

Duress by Threatened Breach of Contract

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1. Introduction

If two people have made a contract and one wishes to change its terms, what may he do to persuade the other to agree? May he re-open the negotiations afresh? May he refuse to perform the contract until the change he desires is made? If contract rights are to be effectively protected, some legal control must be exercised over the undue use of pressure. The extent of this control, as it is found in the common law, is the subject of the present study.

The policy against such pressure has traditionally been expressed in the law of consideration. If, in return for the contract modification, the party seeking it gives no more than the promise to perform the duty he already owes under the contract, the modification will not be supported by consideration and is usually invalid. This is the "pre-existing duty" rule, which can only be justified in modern times as a means of preventing extortion by threatened breach of duty.¹ The need for this protection recently was illustrated by an English case where one party refused to perform his contract in highly coercive and unjustified circumstances.²

Such a policy cannot be implemented through the law of consideration alone. The "pre-existing duty" rule may operate arbitrarily, supporting extortive contracts where there is technical consideration. It may strike down reasonable modifications designed to make workable contracts which have unexpectedly become unsuitable. Only in a minority of American jurisdictions is there any effort to

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¹ See Goodhart, *Performance of an Existing Duty as Consideration*, (1956) 72 L.Q.R. 490.

² *D. & C. Builders v. Rees*, [1966] 2 Q.B. 617, [1965] 3 All E.R. 837 (C.A.); Winder, *The Equitable Doctrine of Pressure*, (1966) 82 L.Q.R. 165 and Cornish, *Economic Duress*, (1966) 29 M.L.R. 428.

deal with such a modification on its general merits.³ And what if the rule does apply? The transaction may be invalid, but remedial problems which follow are apparently left unsolved. It is hardly surprising that courts in the twentieth century are exploring other forms of protection.

This article will examine the potential contribution of the law of "duress". Duress is defined in this way in the *Restatement of Contracts*:

... any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment if the threat was intended or should reasonably have been expected to operate as an inducement.⁴

The definition is applicable to most legal rules, including "compulsion" or "extortion", although the precise meanings of the terms used, especially "wrongful" and "free will", may differ from one rule to another. It is helpful because it identifies three important elements of duress.

The first is the threat which is employed. The system of classification in most judicial and textual treatments of duress depends upon what kind of a threat it is. As far as duress by threatened breach of contract is concerned, there are a number of Commonwealth decisions which can broadly be classified under that head. There is a much greater body of American case law from which examples may be drawn to assist in the understanding of Commonwealth cases.

Secondly, there is the interference with "freedom of will". Generally the courts will insist upon this. Otherwise, they could not stop short of a broad jurisdiction to investigate the merits of all consensual transactions. The required degree of coercion, however, may vary. Take, for example, a man who is faced with bankruptcy, and a man who has to walk to the next shop to get what he wants. Both may be said to "act against their will" if they decide to submit to the threat.⁵ The courts may be expected to discriminate, requiring a higher degree of coercion to be proved where the attacked trans-

³ *E.g. King v. Duluth, M. & N. Ry.*, 61 Minn. 482, 63 N.W. 1105 (1895). See 1A *Corbin on Contracts* (1963), paras. 183-4; 1 *Williston on Contracts* 3d ed. (1957), 541-2, para. 130A; Annot., 12 A.L.R. (2d) 80 (1950).

⁴ American Law Institute, 2 *Restatement of the Law of Contracts* (1932), 938, para. 492(b) (*Restatement of Contracts*). This article is not concerned with the more extreme form of duress specified in para. 492(a).

⁵ For discussions of "freedom of will", see Dalzell, *Duress by Economic Pressure*, (1942) 20 N.C.L.R. 237, 239 and articles there cited.

action has merit.⁶ Similar variations in degree may be expected where the party who has allegedly been coerced might have taken legal steps to avoid the pressure but prefers not to do so because of the delay or risk involved.⁷ While some theorists speak as if a single standard of coercion applies in all cases,⁸ it is safer to examine the particular rules governing each case.

Thirdly, there is the element of "wrongfulness". This term is applied not to the action which is threatened, but to the threat and the purpose for which it is made. The mere fact that the action threatened would be a breach of legal duty does not necessarily mean that the threat itself is "wrongful". Conversely, a threat to carry out a lawful act may nevertheless be wrongful:

Just as acts contracted for may be against public policy and the contract vitiated for that reason, though the law imposes no penalty for doing them, so acts that involve abuse of legal remedies or that are wrongful in a moral sense, if made use of as a means of causing fear vitiate a transaction induced by that fear, though they may not in themselves be legal wrongs.⁹

What principles underlie the decision to hold a threat "wrongful"? In America, opinions differ. Professor Dalzell seems to regard all legally unauthorized pressure as wrongful, the function of the law of duress being to free people from all unreasonable pressures on them to make a contract.¹⁰ Professor Dawson, on the other hand, emphasizes the law's role in correcting unequal exchanges which can result from the unfair use of disproportionate power. He suggests that undue attention may be paid to the wrongfulness of the means used, when the crucial factor is often the inequality of exchange.¹¹ In the present context, however, the difference is less significant than might be supposed.

The *Restatement* definition is not adopted as a "test" for duress. Its concepts are too indefinite to be falsified or verified by decisions. It is used instead as a conceptual framework within which it is

⁶ Compare Dawson, *Duress Through Civil Litigation*, (1947) 45 Mich.L.Rev. 571, 575 (Dawson, "Civil Litigation"), with Dawson, *Economic Duress — An Essay in Perspective*, (1947) 45 Mich.L.Rev. 253, 256-8 (Dawson, "Economic Duress").

⁷ 5 *Williston on Contracts* Rev. ed. (1937), para. 1620; Dalzell, *supra*, f.n.5, 380; Dawson, "Civil Litigation", 686-7.

⁸ Dalzell, *ibid.*, 379-81 (same standard applied to variable circumstances of each case).

⁹ 2 *Restatement of Contracts* (1932), 941, para. 492, comment g. Cf. Salmond and Winfield, *Principles of the Law of Contracts* (1927), 259-60.

¹⁰ Dalzell, *supra*, f.n.5, 362-7.

¹¹ Dawson, "Economic Duress", 289; "Civil Litigation", 712-16. See also Dawson, *Economic Duress and the Fair Exchange in French and German Law*, (1937) 11 Tul.L.Rev. 345, 12 Tul.L.Rev. 42.

possible to analyse and compare decisions from various jurisdictions. The analysis will be used in the next section to show how the law of duress extended to cover duress by threatened breach of contract. In the following section it becomes a basis for assessing the developments which might be expected if present trends continue.

2. How the Doctrine of Duress Developed

(a) *Duress Generally*

In English common law, the doctrine of duress could only be invoked in the case of contracts induced by certain extremely vicious threats. Unlawful imprisonment could constitute duress,¹² as could "menace"¹³ which forced the victim to submit for fear: 1. of loss of life; 2. of loss of member; 3. of mayhem; 4. of imprisonment.¹⁴ Insufficient were lesser threats like battery, destruction of goods, or the wrongful detention of property,¹⁵ at least in earlier law. In later law, the doctrine was thought to extend to most threats involving physical violence.¹⁶ The threat had to be real: vain threats that would not coerce the "constant man" were not enough.¹⁷ Once such a threat was proved, relief¹⁸ was apparently given without enquiry into the merits of the coerced transaction itself.

Three centuries have passed since these simple rules were first formulated, and they have changed little. Even the criminal law of blackmail seems to have a wider scope and a more refined technique for dealing with extortionate threats.¹⁹ It seems that conduct which does not fall within the common law of duress may yet be a criminal offence.²⁰ One concession has been made: the old standard of the "constant man" has been abandoned in favour of a "subjective test" under which the court enquires in each case whether the threat

¹² 1 Rolle Abr. 687.

¹³ 2 Rolle Abr. 124 (duress *per minas*).

¹⁴ 2 Co. Inst. 483.

¹⁵ *Sumner v. Ferryman* (1709), 11 Mod. 201, 88 E.R. 989 (Q.B.).

¹⁶ *Chitty on Contracts* 2d ed. (1834), 169.

¹⁷ 1 Co. Inst. 253b.

¹⁸ On whether the contract was void or voidable, see Lanham, *Duress and Void Contracts*, (1966) 29 M.L.R. 615.

¹⁹ Winder, *The Development of Blackmail*, (1941) 5 M.L.R. 21; Hooper, *Larceny by Intimidation*, (1965) Crim.L.Rep. 532. See e.g. *Thorne v. Motor Trade Association*, [1937] A.C. 797 (H.L.) ("legitimate business purpose" test).

²⁰ E.g. *Hardie and Lane Ltd. v. Chilton*, [1928] 2 K.B. 306 (C.A.), and Lord Wright's criticism in *Thorne v. Motor Trade Association*, *ibid.*, 821-3.

so terrorized its victim that he could not resist.²¹ On the whole however, the doctrine appears to be a primitive rule, little used now that moral standards have improved.

It ought not to be inferred that the victims of less objectionable threats were thought unworthy of protection since there is evidence of extensive equitable powers of protection which operated alongside the common law rule.²² They were exercised not merely in the case of some special relationship which gave rise to an inference of over-reaching,²³ but in all cases where improper pressure was brought to bear. It is believed that by the time the English court system was fused in 1875, the Chancery courts had established a distinct jurisdiction in matters of "pressure" which did not amount to duress at common law.²⁴ The supervision of contracts procured by threatening criminal prosecution was the leading example,²⁵ though of more direct interest to the present enquiry was a single reported example of a contract set aside because it was induced by a threat to break a previous contract.²⁶

Why was the common law of duress not expanded? Presumably, less objectionable threats did not fit in easily to the common law formula. To decide whether relief should be given, the court would have to consider a wider range of factors, such as the *bona fides* of the party making the threat and the merits of the coerced transaction. Equity was better suited to deal with such complex issues. Since fusion, however, this justification has become less satisfactory. While some theorists argue that a wide equitable jurisdiction remains,²⁷ most contemporary opinion is cautious about endorsing such extensive equitable powers.²⁸ The protection offered by equity has become more precarious, and an extended common law rule is now urgently needed.

²¹ *Scott v. Sebright* (1886), 12 P.D. 21, 24, quoted in *Chitty on Contracts* 12th ed. (1890), 220, and succeeding editions.

²² 2 Bac. Abr. 7th ed. (1832), 772.

²³ *E.g. Hylton v. Hylton* (1754), 2 Ves. Sen. 547, 548-9, 28 E.R. 349, 350 *per* Lord Hardwicke, L.C.

²⁴ Winder, *Undue Influence and Coercion*, (1939) 3 M.L.R. 97, 110-119.

²⁵ *Williams v. Bayley* (1866), L.R. 1 H.L. 200.

²⁶ *Ormes v. Beadel* (1860), 2 Giff. 166, 66 E.R. 70 (V.C.); *rev'd* on other grounds (1860), 2 De G.F. & J. 333, 45 E.R. 649 (L.C.).

²⁷ Winder, *supra*, f.n.24; Salmond and Winfield, *Principles of the Law of Contracts* (1927), 258-9; approved *Mutual Finance Ltd. v. John Wetton & Sons Ltd.*, [1937] 2 K.B. 389, 394, [1937] 2 All E.R. 657, 661.

²⁸ Typical are *Anson's Law of Contracts* 23d ed. (1969), 247-8; Treitel, *Law of Contract* 3d ed. (1970), 345-6.

(b) Duress of Property

Threats to property, according to the traditional common law formulation, could not constitute duress. Threats of physical violence were possibly an exception, if only because they implied a further threat of physical injury to those who stood in the way. Nineteenth century cases confirmed this narrow view of the law of duress.²⁹ Relief, if it was to be obtained at all, had to be obtained from courts of equity.³⁰ To this general rule, a qualification must now be added.

A vital distinction was drawn, from early times, between the setting aside of a contract and the recovery of money paid.³¹ After some confusion in the early nineteenth century,³² the distinction was firmly adopted. The courts now held that if a person pays an invalid claim in order to release property which has been unlawfully detained, he may recover it.³³ Of this rule it was said,

...the principle...must be taken as well established and generally recognised. It may produce the inconvenience of circuitry of action; but the evil of allowing extortion by means of a wrongful detention of goods would be much greater; and the wrongdoer has no right to complain when he is compelled to restore money which he was warned that he had no right to extort. The case is wholly different from that class where the parties have come to a voluntary settlement of their concerns, and have chosen to pay what is found due.³⁴

The rule applied in a variety of situations where property or business interests were threatened in order to "enforce" an invalid demand. For example, a mortgagee who refused to reconvey the land on tender of the full amount due,³⁵ and an official or a railway company which refused, on tender of the proper fee, to perform their public or statutory duty,³⁶ were brought within the rule.

Though the rule is obviously distinct from the traditional law of duress, and some judges prefer to use a different name for it,³⁷ it is commonly known as "duress of goods" and falls within the general

²⁹ *Skeate v. Beale* (1841), 11 Ad. & E. 983, 113 E.R. 688 (K.B.); *Atlee v. Backhouse* (1838), 3 M.&W. 633, 150 E.R. 1298 (Exch.).

³⁰ E.g. *Mulholland v. Bartsch*, [1939] 1 W.W.R. 100 (Alta. S.C.).

³¹ *Astley v. Reynolds* (1731), 2 Stra. 915, 93 E.R. 939 (K.B.).

³² E.g. *Gulliver v. Cosens* (1845), 1 C.B. 788, 135 E.R. 753 (C.P.); *Skeate v. Beale*, *supra*, f.n.29.

³³ *Wakefield v. Newbon* (1844), 6 Q.B. 276, 115 E.R. 107; *Somes v. British Empire Shipping Co.* (1860), 8 H.L.C. 338, 11 E.R. 459.

³⁴ *Wakefield v. Newbon*, *ibid.*, 281 and 108-9 *per* Lord Denman, C.J.

³⁵ E.g. *Fraser v. Pendlebury* (1861), 31 L.J.C.P. 1.

³⁶ E.g. *Steele v. Williams* (1853), 8 Exch. 625, 155 E.R. 1502; *Great Western Ry. Co. v. Sutton* (1869), L.R. 4 H.L. 226.

³⁷ See *In Re Hooper & Grass' Contract*, [1949] V.L.R. 269, 273 *per* Fullagar, J.

definition of "duress" adopted from the *Restatement*. Its requirements are of interest, because they support the view that duress rules may be more or less stringent depending upon the merits of the transaction to be set aside. No particular degree of coercion is required beyond proof that the disputed claim was paid in order to obtain possession of wrongly detained property.³⁸ The fact that the demandant believed he had a valid claim is irrelevant.³⁹ The quotation above suggests that he must at least be warned that his claim is invalid but even this is not now the case, as it has been held that protest on the part of the person paying is no more than proof that he pays unwillingly,⁴⁰ and this may be proved in other ways. The modesty of these requirements is presumably justified on the ground that the retention of money which is not due has little claim to protection compared to a valid contract.

The English approach to duress is thus fragmented, there being not only separate legal and equitable rules, but also a special common law rule dealing with coerced payments. It may be contrasted with the approach in the United States. There, though the same basic rules were inherited, the courts seem to have accepted that any threat to property can be duress in the fullest sense.⁴¹ Contracts have been set aside on account of such a threat where the threat was extremely coercive and the resulting transaction unfair.⁴² Some courts, developing the "subjective test", managed to include in the law of duress most of what previously belonged to equity.⁴³ These developments, which first appeared in the late nineteenth century, encouraged theorists to conceive of a law of duress which would bring all legal control of coercion within a single system of rules.⁴⁴ "Economic duress", a term designed to cover all unjustified threats to a person's property, business or other economic interests, came into prominence in theoretical⁴⁵ and later in judicial discussion of

³⁸ *Shaw v. Woodcock* (1827), 7 Barn. & Cresw. 73, 108 E.R. 652 (K.B.).

³⁹ *Knutson v. The Bourkes Syndicate*, [1941] S.C.R. 419, 425.

⁴⁰ *Maskell v. Horner*, [1915] 3 K.B. 106, 120-1, 124, 126 (C.A.).

⁴¹ See 5 *Williston on Contracts*, *supra*, f.n.7, para. 1617; Dalzell, *supra*, f.n.5, 242.

⁴² E.g. *First National Bank of David City v. Sargent*, 65 Neb. 594, 81 N.W. 595, 600, 59 L.R.A. 296 (1902).

⁴³ E.g. *Galusha v. Sherman*, 105 Wis. 263, 81 N.W. 495, 47 L.R.A. 417 (1900). Missouri law is a good example of the development of this principle: see *Mississippi Valley Trust Co. v. Begley*, 298 Mo. 684, 252 S.W. 76 (1923), and cases there cited.

⁴⁴ 10 *Am. & Eng. Encyc. Law* 2d ed. (1899), 321-7; 3 *Williston on Contracts* 1st ed. (1922), 2830; 2 *Restatement of Contracts*, Ch. 16, 938.

⁴⁵ E.g. Dalzell, *supra*, f.n.5; Dawson, "Economic Duress", *supra*, f.n.6. Cf. Annot., 79 A.L.R. 655 (1932) ("business compulsion").

the law. While this unified approach may tend to obscure proper matters for discrimination, it has the marked advantage of emphasizing the law's responsibility to deal with all issues arising from coerced consent in a consistent way.

(c) *Duress by Threatened Breach of Contract*

Duress by threatened breach of contract is closely linked with "duress of goods". Though there is no English case in point, some Commonwealth courts have pressed the analogy, allowing the recovery of payments made to procure the performance of a contract where the money was not due. Two cases, one from the Supreme Court of Canada and the other from the High Court of Australia, establish the basic approach. In view of the authority of the courts which decided them, and the absence of authority elsewhere, they are taken to represent Commonwealth law.

(i) British Commonwealth Law

In the Canadian case, *Knutson v. The Bourkes Syndicate*,⁴⁶ the plaintiff Syndicate bought land under an option agreement. The land was subject to an encumbrance the seller promised to discharge, but difficulties were encountered and Knutson, a member of the Syndicate, paid off the encumbrance himself. Knutson also acquired, subject to the option agreement, the seller's interest in the land. He had expected to be reimbursed for the money paid to the encumbrance holder, but the Syndicate refused to pay. Knutson then declined to transfer the land until his claim was met. The Syndicate paid him and later successfully sued for the return of the money. The principal judgment stated the following after referring to English cases in which the "duress of goods" principle was applied:

Here the evidence is plain that the payments were made under protest, and that they were not voluntary in the sense referred to in the cases mentioned. The circumstance that O.L. Knutson thought he had a right to insist upon the payments cannot alter the fact that under the agreement of September 16, 1936, it is clear that he had no such right. In order to protect its position under the option agreement and to secure title to the lands . . . the Syndicate was under a practical compulsion to make the payments in question and is entitled to their repayment.⁴⁷

In order to establish this claim, the Syndicate apparently did not

⁴⁶ *Supra*, f.n.39. Additional facts are stated in *Bourkes Syndicate v. Olson* (1940), 49 O.W.N. 442, [1940] 4 D.L.R. 641 (C.A.).

⁴⁷ *Supra*, f.n.39, 425.

have to prove that it was under any immediate or pressing need for the property when it paid the money.⁴⁸

The Australian decision, *Smith v. William Charlick Ltd.*,⁴⁹ explores the outer limits of the principle. Charlick was a wheat dealer who bought his produce from the Australian Wheat Board. When the Wheat Board authorized an increase in price, Charlick made a profit from stocks he had in hand at the time of the increase. The Board insisted that Charlick pay the extra profit over to the Board, or else it would cut off future supplies. Since the Board was the monopoly supplier, Charlick was forced to pay to stay in business. He sued to recover the money. The lower court,⁵⁰ after an extensive review of the English authorities on the duress of goods principle, concluded the money was recoverable as having been demanded without right and paid to avert a commercial evil. The High Court reversed this decision, restrictively interpreting the three cases on which the lower court decision was based.⁵¹ According to the High Court, a threat to perform a lawful act is not included within the general rule. The Board was allowed to keep the money because in threatening to withhold future contracts, it was not threatening anything unlawful.

The Court does not seem to have been unanimous in the test to be applied in such cases. Knox, C.J. defined it in technical terms, referring to threats of "unauthorised interference with the person or the property or any legal right".⁵² He evidently thought that, apart from the special case of the unjustified demand of a public official, there would have to be a threat of an unlawful act. A different view seems to have been taken by Isaacs, J., who pointed out that in successful duress claims the "'compulsion and pressure' originated from the defendant",⁵³ which was not the case here since "[r]efusal to relieve from business difficulties is not the creation of those difficulties".⁵⁴ This view would leave the question of unlawfulness open, but other statements in the judgment lend support to Knox, C.J.'s test, and the ratio is unclear. Higgins, J., concurring with the majority

⁴⁸ *Ibid.*, 423. The judgment was criticized in a Note, (1941) 19 C.B.R. 694, for not examining whether alternative remedies were available, but in *In Re Hooper & Grass' Contract*, *supra*, f.n.37, Fullagar, J. was "much more impressed by the decision than by the criticism".

⁴⁹ (1924), 34 C.L.R. 38 (High Ct.).

⁵⁰ *William Charlick Ltd. v. Smith*, [1922] S.A.S.R. 551 (Sup. Ct.).

⁵¹ *Hills v. Street* (1828), 5 Bing. 37, 130 E.R. 973 (C.P.); *Kenday v. Wood* (1871), L.R. 6 Ex. 243; *Melbourne Tramway and Omnibus Co. v. Mayor, etc., of Melbourne* (1903), 28 V.L.R. 647 (Full Ct.).

⁵² *Supra*, f.n.49, 51.

⁵³ *Ibid.*, 55.

⁵⁴ *Ibid.*, 56.

on this point, expressed himself against an "unlawfulness" test, stating that the enquiry in each case is whether "the party receiving the money [has] the right to take advantage of his neighbour's necessity or not".⁵⁵ The other judges do not seem to have endorsed one view or another,⁵⁶ and later judicial discussion leaves the matter open.⁵⁷

These cases emphasize the practical importance of the question of whether the threatened action is unlawful. If, as in *Knutson*, the party making the unjustified demand has refused to perform his contractual duty, the party seeking recovery is not likely to encounter any great obstacles. If, as in *Smith*, the threat could be carried out without any breach of duty, relief will be much more difficult⁵⁸ to obtain. It would be premature, however, to conclude that a general rule to this effect will dispose of all the problems with which this article is concerned. In theory at least, it is possible to maintain a broader view of duress by threatened breach of contract which could include any threat, lawful or not, which forces the other party to a contract to forego the benefits to which he is entitled under it. Such a threat is wrongful because it contravenes an implicit duty not to subvert the terms of an existing contract and to cooperate with the other party in realizing its purposes. Whether or not such a theory can be maintained in law depends upon a much closer examination of the implications of the principles established in these cases and their application in subsequent decisions.

(ii) American Law

The law has developed somewhat differently in the United States. It must be remembered that a great deal more was at stake than the logical extension of a narrow rule governing coerced payments. Because the doctrine of duress tended to be seen as a general principle affecting all transactions induced by threat, including contracts as well as money payments, a holding that a threatened breach of contract could amount to duress would have far-reaching consequences. Some hesitation was to be expected.

The issue first arose in the late nineteenth and early twentieth century. When invited to find that a threat to break a contract could

⁵⁵ *Ibid.*, 65.

⁵⁶ See *ibid.*, 68 *per* Rich, J., and 70 *per* Starke, J.

⁵⁷ See *Nixon v. Furphy* (1925), 25 S.R. (N.S.W.) 151; *Criterion Theatres Ltd. v. Melbourne and Metropolitan Board of Works*, [1945] V.L.R. 267; *In Re Hooper & Grass' Contract*, *supra*, f.n.37. All dealt with threatened conduct which was technically a breach of duty to the plaintiff.

⁵⁸ For Canadian authority, see cases cited *infra*, Section 3(c), and also *Sutherland v. Sutherland*, [1946] 4 D.L.R. 605, 613-4 (B.C.S.C.).

constitute duress, some courts denied the possibility outright.⁵⁹ In others, relief was refused for reasons which made the possibility very doubtful. In *Silliman v. U.S.*,⁶⁰ for example, a claim of duress was rejected because the claimants' duty, "if they expected to rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiation of a valid contract". It was apparently thought irrelevant that had the claimants waited for their suit to be heard, they might in the meantime have suffered financial ruin. This attitude was justified in the influential case of *Hackley v. Headley*, where the court said,

It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made his money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand.⁶¹

The court thought it unfair to treat the claimant differently from anyone else who re-negotiated a contract which had broken down merely because his personal circumstances gave rise to a special need for performance, preventing resort to the normal remedies for breach of contract. In the light of these authorities, it is difficult to see how a successful plea of duress could ever have been made out, though admittedly their effect was more optimistically summarized by the United States Supreme Court in 1926.⁶²

Some decisions nevertheless permitted relief without directly opposing the leading authorities.⁶³ A device occasionally used was to classify the threat as an invasion of "property rights". Technically, this was sometimes justified. In one case, for example, it was applied to the conduct of a seller of an identified herd of livestock who, after most of the price had been paid, refused to deliver it to the purchaser.⁶⁴ In this case, "property" in the stock may have passed to

⁵⁹ E.g. *Miller v. Miller*, 68 Pa.St.R. 486, 493-4 (1871); *Tucker v. State*, 72 Ind. 242, 245 (1880); *Taylor v. Ford*, 131 Cal. 440, 63 P. 770, 772 (1901); *Wood v. Kansas City Home Telephone Co.*, 223 Mo. 537, 123 S.W. 6, 13 (1909).

⁶⁰ 101 U.S. 465, 471, 25 L. Ed. 987, 989 (1879). Cf. *Cable v. Foley*, 45 Minn. 421, 47 N.W. 1135, 1136 (1891); *McCormick v. Dalton*, 53 Kan. 146, 35 P. 1113 (1894); *Rosenfeld v. Boston Mutual Life Ins. Co.*, 222 Mass. 284, 110 N.E. 304 (1915).

⁶¹ 45 Mich. 569, 8 N.W. 511, 514 (1881), criticized in Dalzell, *supra*, f.n.5, 256-8. The argument is not confined to failure to pay money; see *Goebel v. Linn*, 47 Mich. 489, 11 N.W. 284 (1882). The decision was widely cited in contemporary cases in many jurisdictions. Its most recent application seems to have been in *Gill v. S.H.B. Corp.*, 332 Mich. 700, 34 N.W. 2d 526, 7 A.L.R. 2d 252 (1948).

⁶² *Hartsville Oil Mill v. U.S.*, 271 U.S. 43, 48, 46 S.Ct. 389, 70 L. Ed. 822 (1926).

⁶³ See Dalzell, *supra*, f.n.5, 255-276; 5 *Williston on Contracts*, *supra*, f.n.7, para. 1620.

⁶⁴ *Lonergan v. Buford*, 148 U.S. 581, 37 L. Ed. 569, 572 (1893).

the purchaser, at least in a technical sense, before the threat was made.

In other cases, such reasoning was more tenuous. In *Harris v. Cary*,⁶⁵ the plaintiff had been promised shares in a trading company, in return for services rendered. The defendant said he would allow the company to go to ruin if the plaintiff would not accept a reduced number of shares. Though such a threat would seem to be no more than a threat to break an implicit term of the contract, the court evidently saw it as a threat to property rights. This is difficult to reconcile with the leading authorities. Although the device occasionally re-appears in modern cases,⁶⁶ it does not seem to have played a significant part in shaping modern law.

More significant was the doctrine of "business compulsion" or "moral duress"⁶⁷ which came into vogue in the early twentieth century and has been described in these terms:

...where one, to prevent injury to his person, business or property, is compelled to make payment of money which the party demanding has no right to receive, and no adequate opportunity is afforded the payor to effectively resist such payment, it is made under duress, and can be recovered.⁶⁸

The doctrine was useful in cases where a party refused to perform his contract unless he received an additional benefit,⁶⁹ or attempted to enforce an invalid demand by threatening to invoke a right of

⁶⁵ 112 Va. 362, 71 S.E. 551 (1911).

⁶⁶ E.g. *Smelo v. Girard Trust Co.*, 158 Pa. Super. 473, 45 A. 2d 264, 265 (1946); *Weiner v. Tele King Corp.*, 123 N.Y.S. 2d 101, 104-5 (Sp. Term 1953); *U.S. ex rel. Kirby v. John A. Johnson & Sons*, 137 F. Supp. 881, 886 (E. D. Tenn. 1954); aff'd 229 F. 2d 713 (6th Circ. 1955).

⁶⁷ These terms tend to be used indiscriminately to cover all types of duress not included in the old common law. They can be used more precisely. "Business compulsion" has been used to describe the rule stated in the text; see e.g. *Ferguson v. Associated Oil Co.*, 173 Wash. 672, 24 P. 2d 82, 83 (1933); noted (1934) 8 Wash.L.Rev. 140. "Moral duress" is used particularly in Illinois and Missouri, where the rule is combined with the "subjective test" of duress, so that the court takes into account pressures which would not coerce a reasonable businessman, but in fact coerce the particular plaintiff. See Comment, *Moral Duress in Illinois*, [1955] U.Ill.L.F. 312; *Brueggestratt v. Ludwig*, 184 Ill. 24, 56 N.E. 419 (1900); *Rees v. Schmits*, 164 Ill.App. 250, 258 (1911).

⁶⁸ *Illinois Merchants Trust Co. v. Harvey*, 335 Ill. 284, 167 N.E. 69, 72 (1929).

⁶⁹ E.g. *Brown v. Worthington*, 162 Mo.App. 508, 142 S.W. 1082 (1912); *Pittsburgh Steel Co. v. Hollingshead & Blei*, 202 Ill.App. 177 (1916); *Manhattan Milling Co. v. Manhattan Gas & Elec. Co.*, 115 Kan. 712, 225 P. 86 (1924); *Inland Empire Refineries Inc. v. Jones*, 69 Ida. 335, 206 P. 2d 519 (1949).

forfeiture.⁷⁰ It does not seem, however, to have seriously impinged on the leading authorities on duress by threatened breach of contract. It did not imply that such a threat was wrongful since, on the above formulation, the threat did not have to be wrongful in itself. Nor does it seem to have been invoked to justify the rescission of an otherwise binding contract.⁷¹ The leading authorities were thus left largely unimpaired.

American courts have thus adopted an equivocal attitude, allowing relief in certain cases, but not admitting that threatened breach of contract is duress in the full sense. In some jurisdictions, however, the courts have recently moved toward a greater recognition of this form of duress. In New York, it has been unequivocally accepted.⁷² In the Federal courts, after a long period of development, the law has now crystallized into a recognizable set of rules.⁷³ In New Jersey, it has been the subject of a striking extension of the law of "moral duress".⁷⁴ These developments may form a nucleus for a more comprehensive law of duress by threatened breach of contract.

3. The Protection Offered by the Law of Duress

Even in the United States, a general theory of duress by threatened breach of contract has not been easy to establish. In the Commonwealth, the acceptance of a narrow rule concerned with coerced payments, closely analogous to duress of goods, is not a substantial basis for such a theory. What signs are there of movement towards a broader theory? Could it provide a satisfactory system of protection?

For the purpose of the present enquiry, it will be assumed that such a theory would include the legal controls exercised over all forms of pressure designed to force another party to a contract to give up his contractual rights. Three forms of pressure are of

⁷⁰ E.g. *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 P. 640 (1921); *Ferguson v. Associated Oil Co.*, *supra*, f.n.67.

⁷¹ See *Pittsburgh Steel Co. v. Hollingshead & Blei*, *supra*, f.n.69, 182; *White v. McCoy Land Co.*, 229 Mo.App. 1019, 87 S.W. 2d 672, 684-5 (1935) (contract invalidated on other grounds); *aff'd White v. Scarritt*, 341 Mo. 1004, 111 S.W. 2d 18 (1937); *London Homes Inc. v. Korn*, 44 Cal.Rptr. 262, 267 (Cal.App. 1965).

⁷² *Austin Instrument Inc. v. Loral Corp.*, 29 N.Y. 2d 124, 272 N.E. 2d 533, 535 (1971). Cf. *Newsom v. Medis*, 205 Okla. 574, 239 P. 2d 784, 786 (1951).

⁷³ E.g. *Aircraft Associates & Manufacturing Co. v. U.S.*, 357 F. 2d 373, 174 Ct.Cl. 886 (1966).

⁷⁴ E.g. *Ross Systems Inc. v. Linden Dari-Delite Inc.*, 35 N.J. 329, 173 A. 2d 258 (1961).

particular legal significance and will be examined in this article. They are: (a) refusal to perform a contractual obligation; (b) threatened cancellation or forfeiture under a contract, pursuant to an invalid demand; and (c) pressure unconnected with the contract. In the last two cases there is often no threat to break a contract in the technical sense, unless it can be found in the breach of an implied obligation not to obstruct the other party in the enjoyment of the benefits of his contract. It will be shown, however, that proof of such a technical breach is not always necessary to establish duress. The problems raised by all three forms of pressure are so closely connected that, for the purposes of the present article, they are all included within the admittedly imprecise term, "duress by threatened breach of contract".

(a) *Refusal to Perform a Contract*

Where one party to a contract refuses to perform it unless he is given some additional benefit, and the other party lets him have it, in what circumstances will the law require the benefit to be restored? This question is central to the whole enquiry. The two Commonwealth cases where the theory of the law governing this type of duress have been most discussed, *Knutson v. The Bourkes Syndicate*⁷⁵ and *In Re Hooper & Grass' Contract*,⁷⁶ seem to provide a ready answer. Where the benefit takes the form of money paid pursuant to an invalid demand, it must be restored. The recipient has obtained it by threatening "to withhold that to which the other party was legally entitled, unless he were paid a price which he had no right to receive".⁷⁷ Special features were present in these cases however, and the courts' general statements may require revision as the law of duress develops. A more straightforward case involving this type of duress is the New South Wales decision, *T. A. Sundell & Sons Pty. Ltd. v. Emm Yannoulatos (Overseas) Pty. Ltd.*,⁷⁸ and it seems preferable to begin the analysis here. Though the full court did not claim to be establishing new theory in that case, its observations may have important implications for the law of duress.

In *Sundell*, the defendant promised to import building materials for the plaintiff, who required them for a government contract. When the overseas price of the materials rose, the defendant unjustifiably insisted upon an additional payment before he would

⁷⁵ *Supra*, f.n.39.

⁷⁶ *Supra*, f.n.37.

⁷⁷ *Ibid.*, 272.

⁷⁸ [1956] S.R. (N.S.W.) 323 (Eq.).

supply them. Not being able to obtain them elsewhere, the plaintiff risked the collapse of its government contract if the defendant would not honour its obligations. It paid the money, and then sued for its recovery. The defendant's principal objection, which was readily disposed of by reference to contrary Australian authority,⁷⁹ was that a threatened breach of contract could not constitute duress. Of greater interest were its other two arguments, which raised important questions.

First, how far does the law of duress extend? The defendant argued that there was no room for its operation here, since the parties' former contractual rights had been superseded by a new contract under which the plaintiff agreed to pay the additional amount. The court gave two alternative answers:

In our view, the whole of the circumstances indicate that Mr. Sundell did no more than agree to pay any increase to which this or any other circumstance would entitle the appellant as against the respondent.

But even if such a promise was made as is alleged, we are of opinion that it was not binding because there was no consideration for it... every promise allegedly given to the plaintiff by the defendant under the so-called second agreement was identical with a promise given under the original agreement.⁸⁰

If the second answer is combined with the court's ultimate conclusion that relief should be given for duress, an added function is given to the law of duress. It provides a remedy not only where money is paid in response to a simple demand, but also where money is paid under an apparent contract of modification which turns out to be invalid for want of consideration. This is particularly significant because in the latter case, the right of recovery does not seem easy to establish without the law of duress. It is true that the court's reasoning on consideration may be an *obiter dictum*, but it is nevertheless a valuable indication of the direction the law of duress may take.

If the courts are prepared to go this far, they may be urged to go the full distance and hold that, in appropriate cases, the law of duress may invalidate otherwise binding contracts. The distinction made in cases of duress of goods between recovery of money paid and the setting aside of a contract has already been strongly criticized by commentators as being arbitrary and unrealistic.⁸¹

⁷⁹ *Nixon v. Furphy*, *supra*, f.n.57; *White Rose Flour Milling Co. v. Australian Wheat Board* (1944), 18 A.L.J.R. 324 (H.Ct., Rich.J.); *In Re Hooper & Grass' Contract*, *supra*, f.n.37. See also *Carr v. Gilsenan*, [1946] Qd. St.R. 44 (Full Ct.).

⁸⁰ *Supra*, f.n.78, 327.

⁸¹ Goff & Jones, *Law of Restitution* (1966), 150-1; 5 *Williston on Contracts*, *supra*, f.n.7, para. 1617.

In the present context the distinction is even more unsatisfactory, because it means that the courts must apply the technical law of consideration when much more flexible methods for determining the validity of a coerced transaction are available within the law of duress itself. It is true that American courts seem to have been reluctant to extend the law so far.⁸² More recently, however, the New York⁸³ and Federal courts⁸⁴ have clearly done so, and this accords with the general theory of economic duress developed in cases of duress of goods.⁸⁵ In the Commonwealth, the same result could be achieved by amalgamating the law of duress with older equitable doctrine,⁸⁶ a step with much to commend it in terms of simplicity and rationality.

Secondly, what degree of coercion is required? In *Sundell*, the defendant argued that there was no proof of "practical compulsion". These terms are used in other Australian cases,⁸⁷ though it is not clear whether they imply that "genuine coercion" must be established as a matter of fact. Speaking of duress of property generally, the court in *In Re Hooper & Grass' Contract* said that "the withholding of another's legal right is, I think, itself treated as 'practical compulsion'".⁸⁸ These comments seem, however, to be *obiter*, since in that case there was an accompanying threat to cancel the contract which was apparently coercive.⁸⁹ The Canadian Supreme Court seems to have taken the same view in *Knutson*,⁹⁰ but there too there was some evidence of coercion because the plaintiffs stood to lose a profitable re-sale if they did not secure title within a reasonable time.

The court in *Sundell* departed from these dicta by treating "practical compulsion" as a separate question of fact to be determined by the trial judge.⁹¹ A similar emphasis on coercion as an

⁸² *Supra*, f.n.71.

⁸³ *Supra*, f.n.72.

⁸⁴ *Supra*, f.n.73.

⁸⁵ *Supra*, f.n.41.

⁸⁶ Discussed *supra*, section 2(a). See *Scott v. Sebright* (1886), 12 P.D. 21, 24, 31, and explanation of that case (and others) in *Galusha v. Sherman*, *supra*, f.n.43.

⁸⁷ See *Smith v. William Charlick Ltd.*, *supra*, f.n.49, 56 *per* Isaacs, J.; *Nixon v. Furphy*, *supra*, f.n.57, 160; *Criterion Theatres Ltd. v. Melbourne & Metropolitan Board of Works*, *supra*, f.n.57, 274. There has been subsequent High Court discussion of the *colore officii* principle, but that is not in issue here.

⁸⁸ *Supra*, f.n.37, 272. Fullagar, J. concedes that practical compulsion may be an issue of fact in other cases.

⁸⁹ *Ibid.*, 271.

⁹⁰ *Supra*, f.n.39, 423.

⁹¹ *Supra*, f.n.78, 328.

issue of fact is found in another judgment concerned with a refusal to perform a contract for the sale of goods, where the court observed that the plaintiff buyer "could not help itself".⁹² These statements, while falling short of establishing a required degree of coercion in cases of duress by threatened breach of contract, indicate judicial interest in this possibility, and may be the foundation of a new rule.

The requirement is generally imposed in American decisions. Typical is the statement of the majority of the New York Court of Appeals in *Austin Instrument Inc. v. Loral Corp.*:

... a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply and that the remedy of an ordinary action for breach of contract would not be adequate.⁹³

This view can be traced back to two early Court of Appeals decisions. In one, a contractor had to do extra work in order to get his money, but there was no evidence that he could not have sued for it in the normal way. The court treated him as having made a gift of the extra work.⁹⁴ In the other, where a creditor agreed to settle for a reduced sum, the court said:

There was nothing so peculiar in their position, or in the position of [the debtor], as to give them any stronger or better claim for relief than any creditor would have who compromises a claim against his debtor for fear that he would be subjected to expense, delay, and risk in enforcing payment thereof.⁹⁵

The rule has been consistently enforced in New York, and appears in various forms in many other jurisdictions.

The reason for the rule evidently lies in the court's concern not to upset ordinary commercial arrangements. If a businessman, for reasons of expedience or otherwise, chooses not to insist on his strict legal rights, it would be wrong to allow him to recall the transaction later on the pretext that it was induced by a threatened breach of contract. In the absence of evidence of coercion, the transaction must be presumed fair, and the businessman left to be content with whatever commercial goodwill he may have acquired. This policy applies to duress by threatened breach of contract with special force; it is less apposite in cases where the

⁹² *White Rose Flour Milling Co. v. Australian Wheat Board*, *supra*, f.n.79, 327.

⁹³ 29 N.Y. 2d 124, 272 N.E. 2d 533, 535 (1871).

⁹⁴ *Doyle v. Rector, etc., of Trinity Church*, 133 N.Y. 372, 31 N.E. 221, 222 (1892).

⁹⁵ *Secor v. Clark*, 117 N.Y. 350, 22 N.E. 754, 755 (1889).

giving of consideration is at issue, since there the question is whether a generous promise should be enforced rather than whether a closed transaction should be re-opened. Still less does it apply where money has been paid to release goods which have been wrongfully detained, and here the American courts have been much less consistent in requiring proof of coercion.⁹⁶

It follows that the Commonwealth decisions which advert to questions of proof of coercion are not aberrational, but touch on an issue which is of some importance in cases of duress by threatened breach of contract. Adoption of this requirement would show that the law of duress, in this context, is not simply a logical extension of the law of duress of goods. It would also lead to a third and final problem which is not mentioned in *Sundell* or the other Commonwealth cases, but which has evidently troubled American courts.

According to legal theory, before a threat will constitute duress it must be "wrongful". Is it sufficient to show that the threat would, if carried out, involve a breach of contract? The rule requiring proof of coercion assumes that new contractual arrangements may be fair, even though they are induced by such a threat. Yet proof that the threat was coercive does not necessarily prove that the resulting transaction was unfair. The so-called "victim" may simply have been impelled to agree to a contractual re-arrangement that a sensible person would have agreed to anyway, without being pressured by the threat. Why should not such a transaction stand? The case against relief was put strongly in the old decision of *Hackley v. Headley*:

The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendant's conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper.⁹⁷

To avoid the charge that they are administering a "dangerous" and "unequal" doctrine, the courts may feel obliged to enquire whether the coercing party's conduct was morally blameworthy.

⁹⁶ Dawson, "Economic Duress", *supra*, f.n.6, 256-8; Dalzell, *supra*, f.n.5, 241-2.

⁹⁷ 45 Mich. 569, 8 N.W. 511, 514 (1881).

Such an enquiry has been undertaken in a few cases, notably *King Construction Co. v. W.M. Smith Electric Co.*⁹⁸ In that case, the supplier of a crane refused to deliver the right crane until the purchaser agreed to pay a considerably higher price. In upholding the purchaser's claim of duress, the court seems to have thought it relevant that the supplier knew that it was in breach, and that the purchaser had no means of passing on the extra cost. It seems implicit that, while the threat would have been a breach of contract if carried out, such proof might not have been sufficient on its own to justify relief.

On the other hand, it may be contended that "moral blame" is altogether too vague a criterion, and it would still lead to a position where "no-one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need".⁹⁹ A simple rule, allowing or denying relief in all cases, may be preferable. This consideration may explain the tendency in the early American cases to hold that the threat to break a contract could never constitute duress, though this rule would now be considered too harsh. It also helps to justify the recent New York formulation in *Austin Instrument Inc. v. Loral Corp.*,¹⁰⁰ which adopts the view that a threat to refuse to perform a contract is wrongful in itself. This view perhaps goes too far if it implies that a coerced yet reasonable solution of a difficult commercial problem must necessarily be set aside. It should be noted that earlier New York authority does not seem explicitly to support such an absolute view,¹⁰¹ and in some pre-

⁹⁸ 350 S.W. 2d 940 (Tex.Civ.App. 1961). See especially p. 945; elsewhere, the court seems to run together its reasoning on duress and on contract modification. Cf. cases cited *infra*, f.n.102. Some support might be found in a few cases on business compulsion for such an enquiry; see *Brown v. Worthington*, 162 Mo.App. 508, 142 S.W. 1082, 1085 (1912) ("...if it is against equity and good conscience for the money to be withheld from plaintiff..."); *Thompson Crane & Trucking Co. v. Eymann*, 123 Cal.App. 2d 904, 267 P. 2d 1043, 1046 (1954) ("... something more than a mere passive threat to breach a previous oral contract").

⁹⁹ *Hackley v. Headley*, *supra*, f.n.97, 514.

¹⁰⁰ *Supra*, f.n.93.

¹⁰¹ Three major authorities are cited for the proposition that a threatened breach of contract is duress: (1) *E.I. Du Pont de Nemours & Co. v. J.I. Hass Co.*, 303 N.Y. 785, 103 N.E. 2d 896 (1952) (memorandum decision, reason for finding duress unstated); (2) *Gallagher Switchboard Corp. v. Heckler Elec. Co.*, 36 Misc. 2d 225, 232 N.Y.S. 2d 590 (Sp. Term 1962) (refusal of motion to strike out defence, on authority, *inter alia*, of *Wou v. Galbreath-Ruffin Realty Co.*, *infra*, f.n.102); (3) 13 *Williston on Contracts* 3d ed. (1970), 705 (author states that a threat to breach a contract "may involve" duress, and cites *King*

vious cases where duress was held to exist, the courts undertook to show that the coercing party was guilty of something more than a mere threat to break the contract.¹⁰²

An attractive middle way between a discretionary approach and a hard and fast rule is to be found in the decisions of the Federal courts. This approach, which has been developed over a long period,¹⁰³ is stated in *Fruhauf Southwest Garment Co. v. U.S.*:

An examination of the cases, however, makes it clear that three elements are common to all situations where duress has been found to exist. These are: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.¹⁰⁴

The third element is crucial, and is elaborated in the judgment:

In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities.¹⁰⁵

The defendant must therefore be "responsible" for the plaintiff's troubles.¹⁰⁶ This implies both blame and causation.

The defendant is responsible for the plaintiff's difficulties only if he commits a wrongful act. It is not duress to refuse to deal with the plaintiff except on hard terms,¹⁰⁷ or to proceed against

Construction Co. v. W.M. Smith Electric Co., *supra*, f.n.98, as a leading example). Pre-1950 cases are generally equivocal, some allowing relief for unclear reasons, some refusing relief because of failure to prove coercion, and some refusing relief in terms which make the possibility of duress doubtful.

¹⁰² *Wou v. Galbreath Ruffin Realty Co.*, 22 Misc. 2d 463, 195 N.Y.S. 2d 886, 888-9 (Sp. Term 1959); *Pearlman v. State*, 18 Misc. 2d 494, 191 N.Y.S. 2d 422, 427 (Ct.Cl. 1959); and *cf. Manno v. Mutual Benefit Health and Accident Association*, 18 Misc. 2d 80, 87 N.Y.S. 2d 709, 713 (Sp. Term 1959).

¹⁰³ See *Hartsville Oil Mill v. U.S.*, 271 U.S. 43, 48-9, 46 S.Ct. 389, 70 L. Ed. 822 (1925); *Hazelhurst Oil Mill & Fertilizer Co. v. U.S.*, 42 F. 2d 331 (Ct.Cl. 1930); *James Shewan & Sons v. U.S.*, 73 Ct.Cl. 49 (1931); *Struck Construction Co. v. U.S.*, 96 Ct.Cl. 186 (1942); *U.S. v. Bethlehem Steel Corp.*, 315 U.S. 289, 301-2, 62 S.Ct. 581, 86 L. Ed. 855 (1942). Dalzell, *supra*, f.n.5, 254, puts such cases in a special category relating to government officials, but the principle now seems to be applied more widely.

¹⁰⁴ 111 F.Supp. 945, 951 (Ct.Cl. 1953). *Cf. W.R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F. 2d 896, 904 (8th Circ. 1957); *Urban Plumbing and Heating Co. v. U.S.*, 408 F. 2d 382, 389, 187 Ct.Cl. 15 (1969).

¹⁰⁵ *Ibid.*, 951.

¹⁰⁶ *Ibid.*

¹⁰⁷ *French v. Shoemaker*, 14 Wall. (U.S.) 314, 20 L. Ed. 852, 856 (1972); *Lawrence v. Muter Co.*, 171 F. 2d 380, 382 (7th Circ. 1948).

him on a lawful claim.¹⁰⁸ In cases of threatened breach of contract, there must not only be a refusal to perform the contract,¹⁰⁹ but also oppressive conduct which goes beyond what is reasonably necessary to protect the defendant's legitimate interests.¹¹⁰

There must also be a clear causal connection between the wrongful conduct and the coercive circumstances. It is not enough that the defendant makes existing difficulties worse.¹¹¹ If the defendant fails to pay money due under the contract,¹¹² it must be shown that the payment would have relieved the plaintiff of his financial difficulties. So, in one of the few cases where the failure to pay money has been held to constitute duress, the court found that "if the plaintiff had been credited with as much as \$150,000 [its minimum claim] on the parts claim, that sum, together with other payments and credits, would have satisfied almost all of its debt to the defendant",¹¹³ whose threat to default the plaintiff under the contract would then have been averted.

The theory of the causal test seems to be that there is a strong case for relief only where the defendant takes advantage of his own wrong.¹¹⁴ In practice, it presumably means that a man in general financial difficulties may go around to his debtors collecting what he can, and no enquiry will be made into the propriety of the arrangements he makes. When he deals with a single major debtor, however, he is much more likely to be overreached, and he is given special protection. The test seems to be a useful device to limit the doctrine to those cases where it is most clearly needed. The whole Federal approach, while it is perhaps unduly cautious,

¹⁰⁸ *In Re Prima Co., Harris Trust & Savings Bank v. Keig*, 98 F. 2d 952, 965 (7th Circ. 1938), cited in *Lawrence v. Mutter Co., ibid.*, as authority for the proposition that "mere stress of business condition does not constitute duress where the defendant was not responsible for such circumstances".

¹⁰⁹ *W.R. Grimshaw Co. v. Nevil C. Withrow Co., supra*, f.n.104, 904 (threat of lawful declaration of default not duress); *Harvey-Whipple Inc. v. U.S.*, 342 F. 2d 48, 53, 169 Ct.Cl. 689 (1965); *Inland Empire Builders Inc. v. U.S.*, 424 F. 2d 1370, 1377 (Ct.Cl. 1970).

¹¹⁰ See cases cited *infra*, f.n.115, and *cf. Fruhauf, supra*, f.n.104, 952.

¹¹¹ As in *Fruhauf, ibid.*, 951-2.

¹¹² In other types of case, proof is no doubt much easier. See *e.g. Urban Plumbing and Heating Co. v. U.S., supra*, f.n.104 and *Struck Construction Co. v. U.S., supra*, f.n.103 (disruption of construction contracts by unreasonable orders).

¹¹³ *Aircraft Associates & Manufacturing Co. v. U.S.*, 357 F. 2d 373, 379, 174 Ct.Cl. 886 (1966). *Cf. James Shewan & Sons Inc. v. U.S., supra*, f.n.103 (two major debts could have been satisfied).

¹¹⁴ *James Shewan & Sons Inc. v. U.S., ibid.*, 93.

is a useful illustration of the way in which courts can extend the law of duress and yet avoid its more troublesome implications.

In view of the relatively undeveloped state of Commonwealth law, there is little point in speculating which of these different approaches to the problem of "wrongfulness" is most appropriate. Clearly, there are persuasive arguments in favour of a test of wrongfulness which does not depend solely upon whether the threatened action would be a breach of contract. They become even more persuasive when considered in relation to threats made in support of *bona fide* legal claims. If the party making a threat knows that he is asking for more than the contract allows him, his conduct will only be justifiable in exceptional circumstances, as where, for example, the original contract has become unsuitable because of unexpected changes in conditions. If, however, he genuinely, though incorrectly, believes that he is asking only for what is due, his threats cannot normally be regarded as oppressive.¹¹⁵ Yet it may still be possible for him to act wrongfully by taking unnecessarily harsh or sudden measures which prevent the other party from litigating a disputed legal issue.

The problem of the *bona fide* legal claim has arisen in a number of Commonwealth cases on duress by threatened breach of contract, and it must be conceded that this consideration has been disregarded in the leading authorities. In *Knutson v. The Bourkes Syndicate*,¹¹⁶ where the defendant vendor relied on a strong moral as well as legal claim in refusing to perform the contract, the court treated the existence of his *bona fide* claim,¹¹⁷ which was not clearly void,¹¹⁸ as irrelevant. The same attitude is evident in *In Re Hooper & Grass' Contract*,¹¹⁹ where a vendor of land refused to convey it until a disputed legal demand was paid, and the court, relying on *Knutson*, allowed relief without reference to the vendor's belief in the validity of his demand. While it is true that these cases did not involve any element of compromise, nevertheless the contracts were performed in good faith, on the understanding that the vendors' legal demands had prevailed. It is re-

¹¹⁵ Cf. *Bennett v. Mahon*, 180 F. 2d 224, 231 (8th Circ. 1950); *La Crosse Garment Manufacturing Co. v. U.S.*, 432 F. 2d 1377, 1382-3 (Ct.Cl. 1970). See also *Weinman Pump Manufacturing Co. v. Cline*, 116 Ohio App. 4, 183 N.E. 2d 465, 471-2 (1961) *per Duffey P.J. diss.*

¹¹⁶ *Supra*, f.n.39.

¹¹⁷ *Ibid.*, 425.

¹¹⁸ *Ibid.*, 423.

¹¹⁹ *Supra*, f.n.37; and cf. *Nixon v. Furphy*, *supra*, f.n.57. Compare *Donaldson v. Gray*, [1920] V.L.R. 379 (Sup. Ct.).

spectfully suggested that greater attention might have been paid to whether it is desirable for the courts to intervene where that happens.

It now appears that the analysis in *Knutson* may be incomplete. In an Alberta case, *J.H. Samuels & Co. Ltd. v. Crown Trust Co.*,¹²⁰ the court made a more determined effort to put the *bona fide* legal claim into its proper commercial perspective. A lessee of business premises claimed he was entitled to a renewal at a "reasonable" rental. Over a long period he wrangled with the lessor, refusing to accept a renewal which was offered him because the rental was too high, but not taking any legal steps to safeguard his position. Ultimately the lessor threatened to let the premises to someone else, and the lessee, to preserve his rights, signed the lease on the lessor's terms. His claim that the lease should be set aside for duress was rejected. The court said:

There was no compulsion on the plaintiff to enter into the lease — it was free to do so or not to do so as it pleased. The only loss it stood to suffer was the loss of prospective profits from its subtenants. If it considered that it could still make a profit under the new lease it was free to enter into it; if it considered that it could not make a profit it was free to reject it. It seems to me that the real position is that over a period of many months the plaintiff was 'jockeying' for position, was trying its utmost to obtain a greater commercial advantage for itself, and when it found at the end that it was not succeeding in its endeavour, it threw up its hands and acceded to the defendant's terms.¹²¹

In this case, which was decided on the assumption that the lessee's claim was valid, the general fairness of the negotiations was evidently regarded as more important than any technical breach of contract the lessor may have committed.

The approach in the Alberta case has much to commend it, but is it consistent with *Knutson* and *In re Hooper & Grass' Contract*? These cases must be related to their own facts. They involved disputed legal claims which held up the completion of land sales. Special policies may apply here. It is not a great concession for the seller to agree to transfer the land rather than leave the buyer to his legal remedies. Unless third parties are involved, which is not likely in this context, specific performance will probably be awarded. The disputed claim, moreover, may be small, yet its significance can be unduly inflated by implicit threats of cancellation.¹²² It is no coincidence that the court in *Knutson* invoked the

¹²⁰ (1959), 27 W.W.R. (n.s.) 160, 18 D.L.R. 451 (Alta.S.C.).

¹²¹ *Ibid.*, 172 and 462. Additional reasons for rejecting the claim were given at 173 and 463, but the court seems not to have chosen the technical ground that a contract cannot be set aside for this type of duress.

¹²² See *In Re Hooper & Grass' Contract*, *supra*, f.n.37, 271.

analogy of duress of goods, saying that the plaintiffs acted "to secure property of which, in equity, the Syndicate had become the owner".¹²³ These observations, it may be argued, have force only for land sales contracts, and the general rules for duress by threatened breach of contract have yet to be established.

These observations confirm a conclusion which may be gathered from all the arguments so far adopted. *Knutson*, though an important case in the development of the law, is too closely tied to the law of duress of goods to be a reliable guide on the requirements of duress by threatened breach of contract. Subsequent decisions, and the experience in America, show that more complex enquiries are required than were at first envisaged. As the courts move towards a broader theory of duress, proof of a substantial degree of coercion, and of oppressive or unreasonable conduct going beyond the simple refusal to perform a contract, may well become regular requirements for successful pleas of duress.

(b) *Threatened Cancellation*

Threats of cancellation or forfeiture present unusual problems for the law of duress, as the following example will show. A life insurance company threatens to cancel a policy because a premium has not been paid. Even if the premium is not due, the insured may be forced to pay it. Why? Not because he has been wrongly deprived of anything he needs; the company is not obliged to give him anything until the policy matures. Nor is he coerced by any unlawful act; legally, the company's purported cancellation would be innocuous. The insured is coerced by his own uncertainty. Until the dispute is settled, his interest in the policy is, for all practical purposes, unacceptably at risk. This element of coercive uncertainty will be found in any case where one party's rights under a contract depend upon his performance of a disputed obligation, or the satisfaction of a precedent condition where the meaning of the condition is in doubt.

In the Commonwealth, *Knutson v. The Bourkes Syndicate*¹²⁴ is an authority in favour of the right to recover money which has been unlawfully demanded and paid to avert a threatened cancellation or forfeiture. In that case, part of the disputed sum of money was paid before the completion of the contract, to ensure that the Syndicate's option to purchase the land was validly exercised. The court allowed recovery, the money having been paid "to protect

¹²³ *Supra*, f.n.39, 423.

¹²⁴ *Ibid.*

[the Syndicate's] position under the option agreement".¹²⁵ Further support is found in *In Re Hooper & Grass' Contract*,¹²⁶ where an implicit threat of cancellation was an important consideration in favour of recovery. Curiously, in neither case was reference made to the fact that the payment in *Knutson* was not the result of a threat "to withhold that to which the other party was legally entitled",¹²⁷ or a threat to perform some unlawful act. Assuming *Knutson* is correct, the decision implies that a threat to perform an unlawful act is not, after all, necessary for duress. Support for this view, as has already been observed, can be found in two of the judgments in *Smith v. William Charlick Ltd.*¹²⁸

In America, the better view also favours recovery.¹²⁹ Earlier cases, where relief was refused,¹³⁰ can be ascribed to a general failure to recognize the coercive effects of uncertainty.¹³¹ The theoretical basis of recovery is beyond argument, at least in jurisdictions which accept the "business compulsion" rule.¹³² The rule seems confined to simple money payments; as far as compromises are concerned, it would, in view of the principles which apply to duress by refusal to perform a contract, be difficult to justify relief based solely on another's threat to exercise rights he genuinely believes he has.¹³³

¹²⁵ *Ibid.*, 425.

¹²⁶ *Supra*, f.n.37, 271.

¹²⁷ *Ibid.*, 272.

¹²⁸ *Supra*, f.n.49, 55-6 *per* Isaacs, J., and 65 *per* Higgins, J.

¹²⁹ Dalzell, *supra*, f.n.5, 273-4; Note, *Quasi-Contractual Recovery of Money Paid to Avoid Penalty or Forfeiture*, (1934) 47 Harv.L.Rev. 1413; Annot., 86 A.L.R. 388 (1933).

¹³⁰ *E.g. Rosenfeld v. Boston Mutual Life Ins. Co.*, *supra*, f.n.60.

¹³¹ *Cf.* Dawson, "Civil Litigation", *supra*, f.n.6, 686-8.

¹³² Discussed *supra*, section 2(c)(ii).

¹³³ A number of American authorities oppose relief here, for a variety of reasons. It is said that the threat to bring proceedings in support of a legal claim is not duress: *Booher v. Williams*, 341 Ill.App. 504, 95 N.E. 2d 518, 521; *Causey v. Matson*, 215 Ga. 306, 110 S.E. 2d 356, 359 (1959) (though the court seems also to have found in these cases that the claim was valid); that the plaintiff could have litigated rather than "compound and complex his position": *Yingling Aircraft Inc. v. Budde*, 208 F.Supp. 773, 776 (D.C. Colo. 1962); that the plaintiff was not unlawfully constrained where he had counsel to assist him in evaluating the unfounded threat: *Alloy Products Corp. v. U.S.*, 302 F. 2d 528, 530-1 (Ct.Cl. 1962); and that the compromise was "voluntary", the refusal to proceed under a contract or to stand suit not being duress: *Nesbitt Fruit Products Inc. v. Del Monte Beverage Co.*, 177 Cal.App. 2d 353, 2 Cal.Rptr. 333, 338 (1960). Different principles apply where one party uses such a threat to take unfair advantage of the ignorance and inexperience of the other.

One might question whether the same principles would not preclude the recovery of money, since the person making the demand will usually be acting in good faith. It must be remembered, however, that the money will be paid to avoid a feared legal consequence, not to induce the recipient to perform some desired action. The transaction is therefore of slight merit, when compared with a compromise of a legal dispute, or the acceptance of another's legal claim in order to rehabilitate a contract which has come to grief on account of the parties' legal differences. If moral wrongfulness is required at all, it may be found in the unfair use of a forfeiture provision to prevent a party from taking a genuine claim to law when he is willing and able to perform the contract no matter what obligation it imposes.

What degree of coercion is required? The fear of the loss of rights under the contract will usually be coercive in itself. The only question which then arises is whether the person making the payment should, if he can, resort to some other legal remedy instead. Orthodox American theory says that he should. This has been taken particularly seriously in California, where recovery has been denied in two cases in which the plaintiffs could have invoked a statutory provision empowering the court to stay forfeiture.¹³⁴ In a third case, the recovery claim went to trial, but it seems that the claimant would need to show that he acted reasonably in not resisting the claim earlier.¹³⁵ Whether this is good policy is another matter. The Massachusetts Supreme Court observed here:

The salutary result of allowing recovery on such facts is that the area of possible litigation is surely confined to the only issue genuinely in dispute, and time is afforded to determine that issue in due and seemly course.¹³⁶

If the statutory procedure were invoked, there would be the additional issue of whether the forfeiture should be stayed and if so, upon what terms. No attempt was made in the California cases

¹³⁴ *Texas Co. v. Todd*, 19 Cal.App. 2d 174, 64 P. 2d 1180, 1187 (1937); *Western Gulf Oil Co. v. Title Ins. & Trust Co.*, 92 Cal.App. 2d 257, 206 P. 2d 643, 648 (1949). Compare e.g. *Sunset Copper Co. v. Black*, *supra*, f.n.70 (no enquiry about other remedies), and *Buck Kreihis Co. Inc. v. U.S.*, 331 F.Supp. 1173, 1174-5 (E.D.La. 1971) (promise to repay inferred from facts which did not establish a sufficient degree of coercion to found a duress claim).

¹³⁵ *Lewis v. Fahn*, 113 Cal.App. 2d 95, 247 P. 2d 831, 834-5 (1952). (The availability of the statutory procedure as a means of resistance is not mentioned.)

¹³⁶ *Governor Apartments Inc. v. Carney*, 342 Mass. 351, 173 N.E. 2d 287, 289 (1961).

to show that the procedure would provide a preferable forum, or that there would be any other countervailing advantages. Moreover, the rule that a person considering payment must act "reasonably" is unhelpful. Not knowing what the court might regard as reasonable, he may be impelled towards an unsuitable alternative remedy. On the whole, it is difficult to find a convincing justification for a rule which insists on the exercise of any alternative remedies.

There seems no reason, therefore, why the courts should not allow recovery readily, without being deterred by the fact that the recipient acted in good faith, or that alternative remedies were available. The principle is a logical one which can be applied in analogous situations. A good example is the case of a building contract, where the building owner claims that certain work is included in the contract, and threatens to declare a default if the builder does not carry it out. What is the position if the builder carries out the work, but later seeks compensation, offering to prove that the work was not included in the contract?

Hitherto, the builder has been given relief on principles which seem peculiar to the law of *quantum meruit*. This remedy has a different history,¹³⁷ and apparently different requirements,¹³⁸ from the remedies available for the recovery of money payments. In *Molloy v. Liebe*, the Privy Council said of such a claim:

Molloy insisted on the works being done, maintaining that they were not extras. The contractor on the other hand maintained that they were. As Molloy insisted on the works being done, in spite of what the contractor told him, the umpire naturally inferred (and it was for him to draw the inference) that the employer impliedly promised that the works would be paid for either as included in the contract price or, if he were wrong in his view, by extra payment to be assessed by the architect. It is difficult to see how the umpire could have drawn any other inference from the facts as found by him, without attributing dishonesty to Molloy.¹³⁹

This view is now orthodox building law,¹⁴⁰ though it is by no means free from doubt.¹⁴¹

¹³⁷ Ames, *Lectures on Legal History* (1913), 154-6; Bullen and Leake, *Precedents of Pleadings* 2d ed. (1863), 31-33, 36-42.

¹³⁸ Goff and Jones, *Law of Restitution* (1966), 29-31, 144; Denning, *Quantum Meruit: the Case of Craven-Ellis v. Canons*, (1939) 55 L.Q.R. 54. See e.g. *Craven-Ellis v. Canons Ltd.*, [1936] 2 K.B. 403, 412, [1936] 2 All E.R. 1066, 1073-4 (C.A.); *Upton-on-Severne R.D.C. v. Powell*, [1942] 1 All E.R. 220, 221 (C.A.).

¹³⁹ (1910), 102 L.T. 616, 617.

¹⁴⁰ *Hudson's Building Contracts* 10th ed. (1970), 541-3, 548. Cf. Spencer, *Powers of Direction and Determination under Construction Contracts*, (1955) 41 Va.L.Rev. 343, 348-52; Ellis, *Note*, (1961) 19 Fac.L.R. 171.

¹⁴¹ See counsel's use of a similar argument in *Davis Contractors Ltd. v. Fareham U.D.C.*, [1956] A.C. 696, 704, [1956] 2 All E.R. 145 (H.L.), and the

Its theoretical shortcomings were exposed in the Canadian Supreme Court decision, *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*¹⁴² There, a subcontractor had been told he would be put off the job if he did not perform certain extra work at his own expense. He did the work, but his suit for a *quantum meruit* was not successful. Applying modern theory, the court looked for either an actual contract, to be inferred from the parties' conduct, or for a quasi-contractual obligation to pay for the work. In the view of the majority, the head contractor's express refusal to pay anything extra was fatal to any inferred contract.¹⁴³ Nor was there any room for an obligation imposed by law which, according to the majority, was excluded by the express remuneration provision in the contract.¹⁴⁴

It seems inevitable, from the majority's reasoning, that the builder's claim in such cases must be based on an obligation imposed by law. Where relief is not precluded by the terms of the original contract, on what theory might the obligation be imposed? Here, the dissenting judgment of Cartwright, J. is of special interest. He referred to the extreme circumstances of compulsion, and argued that relief should be given on the same principles of duress as were applied in *Knutson v. The Bourkes Syndicate*.¹⁴⁵ This extension of the law of duress, if logically pursued, may well bring consistency to the law of quasi-contract. The only reservation one might have is whether the building owner will be given sufficient protection should he change his position to his detriment on the assumption he will not have to pay extra for the work. This, however, is a common problem in the law of quasi-contract, and perhaps the only answer is the adoption of an enacted change of position defence, examples of which are to be found in some Commonwealth countries where the law of money paid under mistake has been dealt with by the legislature.¹⁴⁶

(c) *Extraneous Pressure*

Pressure used to induce another person to give up his rights under a contract may take the form of a threat quite unconnected

doubts expressed by Viscount Simonds at 713 and 147, and Lord Reid at 723-4 and 155.

¹⁴² [1960] S.C.R. 361.

¹⁴³ *Ibid.*, 366.

¹⁴⁴ *Ibid.*, 368-9.

¹⁴⁵ *Ibid.*, 378-81.

¹⁴⁶ New Zealand: *Judicature Act*, 1908, s.94B, as inserted by *Judicature Amendment Act*, 1958, s.2, no. 40; West Australia: *Law Reform (Property, Perpetuities and Succession) Act*, 1962, s.24, no. 83.

with the contract itself. The threat may be independently wrongful, as where, for example, a public official misuses his powers. Presumably, such pressure is governed by the principles of duress established to deal with threats of this kind, and is therefore beyond the scope of the present enquiry. The threat may, on the other hand, be perfectly lawful, as where a person is told that if he does not comply with a demand, he will be refused further contracts with the party making it. If the demand does not correspond with the obligations created by an existing contract between the two parties, the most plausible objection to the pressure is that it conflicts with general duties of good faith owed by the party making the demand on account of the contract he has undertaken. This form of pressure is directly relevant to the present enquiry.

Commonwealth authorities are opposed to allowing relief for duress here. *Smith v. William Charlick Ltd.*,¹⁴⁷ discussed earlier, is directly in point. A more recent decision to the same effect is the judgment of the Ontario Court of Appeal in *Morton Construction Co. v. City of Hamilton*.¹⁴⁸ The plaintiff had done some work for the defendant corporation. The work proved unsatisfactory, and a dispute arose about who was responsible. The corporation told the plaintiff he must repair the work at his own expense, or he would receive no more contracts from the corporation. He carried out the work, and then sued for compensation, offering to prove that the failure was the result of the corporation's own poor design. His claim was rejected. There was no implied contract to pay for the work, because the corporation had made it clear that it had no intention of paying.¹⁴⁹ Nor could an obligation be imposed by law, because

[t]he plaintiff's consent to do the work in question was not deprived of its voluntary character by reason of the threats made by certain members of the City council to the effect that the plaintiff would receive no further contracts from the city unless it effected the required repairs at its own expense. The defendant was legally entitled to make a threat of that nature...¹⁵⁰

These cases are a serious obstacle to relief.

¹⁴⁷ *Supra*, f.n.49. See, however, *Criterion Theatres Ltd. v. Melbourne and Metropolitan Board of Works*, *supra*, f.n.57, 274 (*Smith* case considered inapplicable where defendant based his demand on a disputed legal claim).

¹⁴⁸ [1962] O.R. 154, 31 D.L.R. (2d) 323.

¹⁴⁹ *Ibid.*, 161 and 330. Cf. *City of Moncton v. Stephen* (1956), 5 D.L.R. (2d) 722 (N.B.S.C.): see 723-5 *per* Bridges, J.

¹⁵⁰ *Supra*, f.n.148, 161 and 330. Compare *Terminal Warehouses Ltd. v. J.H. Lock & Sons Ltd.* (1957), 9 D.L.R. (2d) 490, 498-9 (Ont. High Ct.), which may now be overruled.

To the extent that they proceed on the view that a threat to do a lawful act cannot constitute duress, the cases may be open to question. On a broader theory of duress, it may well be that proof of the unlawfulness of the threat, if carried out, is neither a sufficient nor necessary condition of relief in all cases. It may be expected that relief for duress will increasingly come to depend upon the application of criteria which are specially developed for that purpose. Applying such criteria, a plausible argument may well be made that any extraneous pressure, brought to bear to frustrate another party's legitimate contractual expectations, can constitute duress.

In America, despite the encouragement offered by legal theory, few courts have gone that far. The courts of New Jersey are an exception. They do not test "wrongfulness", even in this context, by reference to the lawfulness of the threat.¹⁵¹ In the leading case on duress, *Rubenstein v. Rubenstein*, the Supreme Court said,

... means in themselves lawful must not be so oppressively used as to constitute, e.g., an abuse of legal remedies... . The act or conduct complained of need not be 'unlawful' in the technical sense of the term; it suffices if it is 'wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse...' .¹⁵²

This principle was elaborated in an earlier decision,¹⁵³ where it was said,

Judgment whether the threatened action is wrongful or not is colored by the object of the threat. If the threat is made to induce the opposite party to do only what is reasonable the court is apt to consider the threatened action not wrongful unless it is actionable in itself. But if the threat is made for an outrageous purpose, a more critical standard is applied to the threatened action.^{153a}

These observations have proved helpful where pressure has been brought to bear in an effort to alter the effect of the contract.

In *Ross Systems Inc. v. Linden Dari-Delite Inc.*,¹⁵⁴ a commission agent concluded a franchise agreement with a retailer, under which the retailer was to be supplied with Farmland ice cream at a price fixed in the agreement. The agent then negotiated an extra commission from Farmland, and this increased the price the retailer had to pay Farmland. The retailer was forced to pay the extra charge because it feared that Farmland might terminate the franchise agree-

¹⁵¹ On the influence of the *Restatement* here, see Talbott, *Contracts*, (1956) 11 Rutgers L.Rev. 238, 242-3.

¹⁵² 20 N.J. 359, 367, 120 A. 2d 11, 15 (1956).

¹⁵³ *Hochman v. Zigler's Inc.*, 139 N.J.Eq. 139, 50 A. 2d 97. (Ch. 1946).

^{153a} *Ibid.*, 144 and 100.

¹⁵⁴ 35 N.J. 329, 173 A. 2d 258 (1961).

ment, and that the agent might indulge in harassing tactics. The court allowed recovery of the extra payments as money paid under duress. The pressure was apparently held "wrongful" simply because it had the effect of increasing the contract price.¹⁵⁵ Reference was made, elsewhere in the judgment, to a previous Supreme Court decision in which a similar result had been coerced by a threat to withhold future supplies of goods, and the money had also been held recoverable.¹⁵⁶

To the same effect is *Wolf v. Marlton Corp.*,¹⁵⁷ where an unwilling purchaser of a house in a subdivision told the subdivider that he would re-sell the house to an "undesirable purchaser" if he was called upon to complete the purchase. The subdivider, fearing the adverse effect this would have on his other sales, did not call for completion. He nevertheless sued the purchaser for breach of contract and was successful, his failure to call for completion being excused on the ground that it was coerced. Of the purchaser's threat, the court said,

...where a party for purely malicious and unconscionable motives threatens to re-sell such a home to a purchaser, specially selected because he would be undesirable, for the sole purpose of injuring the builder's business, fundamental fairness requires the conclusion that his conduct in making this threat be deemed "wrongful", as the term is used in the law of duress.¹⁵⁸

The fact remains that few courts have carried the law of duress this far. The reason presumably lies deeper than any announced rule that a threat to commit a lawful act cannot amount to duress. Practical problems of decision must not be under-estimated. Some courts may be unwilling to substitute broad notions of "fundamental fairness" or "commercial morality" for established concepts of contract law, though they freely apply equally imprecise notions, such as "reasonable care", in other contexts. Others may see themselves being carried far beyond ordinary contractual considerations. *Wolf v. Marlton*, for example, has been criticized on the ground that an "undesirable purchaser" presumably meant a coloured person, and the decision therefore had the unconstitutional effect of encouraging

¹⁵⁵ *Ibid.*, 335 and 261-2.

¹⁵⁶ *Pompton Stationery Corp. v. Passaic County News Co.*, 127 N.J.L. 235, 21 A. 2d 849 (Sup.Ct. 1941). There the threat does not seem to have been in breach of contract, though it may have been part of an unlawful monopolistic scheme.

¹⁵⁷ 57 N.J. Super. 278, 154 A. 2d 625 (App.Div. 1959).

¹⁵⁸ *Ibid.*, 288 and 630.

racial discrimination in subdivisions of land.¹⁵⁹ Problems may arise, too, with the idea of a "threat". Does it include, for example, the conduct of one who says he does not wish to receive a benefit, but nevertheless accepts it in circumstances where the other party has no option but to give it to him?¹⁶⁰ The extent to which the law, as developed here may depend more upon the willingness of courts to embark on a new process of decision than upon the logical development of any single principle.

4. Conclusion

There are evident advantages in using the law of duress to regulate pressures which one party to a contract may apply against the other. It has a flexibility which is not often found in the more traditional methods of dealing with contract modifications. It also offers, at least as an ideal, the prospect of a coherent body of principle which will cover all aspects of such coercion in a consistent way. Though present Commonwealth law falls short of this ideal, there are welcome signs of a movement towards a broader theory of duress by threatened breach of contract.

One sign is the gradual extension of the scope of the law. Once a narrow rule applied to payments made under duress of goods, it has extended beyond this and closely analogous situations to cover all payments made to induce another to perform his contractual duty, and apparently includes payments made under contracts which prove to be invalid for want of consideration. It also includes payments made, and possibly work performed, to avert threats to exercise 'claimed rights of cancellation or forfeiture under a contract. Two problem areas still remain. One is where the coercive conduct induces a contract which cannot be set aside for any other ground than duress. Here, it has been argued that the law of duress might well be invoked, without undue derogation from existing theory. The other is where extraneous lawful pressure is brought to bear to force a departure from the contract. This is a problem with difficulties of its own which few common law courts have yet been prepared to tackle. On the whole, the areas which the doctrine has yet to cover are those in which it could only be invoked in unusual circumstances.

¹⁵⁹ Note, (1960) 34 St. John's L.Rev. 319, 322. One suspects that New Jersey courts may occasionally avoid broad issues by holding that the plaintiff's will was not overborne, even though the threat had some coercive force; see *Shalit v. Investors Savings and Loan Association*, 101 N.J.Super. 283, 244 A. 2d 151, 154 (1968).

¹⁶⁰ As in *City of Moncton v. Stephen*, *supra*, f.n.149, 724.

Another sign is the increasing interest in determining whether pressure is coercive in fact. There is a strong case for requiring a substantial degree of pressure to be proved before the court allows relief, though the precise degree may be variable, and the requirement itself may be discarded in those particular cases where it would be opposed to sound legal policy. It must be conceded, however, that whatever may be the position in America, the requirement has yet to be firmly established in the Commonwealth.

A point which has, in the writer's respectful opinion, received insufficient attention in the Commonwealth is the test of 'wrongfulness'. No duress rule which attempts to test the coercing party's conduct solely by reference to whether his threatened action would be lawful if carried out can do full justice to the issues discussed in this article. There is, however, no simple answer to the problem. If a solution based solely on technical unlawfulness is unsatisfactory, so too is one which would commit the whole matter to the court's sense of what is the "fair thing" in the particular case. It seems that the lawyer's skill and ingenuity will have to be devoted to creating standards of reasonable negotiating behaviour which are not too vague to be consistently applied. Broad considerations of legal theory are not of great assistance here beyond making the valuable point that whether or not conduct is wrongful depends, not only on what is threatened, but also on what is sought to be achieved.

This article has been concerned to illustrate not only the major theoretical features of the law of duress but also the many different rules which the law includes. The cases considered display a wide variety of legal techniques. They may go some way towards dispelling the fear that a court which commits itself to a broad theory of duress must accept either clear rules leading to unsatisfactory results in some specific cases, or vague and diffuse enquiries of uncertain scope. It is to be hoped that the courts will put aside any such fear, and will continue to act creatively in exercising a jurisdiction they have always had, but which has tended to be overshadowed by other doctrines whose shortcomings are now apparent. The law of duress has a vital protective role to serve in the law of contract.
