26 Ind. App. 443, 59 N.E. 1087 (1901); Scholey v. Halsey, 72 N.Y. 578 (1878); 5 WILLISTON, CONTRACTS, rev. ed., § 1619 (1937).

Judgments vacated by trial court action: Engelken v. Justice Court, 50 Cal. App. 157, 195 P. 265 (1920); Chambliss v. Hass, 125 Iowa 484, 101 N.W. 153 (1904); Knox County Bank v. Doty, 9 Ohio St. 505 (1859). Also Ewing v. Peck, 26 Ala. 413 (1855).

goods to collect a larger amount than is due by the judgment itself is unauthorized, so that the overpayment is recoverable.[55] Similarly, a limitation on issuance of execution contained in the judgment itself will restrict the creditor's authority and provide grounds for relief if process is issued in excess of such limitation.[56]

But the opportunities for coercion are by no means limited to the issuance of process which the judgment itself does not authorize. The power to appropriate and sell assets of the judgment debtor, like the other powers conferred by process in civil actions, is inherently capable of abuse. Even where the process is validly issued and fully authorized, the control of the creditor over time, place, and conditions of sale will give him an important advantage and may enable him to liquidate the assets involved at a sacrifice price. The need for protection of the debtor's interest is reflected in elaborate safeguards provided by statute, regulating the procedure to be followed by the officer conducting the sale, providing for notice in advance of the successive steps, and (in the case of land) allowing redemption by the debtor for specified periods after the sale is concluded.

Relief for the debtor will usually be requested after the formalities of sale are completed, on motion to vacate addressed to the court whose process was used. The problem is then analyzed as a problem in "adequacy" of consideration, with the usual reluctance to review adequacy reinforced by a special anxiety to preserve the judicial sale as a workable instrument. Opposed to these factors is the desire to prevent misuse of the court's own process, which has been used for a compulsory sale under conditions restricting "free" bargaining. The result of this conflict of motives is an exceptional degree of confusion, both in reasoning and results. The formula usually employed is that developed in equity cases, that inadequacy of consideration will justify rescission of the sale if inadequacy of consideration is so great as to "shock the conscience." The most that can be said is that judicial sales can be vacated if the price is extremely unfair and that relief will be more readily given if inadequate notice was given the debtor or some similar defect in procedure can be shown.[57]

[55] Thomas v. O'Connell's Estate, 112 Ind. App. 296, 44 N.E. (2d) 516 (1942).

[56] Thurman v. Burt, 53 Ill. 129 (1870).

[57] Davis v. Chicago Dock Co., 129 Ill. 180, 21 N.E. 830 (1889) (sale of property worth $350,000 under judgment for $17.25, with no notice of the sale provided to the judgment debtor though statutory formalities strictly complied with); Graffam v. Burgess, 117 U.S. 180, 6 S.Ct. 686 (1886) (sale of land and goods worth $13,000 under judgment for $5.10, with no notice of the sale provided to

Where sale in execution is threatened under conditions that would justify reopening of the sale on motion to vacate, doctrines of duress are available to invalidate any settlement made to avert the sale. For example, in the early case of *Neilson v. McDonald*, an execution sale was advertised at the instigation of the judgment creditors while the defendant was absent from home. Personal property valued at $3000 was subjected to the levy, though the judgment was only for $483.62. The judgment defendant arrived home the evening before the sale. On the morning of the day it was to occur he requested three hours' delay but this request was refused by the officer conducting the sale. The sale was conducted rapidly with inadequate opportunity for bidding. The prices realized were about twelve per cent of the "value" of the goods sold. Before the sale was finally concluded the judgment defendant executed a mortgage, including in its total, as demanded by the judgment creditors, a debt owed them by defendant's son on which defendant was not liable. In a subsequent proceeding to cancel the mortgage, the court indicated its strong disapproval of the "abuse of process" involved and concluded that the mortgage was given under coercion, "while the victim lay bleeding at the spoiler's feet."[58]

The combination of elements in *Neilson v. McDonald* made it of course an unusually impressive case of judgment creditor's oppression. All these elements should not be required in order to find duress in the conditions confronting an owner whose assets are about to be subjected to compulsory sale. At least it would seem that the various types of misconduct that have come to be described as "malicious abuse

the debtor, "a woman unskilled in business"); Odell v. Cox, 151 Cal. 70, 90 P. 194 (1907) (sale of corporate stock worth $2,000 under judgment for $584 with judgment creditor buying in for $26.50, again without actual notice to the debtor though statutory formalities complied with); Hannibal & St. Jos. R.R. Co. v. Brown, 43 Mo. 294 (1869) (sale of land worth $114,000 under judgment for less than $150). In discussing the general problem at some length the Missouri court, in Mangold v. Bacon, 237 Mo. 496, 141 S.W. 650 (1911), was unable to give greater precision to the "shock the conscience" test than to suggest that it meant to cause "the moral sense, the inward monitor, to be stunned." Cases are collected in 35 C.J. 101-104. A more recent illustration is Heimes v. Heimes, (S.D. 1946) 24 N.W. (2d) 335.

The use of the "shock the conscience" test in other types of inadequacy of consideration is discussed by Dawson, 45 MICH. L. REV. 571 (1947).

[58] Neilson v. McDonald, 6 Johns. Ch. 201 (1822). It is interesting that an appeal in Neilson v. McDonald led to a reversal of the decree for cancellation, not because of disagreement with the basic doctrine on which the decree was rested but in part for laches, and principally because the debt of the son was found to be one on which the judgment defendant was "morally" though not legally liable, so that on the whole case the settlement reached appeared reasonable and fair. McDonald v. Neilson, 2 Cow. 139 (1823).

of process" for purposes of the damage remedy might readily be treated as a foundation for findings of duress.

A more difficult question is presented where the threatened sale, if completed, would not be vulnerable to attack and no specific deviation from the authority conferred by legal process can be shown, but the creditor has used the pressure of execution process as a means of extracting something more than compliance with the judgment itself. This question is raised by *Stott Realty Co. v. Detroit Savings Bank,*[59] which involved a payment of $40,000 made by an owner of valuable city real estate for a 60-day option to repurchase property already levied upon and sold to the judgment creditor, at prices claimed to be approximately one-sixth its current market value.[60] The option agreement, made one week before the statutory period of redemption from the sale was to expire, was claimed by the judgment debtor to have been the product of duress, the principal element of which was the inability of the corporate defendant to secure loans for refinancing of its indebtedness (in part reflecting the reluctance of lending agencies in 1931 but chiefly produced by internal disputes between defendant's own stockholders). The $40,000 paid was admitted to be in excess of the amounts due by the judgment. The retention of this sum was justified by the creditor in part on the ground that the sale proceedings had entailed additional expenses not covered by the judgment, including attorneys' fees, though these expenses were not itemized. The verdict of the jury in the trial court, for approximately one-half the $40,000 in controversy, may perhaps be explained as an attempt to allow for these expenses. On appeal to the Supreme Court, however, this compromise solution was rejected, and judgment was directed for the defendant, denying any recovery. Though strong language was used by the Supreme Court to the effect that the judgment creditor was in no way responsible for the internal disputes which had handicapped the corporate debtor in salvaging its properties, the final result of the decision is somewhat inconclusive. The refusal of restitution

[59] 274 Mich. 80, 264 N.W. 297 (1936).

[60] The judgment under which the levies were made was for $534,964.35. Four office buildings, valued in terms of 1929 prices at $3,150,000, were included in the levy. However, the option to repurchase, given in March, 1931, related only to two buildings, whose 1929 value was estimated by plaintiff at $1,500,000 and which were bid in by the judgment creditor at $400,000. The option provided for repurchase at the prices bid by the judgment creditor. The use of 1929 values was of course contested by the judgment creditor, which did not, however, deny that the prices bid at the sale were very substantially below market values in 1931. These facts appear from the appellate record.

appears to have rested ultimately on the conclusion that the judgment creditor's conduct, through the long history of its attempts to collect the large sums unquestionably due, had been reasonable and fair, and that the $40,000 demanded bore a reasonable relationship to the creditor's own expenses produced by the delay.[61]

Several other decisions have indicated that the judgment creditor, under the circumstances presented by *Stott Realty Co. v. Detroit Savings Bank*, has substantially unlimited freedom to bargain for further advantage.[62] But a conclusion to this effect would be at least premature. Direct attack on judicial sales for inadequacy of price will continue to meet with a chilly reception, since the conditions producing inadequate returns from judicial sales are basic and in large part incurable. Relief for duress to the judgment debtor is likely to encounter similar reluctance insofar as the settlement made under threat of judicial sale can be construed as leniency or indulgence on the part of the creditor. But a different issue is raised where the advantage secured through power to subject assets to sale can be shown to have exceeded by a wide margin the obligations defined in the judgment itself. If the judgment debtor was placed at an unusual disadvantage in averting disproportionate loss and the creditor was thereby enabled to secure

[61] One complication, on which the supreme court in part relied in refusing restitution, was the specific approval of the $40,000 payment which had been given by the circuit court in a receivership proceeding pending at the time of the repurchase agreement and originally made necessary by internal strife between the stockholders of the Realty Company. This approval, presenting elements both of res judicata and estoppel, would probably have sufficed in itself as ground for refusing relief. The Supreme Court went on to assert that the warfare between the stockholders did not require the judgment creditor to the "indulgent," since the debtor's difficulties were "self-inflicted." After stating plaintiff's claim that the weakness of the debtor "was seized upon by defendant to exact a hard bargain, euphoniously called duress," the court said at p. 85: "Plaintiff was undoubtedly in financial distress, by reason of long-continued feuds and litigation, and the question is whether such and the consequences were capitalized by defendant, or are now being sought to be capitalized by plaintiff as grounds for release from the performed agreement." The court's lack of sympathy with the claim for restitution is clear enough. The question remains whether a remedy would have been provided if the creditor had secured, not $40,000, but $400,000 in excess of the judgment debt especially if the judgment debtor's difficulties had been of a type more likely to inspire sympathy.

[62] In addition to the cases cited above, note 48, the conclusion suggested in the text is supported by Ross v. Sutherland, 81 Ill. 275(1876) (payment of $13,538 made under contract to extend period of redemption from mortgage foreclosure, mortgage debt being $8,674.46 plus interest for two years) and Zimmerman v. Benz, 162 Minn. 47, 202 N.W. 272(1925) (contract for sale of corporate stock at price claimed to represent approximately one-half its value, under threat to sell stock in satisfaction of money decree of probate court, supplemented by a threat to withhold dividends and render the stock "worthless" in the hands of the owner).

substantially more than the satisfaction authorized, the absence of specific misconduct in the judgment creditor should present no obstacle to relief for duress.

The situations so far considered have involved compulsion applied by execution process directly against the judgment defendant. Very different issues are involved where attempts are made to subject to execution assets owned by strangers to the original suit. In this case the seizure itself is improper and possibly tortious, even though conducted through the forms of judicial procedure and founded on a claim asserted in "good faith" (such as a claim of lien or a claim that the asset had been transferred in fraud of creditors). No "opportunity to litigate," to establish immunity from seizure, will ordinarily be provided before the seizure is made. The reasons for refusing relief to the judgment debtor can scarcely apply to a stranger who is in no way precluded by the judgment or subjected to its sanctions. On the contrary, the coercive effects of the threatened seizure should be readily recognized and the avenues to relief from the pressure opened wide.

The first course of action available is by affirmative action for equity injunction. The arguments for equitable relief are persuasive. If the assets threatened with seizure are in fact exempt, the sooner this fact is established the better for all concerned, not only for prospective purchasers at the sale but for the judgment creditor himself. If the levy was made or directed in "good faith" by the levying officer or judgment creditor, the recovery in an action for damages for tort will probably be restricted to the value of the assets sold and will not include additional elements of injury to business or credit. In any event no persuasive reason can be urged for compelling the owner to surrender the assets in question and accept their money value as a substitute.

The equity remedy in this situation has been analyzed as a form of bill to remove cloud from title and has become involved in the needless and misplaced restrictions that so greatly restrict the usefulness of that remedy. On the one hand, injunctive relief has been freely given where the levy is threatened on business assets such as a retailer's stock of goods, whose value would be seriously impaired by the disruption produced by forced sale.[63] On the other hand, personal property not possessing unusual attributes or utility to the owner has been denied

[63] Decisions on this point stem from Watson v. Sutherland, 5 Wall. (72 U.S.) 74(1866), where an injunction was awarded against levies under final judgment on a stock of goods purchased as part of a going business by the equity plaintiff from the judgment debtor. The creditors charged fraud in the transfer but the court found that the plaintiff had purchased for value and in good faith. The grant of injunctive

injunctive protection and damage remedies for wrongful seizure have been held to be adequate.[64] Where levy on real estate has been threatened, the special solicitude for land interests that characterizes so many fields of equity has usually led to the grant of injunctive relief, but some cases have adopted the highly technical doctrines that require immediate threat of dispossession or refuse to remove as a cloud the "clearly invalid" adverse claim.[65]

The alternative course for the stranger to the action whose assets are threatened with levy is to submit to the pressure, satisfy the judgment, and seek recovery of the payment on the ground of duress. That the elements of duress are present is recognized by several cases. Strangely enough this result has been accepted most readily where the threatened levy is on personal property.[66] Where land is involved, a finding of duress may be rested on special elements in the owner's position, such as impending negotiations for sale which the levy will disrupt:[67] otherwise the availability of equitable relief, to enjoin the sale as a cloud on title, will probably be considered an alternative means

relief was explained principally through the restricted measure of damages that would be used in an action at law for wrongful attachment, excluding recovery for destruction of business or injury to credit against creditors suing in "good faith." The same plaintiff had already been awarded an injunction on similar grounds in the Maryland state courts, in McCreery v. Sutherland, 23 Md. 471(1865). Watson v. Sutherland was followed thereafter on similar facts in Walker v. Hunt, 2 W. Va. 491(1868); North v. Peters, 138 U.S. 271, 11 S. Ct. 346(1891); Sickles v. Combs, 10 Misc. 551, 32 N.Y.S. 181(1894); Sumner v. Crawford, 91 Tex. 129, 41 S.W. 994(1897); Dingley v. Buckner, 11 Cal. App. 181, 104 P. 478(1909); Haycock v. Tarver, 107 Ark. 458, 155 S.W. 918(1913); and Asiulewicz v. Pietrazewski, 220 Mich. 690, 190 N.W. 659(1922). Contra, Patterson & Co. v. Seaton, 64 Iowa 115, 19 N.W. 869(1884). The reasoning of Watson v. Sutherland was held applicable in Halley v. Ingersoll, 14 S.D. 7, 84 N.W. 201(1900), to an attempted seizure of a secured debt on which an action had already been brought and whose collection would be jeopardized by the threatened levy.

[64] Baker v. Rinehard Mayer & Co., 11 W. Va. 238(1877); Allen v. Winstandly, 135 Ind. 105, 34 N.E. 699(1893).

[65] Injunction granted against levy on land in execution of judgment against third persons: Bishop v. Moorman, 98 Ind. 1(1884), and Key City Gas Light Co. v. Munsell, 19 Iowa 305(1865). The stricter view is illustrated by Rea v. Longstreet, 54 Ala. 291 (1875). Long lists of cases on either side of this much debated question are collected in 78 A.L.R. 24, 150-179(1932).

[66] State v. Slayback, 90 Mo. App. 300(1901) (seizure of goods required in owner's business); Jones v. Fuller, 280 Ky. 671, 134 S.W. (2d) 240(1939) (cancellation decree of replevin bond entered into to prevent seizure of fourteen trucks). Jones v. Fuller is difficult to reconcile with the earlier Kentucky case of Hazelrigg v. Donaldson, 59 Ky. 445(1859), which refuses relief.

[67] Wake Development Co. v. O'Leary, 118 Cal. App. 131, 4 P. (2d) 802 (1931), where these factors were present and restitution was allowed of a payment

of relieving the pressure that the owner should employ.[68] Worse still, the existence of duress may be denied on the ground that the evident invalidity of the sale will prevent inconvenience to the owner; his possession can only be disturbed through an action brought by the purchaser at the sale, which is bound to "fall of its own weight."[69] This same type of argument is frequently used as an excuse for refusing preventive relief in equity and can be considered to make the equitable remedy at least a doubtful one. At times the search for alternative courses of action that might have been used is pursued with an ingenuity that is positively perverse, and that reflects a complete disregard of the owner's unhappy position.[70]

The need for extension of duress doctrines in this situation results in part from the failure of equity courts to deal effectively with the problem of relief from risk or uncertainty, through the direct means available in the quia timet injunction. But there is a further difficulty which lies somewhat deeper and requires a recasting of duress doctrines themselves. Unless the owner is assured of immediate means of arresting the sale, pending decision of disputed or doubtful issues, the factors of uncertainty and risk enter directly into the pressure exerted and should be included as an element of duress. In other words it is not enough to provide remedies (as by action for declaratory judgment) which aim to resolve the uncertainty, if decision will be delayed and the creditor's process is allowed in the meantime to run its normal course. An owner whose assets are threatened with seizure may be reasonably clear, and may earnestly contend, that the levy is improper

made to release the levy in spite of the fact that the payor had already commenced an equity suit to enjoin the levy, in which he later prevailed.

[68] As in Stover v. Mitchell, 45 Ill. 213(1867), where the court pointed out that the plaintiff had "several weeks" in which he could have sued to enjoin the sale.

[69] Pritchard v. People's Bank, 198 Mo. App. 597, 200 S.W. 665(1918). Maskey v. Lackmann, 146 Cal. 777, 81 P. 115(1905); Weaver v. Stacy, 93 Iowa 683, 62 N.W. 22(1895); Richardson v. Brown, 260 Mass. 509, 157 N.E. 603(1927).

[70] An extreme example is Manning v. Poling, 114 Iowa 20, 83 N.W. 895, 86 N.W. 30(1901), where the purchaser at a mortgage foreclosure sale, who was also guarantor of the mortgage debt, disputed the priority of a levy on the mortgaged land by a creditor of the mortgagor. After the trial court had refused on two separate applications to enjoin the levy, plaintiff redeemed from the execution sale. It was held that there was no duress, since the trial court should have been willing to grant, and would have been in error if it had refused, an injunction against the sale for the purpose of preserving plaintiff's rights pending an appeal that had been filed against its earlier decision.

In Richardson v. Brown, supra note 69, the plaintiff satisfied the execution only after she had sued to enjoin the sale of her land and her request for a temporary injunction had been denied.

and the assets exempt. Until this conclusion is firmly established, the risk to his interest in the assets involved will add weight to the pressure and increase its effect. Inclusion of this element in the tests for duress requires no basic redefinition; its relevance has been asserted in comparable situations.[71] More adequate recognition seems needed, particularly in this type of case, where the pressure, though exercised through forms of civil litigation, is by assumption improper and unauthorized. At this point the coercion inherent in legal process can be acknowledged with relative freedom and the results of coercion redressed.

VI

ASSERTION OF LIEN

No clear line of distinction marks off the forms of coercion so far considered from the coercion involved in the claim of a lien. A threat of suit for simple money judgment, for example, may be said to include the assertion of a lien, on the assets available for execution at the time any judgment will ultimately be rendered; the inclusion of a "lien" among the sanctions for enforcement of the judgment would scarcely be thought of itself to limit the bargaining process between debtor and creditor or render the pressure of the judgment itself in any way improper.[72] By various other means, particularly by an attachment sued out on mesne process, the creditor can secure an interest prior to judgment that has the attributes of a "lien" and is often so described. It is therefore evident that the classification used in the present discussion, emphasizing the form of pressure employed through civil litigation, encounters at this point serious difficulties and is in a

[71] Below, note 91, and particularly Bovey-Shute Lumber Co. v. Farmers & Merchants Bank, 43 N.D. 66, 173 N.W. 455(1919), where plaintiff, a second mortgagee, redeemed from the foreclosure of a first mortgage by defendant bank, shortly before the expiration of the statutory period of redemption. Plaintiff, who claimed to have an agreement with defendant bank for subordination of its mortgage to plaintiff's second mortgage, paid the bank the amount of its mortgage in order to ensure redemption within the statutory period. When sued for recovery of this payment the bank contended that plaintiff should have sued the bank instead of acquiescing in its demand. The court said at p. 71: ". . . but the company were business men, and not prophets or clairvoyants and not able to forecast the minds of judges. They did not want to risk a suit that might have dragged until after the period of redemption. When a party unjustly contrives to put another in a dilemma, to put him, as it were, between the Devil and the deep sea, and to subject him to necessity and distress, and he jumps one way it is not for the wrongdoer to insist that he should have jumped the other way."

[72] Though clear enough, this point is made explicit in Kaylor v. Central Trust Co., 154 Pa. Super. 633, 36 A. (2d) 825(1944).

sense artificial. It nevertheless seems useful to mark off for separate treatment the group of cases in which the pressure takes primarily the form of a lien asserted against a specific asset or assets. Being concentrated in its effect, the claim of lien may interfere directly with use or disposal of the asset involved. Though any attempt to realize on the lien asserted may be indefinitely postponed, the claim itself will bring more clearly into the foreground the interests and expectations which give the asset its value. In its immediate incidence, then, this form of pressure can be distinguished from other types of pressure through civil litigation, though the difference is one only of degree.

A. *Mortgage Liens.* The typical case of lien asserted is the mortgage on land or goods. The application of duress doctrines to this form of pressure has of course been influenced by the long history of control by the courts, primarily courts of equity, over bargaining between mortgagor and mortgagee. But this control itself is by no means an accident. The traditional safeguards of the mortgagor's position reflect recognition of the disadvantage produced by economic necessity. Restraints on the power to contract away the normal incidents of the mortgage relationship, the vigilance with which new sanctions for enforcement have been countered with new judicial remedies, and the control over "sales" of the equity of redemption are all part of a system of judicial regulation which ultimately rests on assumed inequality of bargaining power.

The first, and on first view the simplest, question is whether the start or the threat of judicial foreclosure by equity suit can constitute duress. As might be expected, the answer given by most of the cases to a question so phrased is negative. If the mortgage creditor has proposed to employ a judicial proceeding, in the form and with the sanctions specifically authorized, it seems at the outset impossible to spell out misconduct or provide relief from the pressure. If the debtor contends that the claim asserted is excessive or wholly unfounded, he may claim that his debate with the mortgagee will be conducted at a disadvantage; but this claim can be countered with the suggestion that the debate will be conducted before a court, with full opportunity to contest the creditor's claim before foreclosure can be decreed.[73] In this respect judicial foreclosure can be sharply contrasted with foreclosure

[73] Mortgage of land: Burke v. Gould, 105 Cal. 277, 38 P. 733(1894); Thomson v. Mortgage Inv. Co., 99 Cal. App. 205, 278 P. 468(1929); Savannah Sav. Bank v. Logan, 99 Ga. 291, 25 S.E. 692(1896); Hart v. Strong, 183 Ill. 349, 55 N.E. 629(1899); Helmick v. Carter, 171 Ill. App. 25(1912); Vereycken v. VandenBrooks, 102 Mich. 119, 60 N.W. 687(1894); Martin v. New Rochelle Water Co., 11 App.

by extra-judicial sale, where the opportunity to litigate before the sale can occur is supposedly denied and relief for duress will be readily given.[74]

But the "opportunity to litigate" provides an incomplete answer where the circumstances of the mortgagor require immediate relief from the pressure and the invalidity of the mortgagee's claim cannot be established without inevitable delay. A situation of this type will appear, for example, where the mortgage is in fact in default, so that forclosure in due course can be anticipated, and a lien for an excessive amount is asserted at a time when the mortgagor has an opportunity to make an advantageous sale or to refinance the mortgage through a loan from another source. It can be assumed that either means of escape will depend on securing a release from the mortgagee, whose foreclosure action has already been started or is immediately threatened, but the mortgagee makes a release contingent on receipt of a sum in excess of the mortgage debt. Confronted with this situation, courts have produced a variety of answers. A substantial group of decisions have refused to find duress, relying either on the propriety of the means of pressure employed by the mortgagee or on the related ground that the

Div. 177, 42 N.Y.S. 893(1896); F. B. Collins Inv. Co. v. Easley, 44 Okla. 429, 144 P. 1072(1914); Pziepoira v. Long, 338 Pa. 242, 12 A. (2d) 904(1940); Shuck v. Interstate Bldg. & Loan Assn., 63 S.C. 134, 41 S.E. 28(1900); Drew v. Bouffleur, 69 Wash. 610, 125 P. 947(1912). But cf. Hawkins v. Ellis, 168 Miss. 428, 151 S. 569 (1934).

Chattel mortgage: Stone's Beauty Shops, Inc. v. Morrison Service Assn., 285 Ill. App. 163, 1 N.E. (2d) 816(1936); Pease v. Francis, 25 R.I. 226, 55 A. 686(1903). But cf. Bratberg v. Advance-Rumeley Thresher Co., Inc., 61 N.D. 452, 238 N.W. 552(1931).

[74] In some of the cases finding duress through threat of foreclosure under power of sale, it is conceded that relief by injunction in equity might have been available but this factor is considered irrelevant. Close v. Phipps, 7 M. & G. 586, 135 Eng. Rep. 236(1844); Link v. Aiple-Hemmelman Real Estate Co., 182 Mo. App. 531, 165 S.W. 832(1914). Usually this point is not even discussed: Whitcomb v. Harris, 90 Me. 206, 38 N.E. 138(1897); McMurtrie v. Keenan, 109 Mass. 185(1872); Klein v. Bayer, 81 Mich. 233, 45 N.W. 991(1890); Bennett v. Heally, 6 Minn. (Gil. 158) 240 (1861); Ward v. Scarborough, (Tex. Civ. App. 1922) 236 S.W. 434. In Fout v. Giraldin, 64 Mo. App. 165(1895); an assignment of rents of the mortgaged land which had been given the mortgagee by the mortgagor was held to create a power of control which was "equivalent to a detention of his goods," so as to permit recovery of a payment made in excess of the mortgage debt.

A much stricter view seems to have been adopted in Pederson v. Thoeny, 88 Mont. 569, 295 P. 250(1930), though it is difficult to ascertain the precise form of pressure adopted by the creditor. In Vick v. Shinn, 49 Ark. 70, 4 S.W. 60 (1886), a power of sale under a chattel mortgage was held not to create sufficient pressure on the mortgagor, who had remained in possession so that an "opportunity to litigate" would have been provided in an action of replevin.

special necessities of the coerced party cannot justify exceptional treatment.[75] But other cases have found duress, without any attempt to establish "bad faith" in the assertion of the claim that is later found to be excessive and with emphasis instead on the effective control which the mere claim of lien conferred.[76]

A related issue is presented where no foreclosure proceedings have been started or threatened, and the pressure takes the negative form of refusal of a release unless an excessive payment is made. Any general policy against restricting the assertion of claims through the forms of civil procedure would apply here with much less force, since no action has been started or proposed by the mortgage creditor. On the other hand, the pressure applied by the creditor is indirect and remote; in form it consists of a claim enforceable by suit but no suit is in prospect and none may be needed. In spite of this feature, it is here that the courts have gone furthest in finding duress. Where the mortgagor's need for release of the lien is due to an opportunity for sale or refinancing, the mortgagee's refusal of a release unless overpaid on the mortgage debt has been held to be improper pressure. At times the extreme financial necessities of the mortgage debtor have given substance to the finding of economic duress.[77] But in some instances such elements have been absent and the finding of duress has been rested on the interference with disposal of the mortgaged property that results from continued assertion of the lien.[78]

[75] Burke v. Gould, 105 Cal. 277, 38 P. 733(1894); Savannah Sav. Bank v. Logan, 99 Ga. 291, 25 S.E. 692(1896); Hess v. Cohen, 20 Misc. 333, 45 N.Y.S. 934 (1897); Stanford v. U.S. Inv. Co., (Tex. Civ. App. 1925) 272 S.W. 568.

[76] Kilpatrick v. Germania Life Ins. Co., 183 N.Y. 163, 75 N.E. 1124 (1905); Union Central Life Ins. Co. v. Erwin, 44 Okla. 768, 145 S.W. 1125(1915).

[77] First Nat. Bank v. Sargeant, 65 Neb. 594, 91 N.W. 595(1902), where the mortgagor was "in great financial distress and in poor health," threatened with foreclosure of a first mortgage, and had executed a deed absolute in form by way of second mortgage to defendant bank, which threatened protracted litigation unless its terms were met; Rowland v. Watson, 4 Cal. App. 476, 88 P. 495(1906), where the mortgagor, under great pressure from other creditors, had been promised a new loan which would prevent forced liquidation if releases of existing mortgages could be secured within a 10-day period.

[78] Reed v. Boagni, (La. App. 1932) 142 S. 171; Voelpel v. Phoenix Mut. Life Ins. Co., (Mo. App. 1916) 183 S.W. 679; Homecrest Bldg. Co. v. Weinstein's Estate, (N.Y. S. Ct. 1917) 165 N.Y.S. 176; Schwartz v. Prudential Ins. Co., 227 Ky. 823, 14 S.W. (2d) 135(1929). The case last cited distinguishes the earlier Kentucky case of Hamilton v. Kentucky Title & Sav. Bank & Trust Co., 159 Ky. 680, 167 S.W. 898 (1914), on the ground that the sum exacted by the mortgagee in the Hamilton case had been merely a reasonable compensation, which the mortgagee was entitled to exact, for premature cancellation of the mortgage debt.

There lies barely submerged in these cases the issue already considered, whether doctrines of duress can take into account the factors of risk or uncertainty. This issue is brought to the surface where dispute as to the amount of the debt arises at a much later stage, after the mortgagee has proceeded to foreclosure and a sale of the mortgaged property is imminent. In this situation, as in the case where the mortgagee has contented himself with asserting his lien without suit and refusing a release requested, there may be alternative means for contesting an excessive or unjustified claim. If foreclosure proceedings themselves will not provide a forum, a bill to remove cloud on title may still be available after tender of the amount believed by the debtor to be due. It is often contended that this class of remedy provides adequate means of relieving the pressure and that if the creditor's claim is believed to be clearly unfounded the debtor can contest it at leisure.[79] The difficulty with this reasoning has already been suggested. The application of hindsight will usually conceal the real doubt that

A similar question arose frequently under the H.O.L.C. program for refinancing of mortgage security, where mortgagees sought to secure payment of indebtedness exceeding the amounts fixed in refinancing agreements negotiated by the H.O.L.C. If agreements for this purpose were secretly made between mortgagor and mortgagee, without disclosure to H.O.L.C. officials, they could be held invalid under express provision of the H.O.L.C. Act. [Pye v. Grunert, 201 Minn. 191, 275 N.W. 615, 276 N.W. 221 (1937); Council v. Cohen, 303 Mass. 348, 21 N.E. (2d) 967(1939)], but duress through threat of foreclosure and of withholding a release provided an alternative ground [McAlister v. Drapeau, 14 Cal (2d) 102, 92 P. (2d) 911 (1939); contra, McMillan v. Palmer, 198 Ark. 805, 131 S.W. (2d) 943(1939)].

Of the cases refusing to find duress in the situation now considered, Weiner v. Minor, 124 Conn. 92, 197 A. 691(1938), relies on the "rightfulness" of the mortgagee's conduct, citing the CONTRACTS RESTATEMENT in support of its conclusion, but the remainder simply reject the suggestion that the mortgagor's immediate need for freedom to dispose of the mortgaged property can constitute the "controlling necessity" required. Crittenden v. Royce, 100 Conn. 617, 124 A. 215(1924); Cram v. Powell, 100 Ore. 708, 197 P. 280(1921); Walvoord v. Keystone Mtg. Co., (Tex. Civ. App. 1940) 140 S.W. (2d) 307. However, the case last cited is probably to be explained by the reasonableness of the sum demanded for the privilege, apparently not provided in the mortgage, of prepayment of the mortgage debt.

[79] Williams v. Rutherfurd Realty Co., 159 App. Div. 171, 144 N.Y.S. 357 (1913), adopts this reasoning in refusing to find duress through refusal of a mortgagee to execute a release unless overpaid, where refinancing was necessary to prevent foreclosure. The same reasoning appears in Patterson v. Cox, 25 Ind. 261(1865); Mariposa Co. v. Bowman, (C. C. Cal. 1867) Fed. Cas. 9089; Wessel v. D. S. B. Johnston Land & Mortgage Co., 3 N.D. 160, 54 N.W. 922 (1893); Gold-Stabeck Loan & Credit Co. v. Kenney, 33 N.D. 495, 157 N.W. 482(1916), all of which involve payments made to prevent foreclosure sale or to prevent loss of the privilege of redemption after foreclosure sale. The present status of the two North Dakota cases, after the decision in Bovey-Shute Lumber Co. v. Farmers & Merchants Bank, cited in note 71, is a puzzle that must be left for North Dakota lawyers to solve.

surrounds the disputed issue at the time the creditor's demand is made. While litigation at leisure can fairly be demanded of a mortgagor threatened neither with inconvenience nor with loss of the mortgaged property during the interval,[80] it is too much to ask where continued resistance to pressure will have serious consequences. It seems clear that doctrines of duress can be framed to leave room for a reasonable calculation of business risks.[81] Decisions that refuse to admit such elements within the range of duress doctrines can only be viewed as survivals from an earlier period when "duress" implied crime and its broader function of relieving for unjust enrichment was obscured.

A more crucial test of duress doctrines is provided by mortgage situations in which relief is sought not merely for uncertainty and risk but for the unfairness of the terms which superior bargaining power has enabled the mortgagee to dictate. The elements of the problems involved are not sharply distinguished from those in the cases just reviewed. The means of pressure consist at most of a threat of foreclosure, i.e., of resort to judicial action. The economic necessity of the mortgagor is implied by the need for funds which led originally to his securing the mortgage loan, still more by the subsequent default in payment. But this element is present in some degree in substantially all the mortgage cases. The difference lies less in the component elements of the problem itself than in the manner in which the question is raised. For when unfairness in result becomes striking enough, the

[80] As in Awalt v. Eutaw Bldg. Assn., 34 Md. 435(1871). But cf. Homecrest Bldg. Co. v. Weinstein's Estate, (N.Y. S. Ct. 1917) 165 N.Y.S. 176, where relief for duress was given in the absence of these elements.

[81] Bovey-Shute Lumber Co. v. Farmers & Merchants Bank, 43 N.D. 66, 173 N.W. 455(1919), from which a quotation was given above, note 71.

Even where the "opportunity to litigate" may be immediately presented in a foreclosure proceeding threatened by the mortgagee, this element can enter, as is indicated by First Nat. Bank v. Sergeant, 65 Neb. 594, 91 N.W. 595(1902), where the court described the emergency confronting the mortgagor and then said at p. 608: "He could not allow the matter to run the ordinary course of litigation without losing all his equity in the land and facing a probable deficiency judgment. He could not pay costs of litigation and the increased interest on the indebtedness for any length of time without the whole property being swallowed up. He was met with the threat that unless the differences were settled on the terms offered by the bank, the litigation would be continued, and in the event of an unsatisfactory judgment in the trial court, the cause would be appealed there, to take its course with the accumulated litigation then pending in the appellate court awaiting final disposition. This meant a delay of years, as the plaintiff well knew. He must have been cognizant of the fact, as all well-informed men are, that should the matter be litigated, and the property finally exposed to forced sale to satisfy the indebtedness admittedly existing against it, that the sum thus realized would not be at all as favorable to him as would be the result in the event of a voluntary sale and a voluntary purchaser."

question of means takes second rank, and the terms of the transaction itself provide a measure of the creditor's misuse of power. The issues are then seen in a new aspect and new standards of judgment can be applied.

On the issues thus presented we find the same conflict of motives and attitudes as in the cases already considered. In one Colorado decision an attack on an agreement between mortgagor and mortgagee, whose unfairness was attributed to the mortgagor's "embarrassed and helpless condition," was rejected merely with the observation that the situation of extreme necessity in which the mortgagor found itself was "unfortunate" but "their financial condition alone, however desperate it may have been, cannot be made the foundation of a claim to equitable relief."[82] But in *Bither v. Packard*[83] a more exacting creditor was deprived of a bargain coerced by threat of mortgage foreclosure, where the "unconscionableness" of the bargain was considered so extreme as to "shock the conscience." A similar conclusion in *Cook v. Wolf*[84] was explained on the ground that the bargain between mortgagor and mortgagee was "oppressive and unconscionable" and through appeal to the broader idea evolved in the Nineteenth Century reversioner cases that "necessitous men are not, truly speaking, free men."

It is evident that the issues here raised extend far beyond the immediate situation, in which the mortgagee's threat of mortgage foreclosure is used to impose unfair terms on the necessitous mortgagor. It may be, as one case suggests,[85] that doctrines of duress carry too

[82] Smith v. McCourt, 8 Colo. App. 146, 45 P. 239(1896), the transaction attacked being a purchase by the mortgagor, at the insistence of the mortgagee, of bank stock whose value was claimed to be approximately one-half the price paid.

[83] 115 Me. 306, 98 A. 929(1916). Here the mortgagee, uncle by marriage of the plaintiff, insisted on an agreement to pay $200 a month, under threat to foreclose a mortgage on plaintiff's home and store. This rate of payment was calculated by the court to equal a rate of interest at 40 per cent on the indebtedness, with the rate progressively increasing as the principal of the mortgage debt was paid.

[84] 296 Ill. 27, 129 N.E. 556(1921). Here the mortgage debt was between $600 and $700 but the mortgagee under threat of foreclosure secured a deed of the mortgaged land on the ostensible ground that the debt was $2,332.06. The case for cancellation was further strengthened by misrepresentations as to the amount of the debt and as to the legal consequences of foreclosure, made to an inexperienced debtor who relied on the mortgagee for advice.

Wells v. Adams, 88 Mo. App. 215 (1901), likewise employs a broad concept of "moral duress" in allowing restitution of an overpayment by a necessitous mortgagor compelled by threat of foreclosure.

[85] Morrell v. Amoskeag Sav. Bank, 90 N.H. 358, 9 A. (2d) 519(1939), in which the court concluded that the "legality" of the means of pressure (threat of mortgage foreclosure) precluded the use of doctrines of duress to revise or cancel a trust agreement

heavy a weight of inherited restrictions to deal adequately with issues so broad, though the whole argument of this paper is pointed in the opposite direction. Certainly if doctrines of duress are to be used to enforce a standard of equivalence in bargain transactions generally, they need to be redefined so that the "rightfulness" of the means of pressure used (here the threat of civil action) will not be the primary test. Though the problem of equivalence is itself much broader than the problem of economic duress, where unfairness in result is the product of unequal bargaining power it should be possible to dispense with such extra machinery as "shock to the conscience." In any event, whatever machinery is used, we find in the mortgage cases some support for the broader conclusion that even threats in "good faith" of civil litigation can become unauthorized pressure, where economic disadvantage prevents effective resistance and the terms thereby dictated are grossly unfair.

B. *Other Types of Liens.* Though the lien created by mortgage has provided the main battleground for dispute, there remain other types of liens whose assertion has been considered duress and which should be briefly considered.

Least difficulty arises where the claim of lien is made in "bad faith," without belief, and without probable cause for belief, in its validity. Though essentially a threat of civil action for the enforcement of the lien, the threat comes so close to the limits defined in tort actions for damages that its "wrongfulness" can be readily conceded.[86] If the owner can show inconvenience as a result of the claim, the fact that enforcement would be through civil action provides no reason for requiring resistance to the pressure.[87]

under which an officer of the bank was made a trustee for the management of the mortgaged property with a high rate of compensation. The court admitted, however, that contracts could be canceled in New Hampshire because "unconscientious and oppressive." After a review of the whole transaction the court concluded that the powers given the trustee under the agreement were not excessive or the compensation too high for the responsibilities conferred, and refused cancellation.

[86] Cf. Smith v. Smith, 56 How. Pr. 316(1878); Johnston v. Deidesheimer, 76 Colo. 559, 232 P. 1113(1925), and Chatham Estates v. American Nat. Bank, 171 N.C. 579, 88 S.E. 783(1916), allowing actions for malicious prosecution where loss of opportunities to resell or refinance resulted from the filing of notices of *lis pendens.*

[87] Aronoff v. Levine, 190 App. Div. 172, 179 N.Y.S. 247(1919), notice of mechanic's lien filed "in bad faith and to extort money" and preventing owner from securing bank loan needed to finance construction job; Ezmirlian v. Otto, 139 Cal. App. 486, 34 P. (2d) 774 (1934), claim to 5 per cent of the proceeds of oil and gas leases, recorded with knowledge of the invalidity of the claim and with the object of preventing a sale then pending.

A more serious question arises where no elements of "bad faith" can be shown but the claim of lien interferes with disposal of the asset against which the claim is made. Again the pressure takes the form of a threat of litigation; again the overhauling of the settlement might be thought to discourage the "good faith" assertion of claims. But if in the total context, inability to dispose of the asset involved will have serious repercussions for the owner and deprive him of effective choice, strong reasons can be urged for reclaiming from the lien creditor an uncompensated gain that he has been able to exact. Though opinions again are divided, the cases allowing relief for duress give support for the view that means of pressure in themselves quite legitimate can become improper when used to exact an unjustified gain.[88]

VII

DISPOSSESSION FROM REAL ESTATE

All the issues so far considered are reproduced, though with some variations, in proceedings aimed at dispossession from real estate. Under usual rules of procedure the physical transfer under court order will not be effected until final judgment after hearing on the merits; in this sense the pressure is postponed and the "opportunity to litigate" will be provided. On the other hand, the proceeding is directed at a particular asset, as in the case of a lien asserted, and all the interests which make its continued use and disposal essential to the occupant may be jeopardized by an enforced transfer under court order.

In general the same reluctance is shown here as in other types of

[88] Mechanic's lien asserted in action already commenced: Smith v. Baldwin, (Ala. 1939) 187 S. 192 (owner engaged in securing a new loan to finance an existing mortgage); Joannin v. Ogilvie, 49 Minn. 564, 52 N.W. 217 (1892) (owner, "pressed for money," was negotiating loan to refinance existing mortgage).

Threat to file mechanic's lien: Gates v. Dundon, (City Ct. of N.Y. 1891) 18 N.Y.S. 149. Similarly, Hubbard v. Jones, 103 Okla. 276, 229 P. 516(1924) (recording of oil and gas lease that had already expired).

Contra, Crossways Apartment Corp. v. Amante, 213 App. Div. 430, 210 N.Y.S. 346(1925), and Abelman v. Indelli & Conforth Co., 170 App. Div. 740, 156 N.Y.S. 401 (1915), both resting principally on the ground that a threat to file a mechanics lien constitutes essentially a threat of civil action and therefore cannot be duress. The same objection was stated by the court in Ward v. Baker, (Tex. Civ. App. 1911) 135 S.W. 620, but another means was found of killing the cat in question, for the agent of the lien claimants was an attorney who was held to be "charged with knowledge" that the liens asserted were invalid because the property in question was a homestead, so that relief could be given on the ground of "fraud."

Hipp v. Crenshaw, 64 Iowa 404, 20 N.W. 492(1884), involving the lien of a judgment, must also be considered as opposed to relief in this situation.

civil litigation to restrict the creditor's use of the bargaining power provided by a standard legal remedy. Where equity courts are appealed to to restrain prosecution of dispossession proceedings by means of equity injunction, it is unlikely that a special disadvantage of the occupant (as through poverty preventing the posting of a bond) will be considered to justify change in general procedural rules, though such elements of hardship may combine with traditional grounds for equitable relief (e.g., avoidance of multiplicity of suits) to provide a case for injunction.[89] Where relief is sought for duress, after settlement induced by this form of pressure, the normal reaction will certainly be that the start (or the threat) in "good faith" of an action for dispossession is legalized coercion which cannot constitute duress.[90]

But again it is necessary to review the whole context in which the pressure will operate before final conclusions are reached. Dispossession remedies may affect interests more serious than the interest in continued possession; the threat to those interests may throw into high relief some elements in the threatened party's position that severely

[89] Napier v. Varner, 149 Ga. 586, 101 S.E. 580 (1919), and Lipscomb v. Butler, (Tex. Civ. App. 1931) 35 S.W. (2d) 742, refuse injunctive relief, though Simpson v. McGuirk, (Tex. Civ. App. 1917) 194 S.W. 979, had allowed an injunction where a threatened multiplicity of actions was made more than usually oppressive by the tenant's poverty, interfering with his posting of a bond to retain possession.

Protection by equity injunction against dispossession was held proper in New Music Hall Co. v. Orpheon Music Hall Co., 100 Ill. App. 278 (1902), where dispossession was being attempted in an action brought against a third person.

These references are of course not meant to exhaust the possibilities of equitable control over actions in ejectment or for summary dispossession on the ground that issues have been raised that are peculiarly equitable and cannot be litigated in a dispossession proceeding.

[90] Defense of duress rejected in action brought under lease executed by occupant to avoid dispossession by court proceedings: Davis v. Rice, 88 Ala. 388, 6 S. 751 (1889); Chambers v. Irish, 132 Iowa 319, 109 N.W. 787(1906); Emmons v. Scudder, 115 Mass. 367(1874); Portland Hotel Corp. v. Fidelity Storage Co. (D.C. App. 1943) 134 F. (2d) 57. Similarly, Dunfee v. Childs, 59 W. Va. 225, 53 S.E. 209 (1906); McCrory Stores Corp. v. Braunstein, 99 N.J.L. 166, 122 A. 814(1923); Perkins v. Trinka, 30 Minn. 241, 15 N.W. 115 (1883); Wolfe v. Marshall, 52 Mo. 167(1873), the latter case involving a threat of dispossession from a bar leased by the occupant on a Mississippi steamboat.

However, Smith v. Coker, 110 Ga. 654, 36 S.E. 107(1900), and Findley v. Hulsey, 79 Ga. 670, 4 S.E. 902(1887), seem to rest a finding of duress on the fact that dispossession was threatened against tenants not subject under Georgia law to dispossession proceedings, so that their eviction would have been "wrongful." In Houston v. Northern Pac. Ry. Co., 109 Minn. 273, 123 N.W. 922(1909), duress through threat of dispossession was used as a supplement to mistake (of law) as ground for cancellation. And in Blackwilder v. Loveless, 21 Ala. 371 (1852), specific performance was refused of a contract to convey land for an inadequate price, induced by the pressure of threatened dispossession.

restrict his bargaining power. For example, a threat of dispossession by a vendor in a land contract or a lessor in a lease may involve risk of investments already made and of gains anticipated in the future. If the bargaining positions of the parties are examined in the light of the interests at stake and the risks involved in resisting the demand, the fact that pressure takes the form of a threat of civil action becomes merely incidental. In the particular cases suggested it is necessary to evaluate also the risks of miscalculation, where decision of disputed issues will involve some delay. That doctrines of duress can take account of these broader effects of pressure, including the element of risk, is indicated by several cases, though again there is support for a narrower view.[91]

In dispossession proceedings, as in other types of civil litigation, any general conclusions as to the legitimacy of the means of pressure must be further qualified by the doctrines developed in equity under the heading of undue influence. In *Erdmann v. Gregg*,[92] for example, a contract to purchase residential property at a price considerably ex-

[91] Dale v. Simon, (Tex. App. Comm. 1924) 267 S.W. 467 (restitution allowed of $22,000 paid as rent for 22,000 acres of oil and gas land under threat, made by lessors in "good faith" and under a mistake as to the construction of the lease, to forfeit a five year lease on which $110,000 had been paid); Goodhue v. Hawkins, (Tex. Civ. App. 1910) 133 S.W. 288 (recovery allowed of overpayments of rents where lessor had power to re-enter for non-payment); Sunset Copper Co. v. Black, 115 Wash. 132, 196 P. 640(1921) (vendee in land contract allowed to recover overpayments of interest made to prevent forfeiture of contract on which the vendee had paid substantially all of the $52,500 contract price and to prevent loss of improvements valued at $200,000 which had already been made); Ferguson v. Associated Oil Co., 173 Wash. 672, 24 P. (2d) 82(1933) (lessee of gasoline station allowed to recover overpayments made for petroleum products purchased, where lease gave a power to forfeit the lease to the lessor); Smelo v. Girard Trust Co., 158 Pa. Super, 473, 45 A. (2d) 264(1946) (payments of interest and tax penalties by land contract purchaser).

The contrary result reached in Illinois Merchants' Trust Co. v. Harvey, 335 Ill. 284, 167 N.E. 69(1929), can only be regarded as reflecting an unnecessarily narrow view under circumstances pointing strongly toward relief for duress. Here the lessee of the Marshall Field store in Chicago, whose leasehold interest was alleged by the lessee and assumed by the court to be worth $2,000,000, paid the sum of $8,350.97, representing income tax on the lessor's income from the property, under a threat to forfeit the leasehold under an express provision of the lease allowing forfeiture for non-performance of the lessee's obligations, on sixty days' notice. Although it had subsequently determined that the sum paid was payable by the lessor and not by the lessee, the court held that the lessee should have sued in equity to enjoin the threatened forfeiture and establish the invalidity of the lessor's claim, since the lessee "had sixty days in which to apply for such relief."

The issues involved in this group of cases are further discussed in comment, 47 HARV. L. REV. 1413(1934).

[92] 90 N. J. Eq. 363, 107 A. 479(1919).

ceeding its value was alleged to have been made by an inexperienced woman, whose husband was insane and who was threatened with eviction within six days from a house she had rented from defendant. In asserting the jurisdiction of equity to cancel the contract, the court relied chiefly on "fraud," consisting in part of representations that the home purchased was worth the price promised and in part on a representation that there was no other housing available. From the discussion, however, it became clear that these tenuous elements of fraud took on meaning through being combined with the unequal position of the parties in experience and bargaining capacity, the "emergent conditions" brought about by the threat of eviction, and the excessive price that the vendor was thereby enabled to secure.

If the elements of "fraud" and personal disparity were extracted from *Erdmann v. Gregg*, the case would suggest a much broader issue. Should courts undertake through doctrines of private contract law to regulate the use of eviction proceedings as a means of coercion during periods of housing shortage? That the threat of eviction can constitute an effective means of coercion has been demonstrated on a national scale by our experience since 1941. If the contentions advanced in this article are correct, there are no inherent limitations which preclude the extension of duress doctrines into this area. In fact, a first tentative move was made in this direction during the period of housing shortage that followed World War I.[98] But it is clear that control of evictions cannot be undertaken without means for the regulation of rents, and that to be effective it must include some regulation of sales. The remedy held available in *Erdmann v. Gregg*, on its peculiar facts, would soon become entangled in the immensely complicated issues of price and rent control during periods of shortages. To confine regulation to housing would be difficult since the pressure of shortage can apply, not only to housing, but to a very wide class of commodities and services. The issues thus suggested quite evidently extend beyond the scope of the present discussion. For present purposes it should suffice to remark that the factors requiring judicial abstention cannot be identified merely by analyzing the specific means of pressure employed (here threat of eviction) and concluding that the means are "rightful."

[98] Sylvan Mortgage Co., Inc. v. Stadler, 113 Misc. 659, 185 N.Y.S. 293 (1920), where the New York Municipal Court found duress through a threat of dispossession of a tenant in poor health during a period of acute housing shortage and a demand for a 92.3 per cent increase in rent, though admitting that relief would be denied if the lessor demanded "a 50 per cent increase of rent or any other sum that was reasonable." This view was rejected on appeal [115 Misc. 311, 188 N.Y.S. 165 (1921)].

If the elements of economic duress are present, the refusal of judicial relief should be rested on the absence of standards and the unsuitability of judicial techniques for regulation on the scale required. But on this more needs to be said, at another time.

VIII

ACTIONS FOR INJUNCTION

It is in the action for equity injunction that the coercive effects of civil litigation are most apparent. Here the pressure is made available not merely as a type of sanction permitted in a generalized class of situations, through the statutory "grounds" for attachment, garnishment, etc., but through a specific order adapted to the situation of the individual defendant and regulating conduct in detail. The sanctions for enforcement (fine and imprisonment for contempt) are direct and severe, as severe as any to be found in our system of procedure. The traditional limits to relief in equity, particularly the "inadequacy of alternative remedies" test, reflect not merely the accidents of our institutional history but the conviction that coercion of such severity should be narrowly confined, to areas in which the need is clear. In those situations in which injunctive relief is available one would expect to find recognition of the coercive effects of civil litigation and of need for corrective measures through doctrines of duress.

That damage liability for malicious prosecution can arise from the start of suit for injunction in "bad faith" and without cause is everywhere recognized, even in states that refuse to admit such liability for prosecution of an "ordinary" civil action.[94] But the protection afforded by the tort remedy is restricted, as elsewhere, by the requirements of "malice" and want of probable cause.[95] The need for a remedy that can operate independently of motive has produced the widespread practice, imposed by statute in many states, of requiring from the party securing the injunction a bond to indemnify for all losses incurred through its issuance if it is later found that the injunction was improperly or erroneously issued. A normal incident to the temporary

[94] Mitchell v. Southwestern R.R., 75 Ga. 398 (1885), 80 Ga. 438 (1888); Rieger & Co. v. Knight, 128 Md. 189, 97 A. 358, L.R.A. 1916E, 1277 (1916); PROSSER, TORTS, § 97 (1941).

[95] Williams v. Mayor and Council of Brunswick, 137 Ga. 178, 73 S.E. 255 (1911); City of Yonkers v. Federal Sugar Refining Co., 221 N.Y. 206, 116 N.E. 998 (1917); Porter v. Mack & Boren, 50 W. Va. 581, 40 S.E. 459 (1901); 45 A.L.R. 1517 (1926).

or interlocutory injunction, and available no doubt at the issuing court's discretion in the case of final injunction, the injunction bond provides at least security for the recovery of provable losses. The control usually retained by the court issuing the injunction over assessment of damages for breach of the bond, within the limits defined by its terms, gives the further advantage of a convenient and summary remedy that is subject to a high degree of judicial discretion in construing its provisions.[96]

Many questions that might otherwise present aspects of duress are worked out in injunction cases through remedies on the injunction bond, with claims for restitution mingled indiscriminately under the inclusive category of "damages." In various situations, however, the reversal or vacating of an equity injunction may present issues requiring clear separation of damage liability from liability to restore unjustified gains. This may occur where no bond was required of the litigant securing an injunction, where the amount of the bond is insufficient to include all the gains received, or the claim to restitution is advanced by a stranger not named in the bond whose interests had nevertheless been affected by the injunction issued.

One approach to the problem dispenses entirely with analysis in terms of duress and substitutes the conception that "restitution" is required of all gains secured through a court order that is subsequently revoked for error in its issuance. In its original form this idea relates to a class of cases already considered, where compliance with a judgment ordering payment of money or transfer of property has directly enriched the judgment plaintiff and the judgment is then reversed.[97] In this class of cases duress through an implied threat of execution can be used to explain rescission of a transfer that the judgment directed. But a broader idea occasionally appears. There is authority for "restitution" of gains realized through reliance on an erroneous judgment, later reversed, where the entry of judgment prevented the gain from

[96] An excellent review of decisions on the construction and effect of the injunction bond appears in comment, 32 COL. L. REV. 869 (1932), with references to decisions in four states that permit recovery in excess of the amount of the bond. On this last point see also Miovsky v. Georgeoff, 363 Ill. 60, 2 N.E. (2d) 740 (1936). Iowa decisions on the remedies for breach of the injunction bond are discussed in 21 IOWA L. REV. 584 (1936).

The extent of judicial discretion in interpreting the provisions of the bond and relieving where necessary against its provisions is suggested by Russell v. Farley, 105 U.S. 433 (1881), and Greenwood County v. Duke Power Co., (C.C.A. 4th, 1939) 107 F. (2d) 484.

[97] Supra, Sec. V.

accruing to the litigant who ultimately prevails.[98] It is in the injunction cases that this doctrine is enlarged to its widest dimensions. The requirement of "restitution" has been made to apply to the erroneous *refusal* of a trial court to grant an injunction against a utility's unjustified charges.[99] It has also been used to compel restitution, by the litigant who secured an erroneous injunction, of payments received from complete strangers to the injunction proceedings in amounts exceeding the total of the injunction bond[100] or even in the absence of any bond whatever.[101]

The doctrine employed in these cases is framed as a rule of appellate procedure, but its implications are wider. Even as a rule of appellate procedure, it finds its justification in the drastic effects of the equity injunction, which make necessary a broad power of judicial

[98] Hoppas v. Bremer, 119 Kan. 411, 239 P. 961 (1925), adopting this theory to justify recovery, in an independent action, for use and occupation of real estate, of which a land contract vendor had remained in possession as a result of the erroneous refusal of a trial court, in a judgment later reversed, to grant the specific performance sued for by the land contract purchaser; Bedell Co. v. Harris, 228 App. Div. 529, 240 N.Y.S. 550 (1930), recovery allowed, in amount exceeding total of injunction bond, for value of use and occupation of building whose possession a hold-over tenant was enabled to retain by an injunction against dispossession which was subsequently dissolved as erroneous. Similarly, Buford v. Briggs, 96 Ark. 151, 131 S.W. 351 (1910).

[99] Baltimore and Ohio R. R. Co. v. United States, 279 U.S. 781, 49 S. Ct. 492 (1929), the original suit having been to enjoin the Interstate Commerce Commission from ordering one group of railroads, using terminal facilities owned by another group of railroads, to pay rates for the privilege that were held on appeal to be excessive, so that the injunction should have issued.

[100] Illinois Bell Telephone Co. v. Slattery, (C.C.A. 7th, 1939) 102 F. (2d) 58, where an injunction, later held to be erroneous, had been secured against a rate reduction order by a public utilities commission and the utility was ordered to make "restitution" to consumers of $14,724,733.99 received during the period of the injunction, plus interest of $4,074,254.15, though the bonds filed by the utility totaled only $6,000,000; Ex parte Lincoln & Electric Gas Co., 257 U. S. 6, 42 S. Ct. 2 (1921). Cf. Berthold-Jennings Lumber Co. v. St. Louis I. M. & S. Ry. Co., (C.C.A. 8th, 1935) 80 F. (2d) 32, refusing preferential treatment to railroad shippers for overpayments made during the period of the injunction, in absence of ability to "trace."

[101] Arkadelphia Milling Co. v. St. Louis & S.W.R. Co., 249 U. S. 134, 39 S. Ct. 237 (1919), where the issue related principally to payments received from shippers during the period of a final injunction, whose entry had had the effect of discharging the bond filed on issuance of a temporary injunction. Jurisdiction of a federal court to enforce "restitution" was asserted even though the original ground for resort to the federal courts had been solely that the administrative order against which the injunction was sought was claimed to deny due process to the railroad.

It should be added that in this type of case an additional ground for restitution to the shipper might be the monopoly of the service possessed by the utility, making a demand for an excessive rate in itself duress. This ground, well enough established in similar types of case [45 MICH. L. REV. 571 (1947)], is not relied on in the decisions referred to in this and the preceding note.

control not only over the conditions imposed in the grant of the remedy but over the readjustments required on its revocation.[102] The doctrine involves a distinction between "damages," recoverable on the injunction bond, and "restitution," enforced independently of the bond to prevent unjust enrichment. This distinction is not easy to apply and leaves room for debate in peripheral cases.[103] In spite of such problems of application, it is a distinction that has proved reasonably workable and much needed in a great variety of situations in modern American law, particularly where restitution is sought as an alternative remedy for tort. It corresponds to the basic distinction which this article was meant to advance, a distinction between recovery for losses incurred and gains received through the pressure of civil litigation.

Expansion of the concept of "restitution" to deal with the results of reliance on an erroneous injunction is only one of the protective devices available. An alternative means is the use of the equity injunction itself to restrain or prohibit the use of the injunctive remedy. Requests for this form of protection have been made with unusual frequency, particularly in such fields as patent infringement where the issue arises between business competitors. The exceptional opportunities for injury and coercion in this situation, through pressure exerted on customers, have produced much litigation. The grant of injunctive relief against the start or the threat of suits for patent infringement has encountered a variety of obstacles. In many cases of this type

[102] The "inherent power" of both issuing and reviewing courts to undertake such readjustments is most strongly asserted by Justice Stone in Inland Steel Co. v. United States, 306 U.S. 153, 59 S. Ct. 415 (1939), a case which illustrates also the need for flexible standards in enforcing restitution in this type of case. The tests of "conscience and fair dealing" that must govern are further exemplified by Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301, 55 S. Ct. 713(1935). Cf. Minneapolis, St. Paul & S.S.M. Ry. Co. v. Washburn Lignite Coal Co., 254 U.S. 370, 41 S. Ct. 140 (1920), refusing "restitution" to a railroad which had been prevented by state court injunctions from collecting rates to which it was ultimately held to be entitled, as against shippers who had relied on the railroad's published tariffs.

[103] United Motors Service v. Tropic-Aire, (C.C.A. 8th, 1932) 57 F. (2d) 479, though accepting the distinction, refuses recovery on a theory of restitution of profits made through use of a patented idea under the protection of an equity injunction erroneously issued, the grounds for the refusal being the uncertain standards that would govern such recovery and the conclusion that the profits in question would not necessarily correspond with the profits that the enjoined defendant would have realized and thus were not "taken from" him. Cf. also Tenth Ward Road Dist. v. T. & P. Ry. Co., (C.C.A. 5th, 1926) 12 F. (2d) 245. Similar issues, though with added complications, were presented and a similar conclusion reached in Greenwood County v. Duke Power Co., (C.C.A. 4th, 1939) 107 F. (2d) 484, 131 A.L.R. 870 at 878 (1941), discussed in an excellent note in 7 UNIV. CHI. L. REV. 382 (1940).

there are added, to the oppressive use of civil litigation, enough elements of defamation to inspire the usual reluctance to employ injunctive relief as the means of control. The interest of customers in learning in advance of suit of any liability to which they may be exposed has sometimes been urged as a reason against restricting notices to the trade, with their inevitable and often explicit threats of litigation. Most serious of all is the effect of the injunction in restricting or foreclosing access to the courts in the "good faith" assertion of claims. In spite of these obstacles recent decisions have shown a marked tendency to extend injunctive protection, particularly where litigation against customers is used or threatened in spite of adequate opportunities to litigate disputed issues in actions between the two principal antagonists. But the injunctive remedy, like the remedy in damages for malicious prosecution, is inevitably involved to a large extent with issues of "bad faith" and motive. As a means of affirmative protection against oppressive use of civil litigation it therefore remains incomplete.[104]

There remains finally the question whether the start or the threat of a suit for injunction can be considered duress for the purpose of reviewing a settlement induced by this form of pressure. In general the decisions follow a familiar pattern. Where no probable cause for the action existed and the claim was not believed to be valid, several courts have felt no difficulty in giving relief for duress.[105] On the other hand,

[104] The earlier cases, generally hostile to relief by injunction, are collecting in the annotation to Kryptok Co. v. Stead Lens Co., (C.C.A. 8th, 1911) 190 F. 767, 39 L.R.A. (N.S.) 1 (1912). More recent decisions are collected in 98 A.L.R. 665 at 671 (1935). See also J. C. Pitman & Sons, Inc. v. Pitman, (Dela. Ch. 1946) 47 A. (2d) 721; Maytag Co. v. Meadows Mfg. Co., (C.C.A. 7th, 1929) 35 F. (2d) 403; 23 GEO. L. J. 881 (1935).

Considerations similar to those that have led to the development of the injunctive remedy have also been urged in favor of wider use of the declaratory judgment where suits for patent infringement have been threatened but not actually commenced. See 45 YALE L. J. 160 (1935) and 34 MICH. L. REV. 570 (1936).

[105] Rees v. Schmits, 164 Ill. App. 250(1911), taxpayer's suit brought to enjoin payment of sums due sewer contractor under construction contract with city, effect of injunction being to prevent contractor from meeting his current obligations; White v. Scarritt, 341 Mo. 1004, 111 S.W. (2d) 18 (1937), taxpayers' suit brought "without good reason" to believe it could be maintained, to enjoin purchase by county of land owned by plaintiff, plaintiff's tenants having moved out prior to the suit in the belief that the purchase was about to be consummated so that loss of income from the tenants threatened plaintiff with mortgage foreclosure. Both cases suggest that the use of a taxpayer's suit for the purpose of compelling payments to the taxpayer by the party enjoined is in itself improper (see infra, Sec. X). White v. Scarritt is interesting as being one of the rare cases in which an action cast in the form of an action for "damages" for exercising duress is held to be maintainable. But the measure of recovery was

the threat or the start of a suit for injunction would normally be thought legitimatized coercion if the claim was believed, with reasonable grounds, to be valid.[106] But again the threat must be viewed in its context and the propriety of the pressure must be judged in part by its effect. In *Ramp Buildings Corporation v. Northwest Building Co.*,[107] one of the leading modern cases announcing the doctrine of "business compulsion," an action was brought on a contract under which defendant had purchased a license to use a specified type of garage ramp in a building then under construction. The defendant sought to defeat recovery by alleging that the contract was induced by a threat of suit for injunction against patent infringement, coupled with a threat to prevent further advances by a mortgagee which were needed to finance construction of the building. Since the only means disclosed of preventing such advances by the mortgagee was the claim advanced of infringement of plaintiff's patent, the coercion involved was essentially the pressure of civil litigation. The court nevertheless held the answer good against general demurrer, emphasizing the mortgagee's actual refusal to continue advances while the issue remained thus in suspense, the resulting interruption to construction operations, and the prospect of bankruptcy that was thereby presented.

IX

BANKRUPTCY AND RECEIVERSHIP

Any bargaining by the debtor to prevent the use or avert the consequences of civil remedies available to the creditor is most clearly conducted under conditions of disadvantage where the remedy whose use is proposed is a bankruptcy or receivership proceeding. Here the sanctions attached to the remedy are inherently drastic, i.e., the appropria-

the amount of money paid to one of the defendants, the McCoy Land Co., to secure dismissal of the injunction suit, and the only purpose in using this form of action was apparently to permit judgment against Scarritt, one of its officers.

Compare Davidson v. Bradford, 203 Iowa 207, 212 N.W. 476 (1927), which admits a defense of duress in an action on a bond given by the defendant in an injunction proceeding for abatement of a liquor nuisance, where the injunctive order was "void" for inclusion of a tract on which no liquor sales had occurred.

106 Hart v. Walsh, 84 Misc. 421, 146 N.Y.S. 235(1914) (royalty agreement made under threat of suit to enjoin copyright infringement); Heller & Son v. Lassner Co., 214 App. Div. 315, 212 N.Y.S. 175 (1925) (license agreement made under threat of suit for patent infringement); Malec v. ASCAP, 146 Neb. 358, 19 N.W. (2d) 540(1945) (royalties paid for reproduction of popular songs under threat of action for copyright infringement).

107 164 Wash. 603, 4 P. (2d) 507(1931).

tion of the debtor's assets and their enforced transfer to a liquidating agent. It is true that the interference with the debtor's freedom of action is greater in the older types of liquidation proceeding, such as bankruptcy, than in the newer types of proceeding for rehabilitation, where provision can be made for continuation of the enterprise without major change in its management. But in either form of action the larger context in which a liquidation proceeding is proposed will itself contain the main elements of unequal bargaining power. The debtor can be assumed to be in financial difficulties. The mere start of bankruptcy or receivership suit will publish these difficulties and increase the pressure from other creditors. The power to initiate such proceedings is a power not only to precipitate financial catastrophe but to destroy such limited freedom of action as the debtor may still possess.

The modern development of liquidation proceedings, with their objective of ratable distribution, represents in one aspect an organized means of preventing undue exploitation of the individual creditor's advantage. The whole machinery of compulsory liquidation, including the cancellation of creditors' "preferences," is founded on recognition of the debtor's inability to bargain his way to a reasonable result. The question now is whether doctrines of duress can provide any supplement to the elaborate controls so developed.

The standard type of duress, through the start or the threat of bankruptcy or receivership proceedings, is dealt with by the standard formula which borrows from the law of tort the test of creditor's motive.[108] It is generally assumed and occasionally held that if the creditor lacked honest belief, and reasonable basis for belief, that enforced liquidation was justified, the elements of duress are present.[109] The cases employing this test more commonly reach the conclusion that the settlement between debtor and creditor cannot be reviewed, since the creditor honestly believed and had basis for believing both that

[108] The cases agree that the start of a bankruptcy or receivership proceeding is not an "ordinary" civil action for purposes of liability for malicious prosecution and that such liability can exist where malice and want of probable cause are shown. 86 A.L.R. 215 at 219 (1933). Where these two elements do not appear it is equally clear that the damage remedy is not available. Garland v. Wilson, 289 Pa. 272, 137 A. 266(1927); Carleton v. Taylor, 50 Vt. 220(1877).

[109] Rose v. Owen, 42 Ind. App. 137, 85 N.E. 129 (1908), sustaining a defense to an action on a promissory note for $35,000 which was obtained by the threat of a stockholder owning only one share of stock to institute receivership proceedings with charges of criminal misconduct by the corporation's officers, the threat being made "without reasonable grounds" for starting receivership proceedings and at a time when receivership would have impaired seriously the corporation's financial prospects.

the claim asserted was valid and that the debtor's economic position justified bankruptcy or receivership.[110] The language of these cases might suggest that the creditor's power to exploit his advantage is entirely unlimited, except to the extent that improper motive can be clearly established.

On closer analysis the views in these cases are by no means so Spartan as might be inferred at first sight. In most cases of this type the creditor has succeeded, through threat of enforced liquidation, in securing merely payment or additional security for an obligation that is uncontested. It is true that doctrines asserting the conclusiveness of private settlement are meant to foreclose inquiry into the existence or amount of the claim asserted. But in the present context it is not enough to show that the creditor has succeeded by threat of enforced liquidation in securing a preference over other creditors that might be set aside if seasonably attacked. Any temptation to employ duress doctrines for this purpose would be easily resisted after considering the difficulties that would have to be faced in marshalling of assets and organizing a ratable distribution. Even if the procedural machinery available were adequate, there would be a serious question of policy whether doctrines of duress should be used to supersede or supplement the complicated procedures for liquidation that are already developed. Where the creditor has done no more than to enforce a claim whose existence and amount are uncontested, it is therefore not surprising that relief has been refused.[111] This suggestion can be put in a

[110] Bankruptcy: Snyder v. Braden, 58 Ind. 143 (1877); Barnes v. Stevens, 62 Ind. 226(1878); Investment & Securities Co. v. Adams, 192 Wash. 41, 72 P. (2d) 288 (1937); Dick v. Marx & Rawolle, Inc., (D.C. App. 1925) 4 F. (2d) 879; Wilder v. Century Carpet Co., (C.C.A. 9th, 1937) 92 F. (2d) 175. Similarly, Peabody v. Tenney, 18 R.I. 498, 30 A. 456(1894) (general assignment).

Receivership: Fuller v. Roberts, 35 Fla. 110, 17 S. 359(1895); In re Liquidation of Bourbon Banking Co., 218 Ind. 96, 30 N.E. (2d) 311, 31 N.E. (2d) 52 (1940); Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N.W. 591 (1900); Byron v. Byron, Heffernan & Co., 98 N.J.L. 127, 119 A. 12(1922); Walla Walla Fire Ins. Co. v. Spencer, 52 Wash. 369, 100 P. 741(1909); Morton v. Morris, (C.C.A. 8th, 1896) 72 F. 392.

[111] This appears most clearly in Morton v. Morris, (C.C.A. 8th, 1896) 72 F. 392, which contains some highly quotable language as to the privilege of the creditor to press his advantage against a delinquent debtor involved in financial difficulties (here the result of the panic of 1893). The court stated that the debtor was entitled to complain only "when some act is done or threatened which is, in itself, unlawful or is contrary to equity." It then was careful to point out that the mortgage obtained by the creditor, which he was seeking to foreclose in the proceeding then before the court, was for a valid indebtedness and that nothing was presented in the case to indicate that the settlement reached "was in any respect unjust or unfair." Of the cases cited in the

different way by saying that the crucial issue will only arise where the creditor has used the threat of bankruptcy or receivership action to extract an advantage that appears in the whole context unfair, through exceeding by a substantial margin the amounts independently due.

This question is presented, with variations, by the New York case of *Scheinberg v. Scheinberg*.[112] Here the contestants were husband and wife, though a decree for judicial separation had been entered between them. Three separate actions were then brought against the wife, all inspired by the husband: one an action by the husband's mother to impress a trust on real estate owned by the wife, a second by an alleged mortgagee to foreclose a mortgage on her real estate and the third a proceeding in bankruptcy by creditors who were under the husband's control. The result was an appropriation of all the wife's income, leaving her without funds for her own support or to finance further litigation. The wife's lawyers advised her that the risk of her losing in some of the pending actions was serious. After full consideration she entered into a settlement by which she surrendered her claim to alimony under the prior decree of judicial separation and agreed to convey her real estate for a sum slightly less than one-half its value. The wife subsequently refused to perform her agreement on the grounds of duress and undue influence and the husband brought an action for specific performance. The court emphasized first the discretionary character of the specific performance remedy and concluded that enforcement of the contract would be "unconscientious." An inference of "bad faith" in the husband was evidently felt by the court to be not quite justified, though the comment was made that "The taint of coercion and fraud infects the whole transaction." The "unconscientiousness" of the husband's conduct was said to consist of his setting legal proceedings in motion "without foundation," depriving the wife thereby of the means to defend herself, and then taking advantage of her necessities by offering to buy her property at one-half its value. With the result of the case it is easy to agree. The chief question is whether the court should have contented itself with a mere refusal

preceding note, most represented similar attempts to secure satisfaction or security for an admitted indebtedness. In Walla Walla Fire Ins. Co. v. Spencer, which involved a settlement of an employee's claim for damages for breach of a long-term employment contract, there appeared no showing that the settlement reached was unfair. It is only in Dick v. Marx & Rawolle, Inc., that a result was produced that might be considered unjust and here the debtor was merely compelled to surrender a claim for damages for delay in performing a contract between debtor and creditor, a claim that the creditor had contested in "good faith."

[112] 249 N.Y. 277, 164 N.E. 98 (1928).

of specific performance, leaving the contract open for an action for damages. It seems difficult to believe that our law lacks resources to deal completely and effectively with the issues here presented and that distinctions between law and equity can still determine the substantive result.

The problem of coercion can also arise in a variety of ways during the actual administration of bankruptcy proceedings. The Bankruptcy Act itself recognizes the dangers of extortion in so drastic a type of judicial surgery, through broad provisions for criminal liability for receiving or attempting to obtain "any money or property, remuneration, compensation, reward, advantage or promise thereof from any person, for acting or forbearing to act in any proceeding under this title."[113] Though this provision refers only to criminal liability, it defines a policy which renders illegal any bargain for surrender of the bankruptcy creditor's procedural advantages.[114] Quite apart from this provision, doctrines of duress are available to invalidate an agreement induced by a creditor's threat to oppose a bankruptcy discharge.[115] Where the creditor's consent is required to a composition proposed, a secret agreement between debtor and creditor for more favorable treatment than the composition provides is not only illegal for its

[113] 11 U.S.C. (1940) § 52(b)(5). The original provision in the Bankruptcy Act of 1898 defined the offense somewhat more narrowly by requiring that the accused must have "extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

[114] Crandall v. Durham, 348 Mo. 240, 152 S.W. (2d) 1044 (1941); Sigmon Furniture Mfg. Co. v. Massey, 192 Okla. 436, 137 P. (2d) 793 (1943); Smith v. Langmaack, 60 N.D. 66, 232 N.W. 600 (1930); all involving guaranties or promises of payment made to the creditor in return for undertakings not to contest discharge or proposed plans of distribution. Cf. United States v. Dunkley, (D.C. Cal. 1916) 235 F. 1000, sustaining a prosecution under the original provisions of the 1898 act against an attorney of a bankruptcy receiver who received a payment for "using his influence" with the receiver to secure approval of a proposed sale of the bankrupt estate.

It is of some interest that Zavelo v. Reeves, 227 U.S. 625, 33 S. Ct. 365 (1913), held this provision of the Bankruptcy Act inapplicable to a promise made by the bankrupt to pay the entire debt proved by the creditor, in return for a new loan of $500 made by the creditor after the start of bankruptcy proceedings for the purpose of paying off the claims of other creditors under a composition. Support for this conclusion was derived chiefly from the fact that the bankrupt's promise of payment was induced by the loan and not by an undertaking of the creditor to surrender any procedural privilege in the bankruptcy proceeding.

[115] Burlatour, Inc. v. Garsson, 229 App. Div. 466, 242 N.Y.S. 583 (1930). That pressure can work both ways is indicated by Kalbfleisch v. Anderson, 201 App. Div. 158, 194 N.Y.S. 692 (1922), which found "genuine duress" in a threat of the *debtor* to file a voluntary bankruptcy petition with a perjured affidavit that a substantial money payment made to the creditor was a voidable preference.

"fraud" on the other creditors but may be voidable for the duress inherent in the creditor's superior bargaining position.[116]

There remains the much larger question whether restrictions should be imposed on bargaining between creditor and debtor where no specific misuse can be shown of the creditor's procedural advantages but the debtor's necessities compel his compliance with unfair or unreasonable terms. Here, as in the analogous case of the necessitous mortgagee, somewhat different techniques for analysis are needed. Though the creditor's superior position is essentially based on the civil remedies at his command, the pressure exerted through express or implied threat of litigation is only one among many pressures converging on the debtor from various directions. As it becomes more difficult to isolate or identify specific forms of coercion, the question is gradually transformed. It becomes necessary to ask whether our law has developed general standards of fair dealing, associated not with specific means of pressure but with a relationship of extreme dependency existing in fact. To attempt an answer to this question here would unduly prolong the discussion. But it can at least be suggested that the negative answer given in many decisions should not be considered final and that the issue is not yet foreclosed.[117]

X

GUARDIANSHIP PROCEEDINGS

The last group of remedies requiring discussion has features both unusual and suggestive. The proceeding for appointment of a guardian or conservator, by reason of personal incapacity of the ward, involves an interference with the owner's control of his assets that makes it comparable to a debtor's enforced liquidation. More important, however, is the declared purpose of such a proceeding, the protection of the ward against his own weakness or improvidence. A remedy developed for such a purpose cannot be considered an appropriate

[116] Atkinson v. Denby, 6 H. & N. 778, 158 Eng. Rep. 321 (1861); Crossley v. Moore, 40 N.J.L. 27 (1878); Batchelder & Lincoln Co. v. Whitmore, (C.C.A. 1st, 1903) 122 F. 355; though Solinger v. Earle, 82 N.Y. 393 (1880), held the element of illegality not sufficiently alleviated by duress so that restitution of the excess paid the creditor was denied. Cf. Dustin v. Farrelly, 81 Mo. App. 380 (1899).

[117] With cases refusing relief, such as French v. Shoemaker, 14 Wall. (81 U.S.) 314 (1871); In re Prima Co., (C.C.A. 7th, 1938) 98 F. (2d) 952; and Willett v. Herrick, 258 Mass. 585, 155 N.E. 589 (1927); should be compared Winget v. Rockwood, (C.C.A. 8th, 1934) 69 F. (2d) 326; and Stiefler v. McCullough, 97 Ind. App. 123, 174 N.E. 823 (1933).

subject of private bargaining, as can other types of civil litigation. Where a threat of guardianship proceedings has been used as a form of pressure, there are apt also to appear those elements of personal inequality that characterize "undue influence." But without direct appeal to the doctrine of undue influence, it is possible to say as several courts have done that the use of this type of remedy for the securing of private advantage is a misuse and diversion from its intended purpose.[118]

The idea expressed in the guardianship cases can be used in other types of judicial proceeding as well. It is essentially the same idea that has emerged where the start or the threat of criminal prosecution is used to extract private settlement, though the broad principle so often asserted in this context is far from maintained in practice.[119] The same type of reasoning would no doubt apply to other proceedings that are civil in form, such as commitment for insanity, juvenile delinquency or neglect, and could even be extended to divorce proceedings. In one situation already referred to, the taxpayer's suit to enjoin improper expenditure of public funds, a strong intimation has appeared that the remedy should be restricted to the protection of the public interest so that its use for private advantage is in itself improper.[120]

This group of cases throws into clearer light the assumptions tacitly accepted in most other types of civil litigation. Ordinarily it is taken for granted that the sanctions of civil procedure are supplied precisely for the purpose of enabling the creditor to extract the greatest possible advantage. Whether the gain is secured directly by coercion of court process itself, or by means of a settlement out of court, it is therefore

[118] Harris v. Flack, 289 Ill. 222, 124 N.E. 377 (1919); Foote v. Depoy, 126 Iowa 366, 102 N.W. 112 (1905); Gill's Trustee v. Gill, (Ky. Ct. of App.) 124 S.W. 875 (1910); Hogan v. Leeper, 37 Okla. 655, 133 P. 190 (1913). Compare Lawrence v. Morris, 167 App. Div. 186, 152 N.Y.S. 777 (1915), where the attorney for a general guardian already appointed used a threat to oppose a termination of the guardianship to induce the ward to make adequate provision for her dependent minor children. The claim of duress was rejected by the court with the statement that "a threat to exercise a legal right does not constitute duress." A much more persuasive reason would seem to be the complete propriety of the arrangement made and the absence of any gain to the guardian.

[119] 5 WILLISTON, CONTRACTS, rev. ed., §§ 1612-1616 (1937); and discussion in Dawson, "Economic Duress—An Essay in Perspective," 45 MICH. L. REV. 253 (1947).

[120] Rees v. Schmits, 164 Ill. App. 250 (1911); White v. Scarritt, 341 Mo. 1004, 111 S.W. (2d) 18 (1937), the court in the latter case using particularly strong language to this effect, though they also concluded that the evidence showed that the "defendant did not have good reason to believe that the suit could be successfully maintained."

most difficult to find any "wrongfulness" in the means employed, or even a modified type of impropriety consisting of a diversion of civil process from its intended purpose. The problem of duress must then be conceived as a problem of defining limits to the gain that can be realized through means that are at least legitimate and in a sense are affirmatively approved.

XI

CONCLUSION

Duress through civil litigation proves on analysis to consist of many forms of pressure, operating at different stages and with widely different effects. Though certain tendencies in judicial decisions are discernible, conforming broadly to distinctions in the form and intensity of the pressure, it is impossible so far to extract from decided cases any single conclusion that will summarize results. Decisions on essentially the same fact situations are often directly in conflict; decisions in comparable situations are difficult to correlate. The general ideas contained in doctrines of duress have been translated into a group of specific formulas which point in opposite directions. The choice between these formulas follows no clear or predictable pattern; in making the choice courts are "free," though even the degree of their freedom would be hard to infer from the language they use.

These difficulties result in part from the attempt to extend over the whole area of civil litigation a set of standards that do not adequately reflect the diversity of elements encountered in fact. They also result from the survival of certain historical ideas that obstruct analysis of the main problems. But entirely apart from these causes, the problems themselves are difficult. Conflict and confusion are to be expected, for in coercion through civil remedies modern doctrines of duress confront their severest test.

It is in coercion through civil remedies that the question is most frequently and directly presented whether relief for duress depends on a showing that the means of coercion are "wrongful," under the law of crime or tort. The argument here presented has been largely concerned with showing that the limits of relief for unjust enrichment are no longer coterminous, as they were at an earlier time, with the tests for criminal and tort liability. The requirement that duress must consist of a wrongful act or threat is ancient and is intelligible in terms of history. In the field of duress through civil litigation it has had extensive influence but can no longer be considered controlling. Certainly all would agree that the injection of improper motives sufficient for tort liability will by no means produce relief for duress if the pressure involved is mild or is postponed in its operation (as in the start or the threat of an action for ordinary money judgment). On the other hand, relief for duress has been given in numerous situations though the creditor has commenced or threatened no more than the use of civil remedies, under conditions that ensured his immunity from damage or criminal liability.

The assumption that coercion through civil remedies is "rightful" involves two quite distinct elements. The primary assumption is that a civil action pursued through its normal course to final judgment will be privileged (at least if the motive is proper) and that any coercion involved will be completely legalized. The correctness of this assumption can rarely be questioned. In most situations it is simply inapplicable. Of the cases here considered very few have involved an attack on a payment or transfer directly coerced by court order, and in these cases the invalidity or reversal of the order itself has provided the occasion.[121] The great bulk of the duress cases are concerned instead with the validity of a settlement made to *avert* the pressure and with a view to *terminating or preventing* the litigation proposed. The assumption that the coercion of civil suit is justified is carried over and made to include a second, more crucial assumption—that the pressure of civil process can be used by the creditor in the manner that will most strongly reinforce his bargaining position in a settlement out of court.

That this transfer of ideas is not inevitable is shown by the cases involving the use of criminal prosecution as a means of enforcing private settlement, and in the limited group of civil actions (discussed in Section X) of which guardianship proceedings are an illustration. But the argument presented here has not purported to criticize either the ease or the frequency with which this transfer is made. It seems unobjectionable to say that the remedies of civil procedure comprise a diversified group of instruments for coercion; that the creditor should be free within very broad limits to select the ones best suited to his purpose; and that in most classes of litigation he is equally free to turn on and turn off the pressure so as to produce the maximum ad-

[121] The chief illustrations of relief against the coercion of judgment are those discussed above in Sec. IV, in connection with notes 51-56.

vantage.[122] To state these assumptions is merely to assert that the bargaining processes by which our economic life is organized apply also to the means of coercion administered by courts. But if these assumptions exist, they should be exposed to view and to conscious evaluation. The time to question them seriously will come only where the pressure thus made available has produced a serious disadvantage in bargaining and the party exerting pressure was thereby enabled to secure a clear and unjustified gain.

To any extensive review of such settlements, through duress or related ideas, there stand opposed the general interests in finality that have been earlier summarized (Section I). The general interest in the security of transactions is reinforced in this whole group of cases by the interest in facilitating private settlement as an affirmative means of reducing the costs, waste, and delay of litigation. The safeguarding of interests so generalized as these involves an exercise of judgment, based on estimates of probability and requiring some insight into human motivation. Complex as the process is, it is on this type of judgment that decision must ultimately rest. It seems evident that no clear guide to decision is available in close or difficult cases, and that there is wide room for difference of opinion in weighting the factors involved.

Nevertheless it has been suggested that the influence of historical tests has unduly restricted the extension of remedial doctrines. Even where the pressure takes the minimal form of an action for ordinary money judgment, some room should be left for the application of duress doctrines in situations where special disadvantages of the party coerced make submission to pressure the only reasonable or practicable course. Still more is this true where the pressure takes the more drastic form of personal arrest or seizure of assets at the inception of suit, though there is already some authority at this point for the use of duress doctrines where the pressure has been made to operate with unusual severity or the situation of the party sued has produced an

[122] It is perhaps worth a reminder that the power to settle a civil proceeding and to impose terms for the settlement is not universally conceded. The provision of Rule 23 of the Federal Rules, applying to class actions generally, requires judicial approval for any dismissal or compromise. The most important field of application for this provision is of course the derivative action of the corporate security holder, which is there specifically included. For this solution of the difficult problems of controlling the stockholder's action and preventing its more serious abuses, there is some authority in state court decisions. McLaughlin, "Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit," 46 YALE L. J. 421 (1936); MOORE, FEDERAL PRACTICE, § 23.06 (1938).

unusual handicap. The pressure of execution under final money judgment presents special complications, either the element of res judicata or the administrative difficulties in ensuring workability of the judicial sale; but where the doctrine of res judicata is inapplicable the coercion involved in execution process has been freely recognized and even the safeguards surrounding the judicial sale have not proved insurmountable (particularly where the interests of strangers to the judgment are affected). Relief for duress has been carried furthest where the pressure takes the form of a lien asserted against a specific asset, primarily the lien of a mortgage; here a long history of protection to the mortgagor's interest has provided enlarged perspective. The same is true, though to a lesser extent, in actions for recovery of real property. In the field of equity injunction the exceptional severity of the sanctions employed has produced an expanded concept of restitution with many peculiar features and has also led to the use of duress doctrines in their more standard form. Finally, in bankruptcy and receivership proceedings the results so far reached are inconclusive, though the language used appears hostile to relief for duress.

It could not be expected that the development of remedial doctrines would proceed at a uniform rate over this whole area. Even if agreement had been reached on basic issues of policy, specific factors peculiar to each type of litigation would continue to produce diversity in results. Furthermore, the issues involved in duress through civil litigation are closely related to those in other types of economic pressure, where the threat of civil action is latent or at most indirect. The conflicts in tendency and in result that appear in these related fields have been reflected here and have added to the confusion.

The principal effect of traditional doctrines has been to concentrate attention unduly on the specific means of pressure used and to narrow the range of inquiry. One symptom of this concentration is the inadequate weight given to the element of uncertainty and risk, which should be recognized as an authentic element of duress to a much greater extent than it has been to date. More broadly, however, the search for some element of impropriety in the creditor's conduct has diverted attention from the crucial issues—the degree of disparity in bargaining position produced by the pressure, and the acquisition of a gain, not otherwise justified, that the disparity has made possible.

It is possible at least to conclude that modern American law has progressed a considerable distance beyond the premises defined by nineteenth century doctrine. In duress through civil litigation, where the difficulties appear to be greatest, a revised conception of duress has already been established at certain strategic points. This development has already gone far enough to indicate that the revision of basic premises will not simplify the process of decision. On the contrary, it has presented a new range of questions as to the purposes of our remedial system and the values it aims to achieve. Behind these are some still larger questions as to the nature and the weight of the social interests which preclude the achievement of justice in the individual case. But the difficulty in answering these questions is no reason for not facing them. These are the essential questions, to which answers are being provided, however the answers are phrased.