

1951

Great American Indemnity Company v. W. S. Berryessa and Frank Berryessa : Brief of Appellant

Utah Supreme Court

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Case No. 7680

In the Supreme Court of the State of Utah

GREAT AMERICAN INDEMNITY COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

W. S. BERRYESSA and FRANK BERRYESSA,
Defendants and Respondents.

APPELLANT'S BRIEF

FILED

THATCHER & YOUNG,
JUL 20 1907 *Attorneys for Plaintiff and Appellant*

Clerk, Supreme Court, Utah

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GREAT AMERICAN INDEMNITY COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

W. S. BERRYESSA and FRANK BERRYESSA,
Defendants and Respondents.

STATEMENT OF FACTS

This is an action brought by plaintiff (appellant) against the defendant W. S. Berryessa, (the defendant Frank Berryessa could not be served with summons by reason of his absence from the State of Utah), upon a joint and several promissory note executed by defendants. Defendant W. S. Berryessa admitted the execution of the note, admitted default in the monthly payment, admitted his refusal to pay, and demanded a cancellation of the note as to him, based upon the alleged ground of duress and want of consideration. By way of counterclaim, defendant also prayed for judgment against plaintiff for the return of \$1550.00 paid by defendant to plaintiff and also for the return of an uncashed check in the sum of \$500.00, based upon the same grounds. Trial to a jury resulted in a verdict in favor of defendant, cancelling the note, and also for a return of the \$1500.00 and the uncashed check.

Much of the evidence is without conflict. However there was a sharp conflict in the evidence as to what occurred at a meeting which was alleged to have occurred in the office of J. G. Hagman on June 6, 1950. We shall very briefly summarize the evidence.

Defendant W. S. Berryessa is the father of the defendant Frank Berryessa. Frank Berryessa was an employee of the Eccles Hotel Company, which operates the Hotel Ben Lomond at Ogden, Weber County, Utah. Plaintiff issued a surety bond guaranteeing the honesty and integrity of said employee.

About the forepart of January, 1950, the hotel discovered a shortage in the cash entrusted to Frank Berryessa. When confronted with the accusation, he admitted the same, but the amount was then undetermined. The father was informed of the shortage. He immediately came to the office of the hotel, accompanied by Frank, and had a talk with Irvine F. Keller, the company auditor. The defendant stated that he was prepared to make good any and all losses and was very insistent on keeping the matter quiet and not reporting it to the bonding company. At that time it was more or less assumed that the shortage involved only the so-called "cash account," and the shortage was thought to be in the neighborhood of \$2000.00. Defendant insisted on signing a note to the hotel company for the amount of the assumed shortage, aggregating \$2000.00. Later the hotel discovered discrepancies and apparent shortages in what is referred to as the "ledger account" and then it became evident that the shortage would be greater than at first anticipated. However, defendant insisted that whatever the amount he was prepared to

make it good. When the auditors began investigating the ledger accounts, Frank, of course, knew of the shortage and also knew it would be discovered. He thereupon wrote a list of the ledger accounts on a small piece of paper, which aggregated some \$4000.00 or thereabouts, and handed the same to his wife and then apparently fled the state. His wife then handed this list to the defendant, suggesting, however, that the same be not given to the hotel but that they wait developments and see if the hotel was successful in finding the same. However, the defendant, in a subsequent interview, handed the list to Mr. Keller, and defendant again insisted that he was prepared to take care of the shortage. He explained that he had fortunately just sold some property to Safeway, from which he was realizing a substantial profit, and that he would have funds available to make good the shortage.

When it had been established that the shortage would aggregate around \$6500.00, Campbell Eccles, Manager of the hotel, called defendant and told him that in view of the amount involved he felt duty-bound to notify the bonding company, and the defendant concurred in his conclusion. Eccles thereupon notified the plaintiff's agent of the shortage. Plaintiff referred the matter to J. G. Hagman, Manager of the Insurance Adjustment Company, to adjust the loss. Mr. Hagman came to Ogden and met defendant at the hotel. At that time Mr. Hagman suggested to defendant that he ought to bring Frank back and he stated that he would do so. There was some general talk about the financial responsibility of the members of the family, including a son-in-law who had a ranch in New Mexico. Defendant did

have Frank return to Ogden, and Hagman and the defendants and Mr. Keller met at the hotel. A general conversation ensued concerning the accounts and the shortages and the circumstances leading up to the same.

At a subsequent meeting between the same parties and after the auditor had made a full and complete audit, Frank signed the same, (Defendant's Exhibit 1), in which he admitted the accuracy of the auditor's report. After that Frank and defendant went down to Salt Lake to Hagman's office, and some general discussions were had with respect to Frank's ability to make good the loss. Frank insisted that he had turned some \$2000.00 of the shortage to his brother-in-law, Roy Patterson, and Hagman suggested that if such was the case, then the brother-in-law should be willing to sign a note with defendant and Frank, and as a result of the discussion Hagman prepared a note for \$4678.40 (the same being the difference between the admitted shortage and the note previously signed by Frank and the defendant and delivered to the hotel.) The note was made payable to the plaintiff and provided for payments at the rate of \$250.00 quarterly, commencing June 1, 1950. It was assumed and apparently tacitly agreed and understood that the note to be signed by Frank, Roy Patterson, and the defendant. Frank took the unsigned note and he and his father then left Hagman's office. Later on defendant and Frank returned to Hagman's office with the note unsigned. Frank stated that the brother-in-law either would not sign the note or they had not been able to contact him. Up to this point there is no contention on the part of defendant that anything improper had occurred and no contention made

of any duress prior to this meeting. (Tr. 56) The testimony all reflects a situation where the defendant appeared to be most anxious to be of financial assistance to Frank, and in view of his previous declarations that he was prepared to assist him in making good the loss, it seemed to be at least tacitly understood and accepted as a fact that the defendant intended to sign a note with Frank for the amount of the shortage, and the suggestion apparently had come from defendant, right from the first meeting, that he intended to and wanted to do so.

We make this explanation at this point in order to lay the foundation for what the defendant claims took place at a meeting which he said occurred in Hagman's office on June 6, 1950, but which did not occur on that date, and the signing of the note did not occur at that time or place, as first testified by defendant.

Concerning this matter we quote in full the direct testimony of the defendant commencing on page 20 to the end of page 22:

“Q Now, you started to tell us about a later meeting that you had.

A Later we took that note, Frank and I took the note back to Mr. Hagman and told him Roy wouldn't sign the note, or hadn't signed it.

Q Now, just one meeting, can we fix the approximate time of the meeting you are now speaking of?

A I think this second meeting was June six, as I remember.

Q So you are now down to a meeting that you had with Mr. Hagman on June 6, 1950.

A Yes.

Q Which is the date that the note in question bears.

A Yes.

Q All right. Now, who was present at that meeting and where was it held?

A Held in Mr. Hagman's office in the Continental Building in Salt Lake City.

Q And who was present?

A Mr. Hagman, Frank, and I.

Q All right. Now, will you state in substance and effect what transpired at that meeting? You have spoken of taking the unsigned note back.

A Well, as I remember Mr. Hagman wanted me to sign that note, and I refused to sign that note because I couldn't pay that amount, and I knew Frank couldn't pay that amount.

Q Now, what amount are you speaking of?

A \$250.00 a quarter.

Q And that was a note made out for the full \$6800.00.

A As I remember, yes. We argued back and forth about this note; Mr. Hagman got angry and swore and pounded the desk with his fist, and said, 'You can't come here and tell me what you will do.' I said, 'I can't sign that note because I can't pay it.' We talked for a while. He said, 'what can you pay,' and

I said, 'I don't think we can pay more than \$50.00 a month,' and he said, 'at \$50.00 a month, you'll never get this paid.' Then he agreed to make the note out, and I was to pay him \$2,000.00 cash and sign the note with Frank, making the note payable at \$50.00 a month. We signed that note, and I come back to Ogden and took a mortgage on my home.

Q Now, let's stop right there a minute. Was this note for \$4865.20 prepared on the occasion of this June 6th meeting in Mr. Hagman's office?

A Yes. Mr. Hagman had his secretary make that note out while we were there.

Q And was it signed at that time?

A It was signed at that time.

Q And was it left with Mr. Hagman?

A Yes. It was left with Mr. Hagman.

Q And is that the note which has been introduced in evidence as plaintiff's exhibit A?

A Yes, as far as I know that is the exact note.

Q Now, you have spoken of a statement made by Mr. Hagman as to what would happen if you didn't do as you were told. Was anything said as to what would happen if you did do what you were told?

A Mr. Hagman told me if we would sign the note and I would make that payment that he wouldn't prosecute Frank, but if I didn't he would have to prosecute him.

Q Now, following the signing of that note and your agreement to pay two thousand dollars

as you have testified to, you returned to Ogden with Frank.

A Yes.

Q And what did you do in connection with the two thousand dollars?

A Well, I went to the loan companies and borrowed money to pay two thousand dollars. I owed on my improvements on the place, and I only had \$1500.00 left to pay Mr. Hagman. I got a cashiers check dated July 3, and it was made out to me, but I signed it over to the adjustment company.

Q Well, now, when did you see Mr. Hagman again after this June 6th meeting?

A I think the Fourth of July. I wouldn't be sure. I got the check out on the third of July. I think it was the Fourth, and Mr. Hagman came down to my home, and I gave him that cashiers check for \$1500.00 and my personal check for \$500.00, and I asked him if he would hold that personal check until I could take out a further loan and meet it, and he said that he would.

Q As you recall that, that was about July four.

A Yes. I think it was. It was soon after I got that check. I think it was July four because I was around home working when Mr. Hagman drove up.

Q And at that time you endorsed over to him this cashier's check for \$1500.00 and gave him your personal check for \$500.00.

A Yes.

Q Which made up the two thousand dollars which you agreed to pay.

A Yes."

The defendant also testified that he personally paid \$50.00 on the note for the July payment, but that the other \$200.00 which was paid on the note was paid by Frank or his wife.

The defendant was then asked the following question (Tr. 26):

"Q Now, Mr. Berryessa, I come back to this June 6 meeting with Mr. Hagman and the occasion for your having signed the \$4800.00 note exhibit A and ask you if you would have signed that note had it not been for the statements made by Mr. Hagman on that occasion?"

Over plaintiff's objection, the Court permitted the defendant to make the following answer:

"A No. I would not have signed that check because I knew, that note because I knew I couldn't meet it because I have my aged mother to take care of and my wife, and I have other obligations I have to pay. I knew I couldn't pay that much money and keep my payments paid up."

The defendant was then asked:

"Q Now, I'll ask you if you would have signed that note at that time had it not been for the statements Mr. Hagman, as testified to by you, that if you did sign Frank would not be criminally prosecuted."

Over the objection of the plaintiff the Court permitted the defendant to make the following answer:

“A No I would not have signed that. That is the only reason I signed it is to keep Frank from going to the penitentiary.”

The defendant was then asked this question at page 27:

“Q Now, coming to July three or four, the date on which you turned over to Mr. Hagman the endorsed cashiers check for \$1500.00, would you have paid that amount of money to him on that date had it not been for the previous statements made by Mr. Hagman on June 6?”

Over plaintiff's objection the Court permitted the witness to answer, “No.”

The witness was then asked the question:

“Q Or would you have given him the \$500.00 personal check, had it not been for those statements made on June 6?”

Again, over the objection of the plaintiff, the Court permitted the defendant to make the following answer:

“A No. I gave him that check to make up the two thousand dollars that I had promised him that other meeting to pay. I tried my best to pay it, but I just couldn't make it.”

Notwithstanding the defendant's positive and unequivocal statement that the note in question was signed by defendant at Hagman's office on June 6th, the defendant, when confronted with positive evidence to the contrary, reluctantly admitted that this statement was untrue, and he admitted that he did not go to Salt Lake

City on June 6th as testified to by him, but that he, his wife, and Frank went down to Hagman's office on Sunday, June 4th; that as a result of that visit Hagman prepared the note in question on the following day, June 5th, and forwarded the same by letter to the defendant addressed at Ogden, Utah, and that the defendant signed the note in Ogden on about June 6th and mailed the signed note with the original letter back to Mr. Hagman in Salt Lake City about June 6th or a day or two thereafter. (See Tr. 41 to 47)

The foregoing evidence, as testified to by defendant on direct examination and as modified by his admissions on cross-examination, constitutes all of the evidence in this case upon which the defendant bases his claim that the note was signed under duress and without consideration. There was also introduced in evidence, as a part of defendant's cross-examination, plaintiff's Exhibits C, D, E, F, and G. These exhibits were letters written by the defendant to the plaintiff on the respective dates which they bear, all of them being subsequent in time to the meeting of June 4th. They show on their face the voluntary acts and conduct of the defendant. Plaintiff then had marked for identification Exhibit H. However the letter was not offered in evidence because it was not written by the defendant and in order to keep the record straight the plaintiff then offered in evidence, as Plaintiff's Exhibit I, a letter written by defendant, which was objected to by defendant and his objection sustained. At this point it should be noted that Mr. Hagman positively and emphatically denied that he made the statements attributed to him by the defendant at the meeting in his office on June 4th.

STATEMENT OF POINTS

POINT 1. The Court improperly permitted defendant to answer the following question:

“Q Now, Mr. Berryessa, I come back to this June 6th meeting with Mr. Hagman and the occasion for you having signed the \$4800 note, Exhibit A, and ask you if you would have signed the note had it not been for the statements made by Mr. Hagman on that occasion?” (Tr. 26)

and similar questions propounded to the defendant. (Tr. 26 and 27)

POINT 2. The Court improperly refused to allow appellant to introduce Exhibit I, the same being a letter written by defendant to plaintiff, (Tr. 51), which said offer was renewed in the absence of the jury. (Tr. 55)

POINT 3. The evidence of the defendant was insufficient to justify the submission to the jury of the issues of duress or want of consideration, and plaintiff's motion for a directed verdict as to the note sued on should have been granted. (Tr. 58) Renewed at conclusion of trial. (Tr. 124)

POINT 4. The evidence was insufficient to justify the submission to the jury of the issue of defendant's right to recover the \$1550 and check for \$500 set forth in defendant's counterclaim, and plaintiff's motion for dismissal of defendant's counterclaim should have been granted. (Tr. 58) Renewed at conclusion of trial. (Tr. 124)

POINT 5. The Court erred in the giving of certain instructions, the giving of which were excepted to by appellant. (Tr. 134)

POINT 6. The Court erred in its refusal to give to the jury certain instructions as requested by appellant, to which exceptions were taken. (Tr. 133)

POINT 7. The appellant's motion for judgment notwithstanding the verdict and for a new trial should have been granted.

ARGUMENT

Point 1. Over plaintiff's objection, the Court permitted the defendant to answer the question as to whether he, defendant, would have signed the note had it not been for the statement made by Mr. Hagman on that occasion and similar questions propounded to defendant, all of which appear in the transcript at pages 26 and 27. It is plaintiff's position that the Court should have sustained plaintiff's objection to this question for the following reasons:

A. It called for a conclusion of the witness on the ultimate fact which the jury was to determine.

B. The answer to whether the defendant would or would not have signed the note had it not been for the alleged statements is no proof of duress.

As we conceive and understand the law of duress, it involves much more than the mere question as to whether the defendant would or would not have signed the note in question had it not been for the statements claimed to have been made by Hagman. The question was whether or not the alleged duress brought about a

mental condition whereby the defendant's will was entirely overcome by reason of the alleged threats, so that his act in signing was not the act of the defendant but was in effect the act of the alleged perpetrator of the duress. We shall discuss this matter further when we discuss the law applicable to duress.

Point 2. We think that the Court clearly erred in refusing to admit plaintiff's Exhibit I in evidence. It certainly had some bearing on the question of the state of mind of the defendant when the letter was written and was certainly competent evidence going to his state of mind. We also think the Court erred when the offer was again renewed at the close of the defendant's testimony and in the absence of the jury. (See Tr. 55) It seems to us that where the question involves the state of mind of the defendant when he signed the note and also when he made the subsequent payments, any evidence, if not too remote in time and certainly it cannot be claimed that this was too remote, which might have a bearing upon the state of mind of the signer, is competent and should have been received.

Point 3. At the conclusion of the defendant's evidence, plaintiff moved the Court for a directed verdict as to the legality of the note in question, which motion was overruled and denied. At this point it is admitted that there may have been some question as to whether or not the acceleration provisions of the note permitted the plaintiff to recover the full amount of the note, and on this point the Court concluded that all that was necessary was to have the jury determine whether or not the note was a valid note and leave the legal question of whether the plaintiff could accelerate the note to be

decided as a question of law. No complaint is made by plaintiff as to this ruling of the Court and when plaintiff renewed its motion for a directed verdict at the conclusion of the trial the motion was so modified as to embrace this point. The question, therefore, presented by the plaintiff is whether or not there was sufficient evidence of duress or want of consideration to submit that issue to the jury, and it makes no difference so far as plaintiff is concerned whether it can accelerate the note or not. The only question is whether the note is a valid obligation.

The reason for the bringing of the action is this: In December of 1950, defendant brought suit against the Insurance Adjustment Company to have the note declared invalid. However, defendant did not sue the owner of the note, Great American Indemnity Company, and that suit was dismissed. The plaintiff, therefore, concluded to bring this suit when the December payment was not made.

Let us analyze the testimony of the defendant in the light of admitted surrounding circumstances for the purpose of determining whether or not there is any evidence upon which the issue of duress could be submitted to the jury.

According to the defendant's own version, at the time the first note was prepared it provided for a payment of \$250.00 each quarter. According to defendant's version of what occurred on June 4th, he said that Mr. Hagman wanted him to sign that note, which he refused to sign because he couldn't pay that amount, that is, he couldn't pay the \$250.00 per quarter. Defend-

ant's objection to signing the note as originally prepared was based solely on the ground that the payment of \$250.00 each quarter was more than he and Frank could pay. Of course defendant now tries to make it appear that he was the one who would have to pay the note, notwithstanding the fact that the party primarily liable was his son Frank, and the discussion as to the amount which could be paid centered around Frank's ability rather than the defendant's ability to pay off the obligation, and the defendant says that at this meeting "We argued back and forth about this note and Hagman got angry and swore and pounded the desk with his fist and said 'You can't come here and tell me what you will do,' " to which defendant replied, "I can't sign that note (the original note) because I can't pay it." He testified, "Hagman said 'What can you pay?' and I said 'I don't think we can pay more than \$50.00 a month,' and he said 'At \$50.00 a month you'll never get this paid.' "

However, it is interesting to note that Hagman then agreed to prepare a new note providing for a payment of \$50.00 per month instead of \$250.00 per quarter. In other words, even under defendant's own testimony he was the one who suggested that the original note calling for \$250.00 a quarter was more than he and Frank could pay, but he thought that they could pay \$50.00 a month, and upon making this suggestion, according to his reluctant admissions on cross-examination, they left the office, it being a Sunday, and Hagman advised them he would have such a note prepared and mail it to them in Ogden. The note was received by defendant, prepared strictly in accordance with his own suggestions,

and was not signed until two days after the alleged meeting and after he had ample time to seek advice and to recover the full possession of his faculties, even assuming any loss of his reasoning faculty by the claimed threats. It was of course very easy for him to take the witness stand after he attempted to rescind the contract and say that he would not have signed the note had it not been for the alleged threats, but we submit that his whole course of dealings indicates that this conclusion, arrived at many months after the transaction, is contrary to all of the facts in this case. Even though Mr. Hagman said, as contended by defendant, that "You can't come here and tell me what you will do," and even though Mr. Hagman told him that if he would sign the note they wouldn't prosecute Frank but if he didn't they would have to prosecute him, yet we contend that this evidence, when considered in the light of all the admitted facts and circumstances in connection with the case, falls far short of proving duress as that term has been defined, not only by this Court, but by many other courts. We rely principally upon the case of

Ellison vs. Pingree,
64 Utah 479,
231 Pac. 827,

and

Fox vs. Piercey,
.....Utah.....,
227 P. 2d 763.

In the Pingree case, this Court quotes with approval

13 C. J., Page 396,
Section 310,

in which the Court says:

“Duress is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness.”

Again this Court quotes with approval

1 Page on Contracts,
Section 496:

“A person in his right mind and in full control of his faculties, who understands what he is doing and who has full power to enter into a legal transaction or to refuse to do so, does not act under duress if he enters into such transaction.”

And in the Pingree case the Court sustained the lower Court in its finding that there was no evidence of duress.

We have already alluded to the question raised under Point 1, and here again we desire to revert to this proposition.

We contend that there is no evidence that when the defendant signed this note on July 6th, two days after the meeting in Salt Lake City, that he was not in full control of his faculties. We contend that he understood perfectly what he was doing and he had the mental capacity to either enter into or refuse to execute the note; that he had at least two days' time to reflect and to seek advice. It seems to us that with no showing whatsoever that he was in any state of mental confusion that for him to be permitted to merely say 'I would not have signed this note had it not been for the state-

ments made," when considered in the light of all of the undisputed facts and circumstances surrounding the transaction, amounts to no evidence whatsoever of duress or compulsion. We reserve for further discussion under Point 4 the question of a delay in acting after the alleged duress has been imposed.

In

17 U.S., Page 531,
Section 172,

the author says:

"Mere threats of criminal prosecution are not enough. There must be a reasonable ground for apprehension that the threat will be carried into execution and it must also appear that the threats operated on the mind on the party so as to overcome his will."

The following cases cite the general rule of law governing duress:

Pugh-Miller Drilling Company
vs. Main Oil Company,
276 Pac. 1043.

Winget vs. Rockwood,
69 F. 2d 323

White vs. Scarritt,
111 S.W. 2d 18

Sulzner vs. Cappsan-Lumley
Company, 39 L.R.A. (N.S.) 421

It is also well-established that a person may waive the defense of duress by subsequent conduct. See

Dairy Company Operative Association
vs. Brands Creamery, 30 P. 2d 338

CONSIDERATION

That there was a valid consideration for the signing of the note cannot be questioned. See

Spear vs. Ryan,
208 Pac. 1069.

Certainly when the payee of the note accepted the joint signatures of the defendant and his son, and thereby extended to the son additional time in which to make payment of the obligation which he admittedly owed, this of itself constitutes sufficient consideration for the signing of the note by the defendant.

We will discuss this more in detail under Point 5 relating to instructions.

Point 4. Plaintiff moved for a dismissal of defendant's counterclaim wherein he sought to recover the \$1,550.00 which he had already paid and the return of his uncashed personal check for \$500.00. The trial court overruled and denied this motion and also denied a similar motion made at the conclusion of the taking of evidence and overruled and denied plaintiff's requested instruction number two, all of which raised the same point, that is, whether or not there was any evidence to submit to the jury as to defendant's right to recover on the counterclaim. We contend that even assuming there was sufficient evidence to go to the jury as to the question of duress and failure of consideration in procuring defendant's signature to the note, yet the recovery back of money subsequently paid

he freely and voluntarily endorsed the cashier's check stands on an entirely different approach and that our motions to dismiss the counterclaim should have been granted. It must be remembered that defendant makes no claim of any alleged duress imposed subsequent to the meeting of June 4th. Yet on July 4th, a month later, for \$1,500.00 and delivered the same to Hagman and then wrote his personal check for \$500.00, but requested Hagman to hold the same for a short time. Then at a later date he freely and voluntarily paid the \$50.00 installment on the note representing the July payment. It must also be remembered that he never at any time made any protest of any kind or character whatsoever with respect to the making of these payments, nor did he in any manner protest or attempt to repudiate the transaction until the following December and during this interim he wrote several letters to Hagman. See Exhibits C, D, E and F. In none of such letters did he suggest any duress or improper conduct. But on the contrary his letters were friendly and courteous and indicated a friendly and courteous relationship. We contend that this evidence conclusively established the fact that the transaction of July 4th and the subsequent payment of the \$50.00 constituted what amounts in law to a voluntary payment which cannot be recovered back. In this connection we desire first of all to call to the court's attention the following language set forth in the case of

Fox vs. Piercey,
Cited supra.

“In view of the fact that this case is determined upon the considerations discussed above, it is unnecessary to resolve the problem sug-

gested by appellant regarding the lapse of time between the alleged threats and the presentation of Fox's resignation. *We do not disagree with the contention that, even if duress had been practiced, an act done after sufficient time had elapsed for fear to disappear would not be voidable for duress. (Italics added.)*

This matter is discussed in

48 C.J., commencing at page 734,
Section 280 to Section 311, inclusive.

We quote from the text the following found on Page 749, Section 300:

“Where no warrant has been issued or proceedings begun, and there is no immediate danger, a payment with full knowledge of the facts will not, as a general rule, be deemed compulsory so as to entitle the payor to recover it back, by reason of the fact that the payment is made under a mere apprehension or threat of a criminal prosecution. However, demands and threats of persons clothed with governmental authority to carry them into execution by arrest and prosecution stand on a different footing from demands and threats of private individuals, and money paid because thereof, if unwarranted, may generally be recovered back, as in such cases the parties do not stand on equal footing.

Cases in support of the foregoing text are cited in the notes.

The subject is also discussed in

70 C.J.S., commencing on Page
350, Section 146
to 149, inclusive.

and in

The defendant admits that he is a man of more than average intelligence. He has been a school teacher for many years. Several members of this family with whom he was in constant touch had attained eminence in the field of education. It seems incredible that a man of that training and experience could wait a month and then be permitted to say that when he made this payment he was acting under duress claimed to have been invoked a month previous. There is no evidence in this case that the defendant was ever acting under fear or that his mind was in the slightest degree coerced by anything that was said or done on June 4th, even according the defendant every reasonable inference as contained in his own testimony. Defendant himself realized the weakness of his case and so he claimed on direct examination that he signed the note in Hagman's office when the threat was made. He also claimed that the first note which provided for a payment of \$250.00 a quarter provided for the entire amount of the shortage and from that tried to infer that the demand for the \$2,000.00 was induced under threats of duress. He was forced to admit that both of these statements were and are absolutely untrue. It is a case which comes very close to perjury because when confronted with documentary evidence he had to admit that his story was absolutely untrue. The original note of April 19th for \$250.00 quarterly was produced. It provided for payment of \$4,678.40. The fact that the note as finally signed was not signed in the office at all has already been alluded to. We say, therefore, that there

was no competent evidence to submit to a jury that on July 4th, when the defendant paid the \$1500.00 and gave his check for \$500.00, the payment was induced by any duress then and there existing which overcame the mind of the defendant.

Point 5. The Court in its instructions to the jury in Instruction No. 1 stated:

“The second defense is that even if it should be determined that such duress has not been proven, nevertheless the only consideration for his signing the note was the promise of plaintiff’s agent, J. G. Hagman, Jr., that if he would sign, Frank Berryessa would not be criminally prosecuted, and that such consideration is illegal and insufficient to support the note. You are instructed that either of these defenses, if established by a preponderance of the evidence, is a sufficient and adequate defense to plaintiff’s action against the defendant W. S. Berryessa.”

Plaintiff duly excepted to the foregoing instruction.

In Instruction No. 6 the Court instructed the jury as follows:

“You are instructed that the note sued upon by the plaintiff is invalid against the defendant W. S. Berryessa if not supported by a valuable consideration. A promissory note given for the suppression of a criminal prosecution is against public policy and cannot be enforced between the parties and it is immaterial whether the individual as to whom the criminal prosecution is suppressed was guilty or innocent. Accordingly, if you find from a preponderance of the evidence that the defendant W. S. Berryessa signed the note sued upon by the plaintiff in consideration

of plaintiff's promise, through its agent J. G. Hagman, Jr., that Frank Berryessa would not be criminally prosecuted for his defalcation, the note is invalid as to the defendant W. S. Berryessa and you must so find."

Plaintiff likewise excepted to this instruction.

Our objection to that portion of Instruction No. 1 quoted supra is this: It gives the jury the idea that there are two separate and distinct defenses to the validity of the transaction: One, duress, and the other, failure of consideration, and the Court specifically tells the jury that if either of these defenses is established by a preponderance of the evidence, the plaintiff cannot recover. In other words, the Court, by this instruction and that portion of Instruction No. 6, gives to the jury the idea that even though duress is not proven, yet the jury may still bring in a verdict in favor of the defendant for want of consideration. As we have heretofore pointed out, there can be no question but what there was a consideration sufficient to support defendant's signing of the promissory note. A joint payee or endorser of a promissory note cannot defeat the action even though he personally receives no benefit from the transaction. This, of course, is fundamental. The consideration in this case which would support the note is the acceptance by plaintiff of a promissory note wherein and whereby Frank Berryessa is given an extension of time in which to pay an obligation which he admits to be presently due. The only question, therefore, in this case, as we see it, is whether or not the obtaining of the defendant's signature to the note was obtained by

duress or coercion, as that term is legally defined. If there was duress, then the note is invalid because of the duress, which some courts refer to as a failure of consideration.

In the case of

Brane vs. First National Bank,
20 P. 2d 506,

the Court says:

“Both parties recognize the fact that the question of want of consideration is incident to and logically a part of the question of duress, so that the duress feature is the sole and only question here involved.”

We contend that the Court, by giving of that portion of Instruction No. 1 and Instruction No. 6, necessarily confused the jury into thinking that even though defendant failed to prove duress by a preponderance of the evidence, yet plaintiff cannot recover because there was a failure of consideration. In this we think the Court committed prejudicial error.

Point 6. Plaintiff requested the Court to give its Requested Instructions No. 1 and No. 2. This question has already been discussed under Points 3 and 4.

Plaintiff requested the Court to give its Requested Instruction No. 3. The Court, in its Instruction No. 4, adopted a portion of this requested instruction but it is to be noted that the Court left out of its Instruction No. 4 the following which is contained in plaintiff's Requested Instruction No. 3:

“Duress will not ordinarily invalidate a promissory note entered into after opportunity for deliberate action.”

We think the Court should have included in its definition the foregoing phrase because the evidence showed conclusively that the note in question was not signed at the time of the alleged duress but two or three days later and the payment of the \$1550.00 was made over a month later.

Plaintiff's Requested Instruction No. 4 was refused. We think the plaintiff was entitled to have this instruction given to the jury. It is certainly a correct statement of the law, as pronounced by this Court in the Ellison case, and we do not believe that the giving of Instruction No. 6 embraces this legal concept.

Plaintiff's Requested Instruction No. 6 was partially covered by the Court's Instruction No. 5, but the Court refused to include therein the following:

“It is the law that payments voluntarily made cannot be recovered back, even though the original transaction was entered into under duress. To entitle the defendant to recover any payments made by him to the plaintiff, it is incumbent upon the defendant to prove by a preponderance of the evidence that the duress which induced the defendant to sign said note, if you find as a fact that such duress actually existed, continued in the mind of the defendant at the time the defendant made said payments, and that such duress controlled the mind of the defendant to the extent that said payments or either of them was made under and by reason of said duress and was therefore not a voluntary payment.”

The Court in its entire instructions failed to define the term "voluntary payment," although it was expressly made an issue in this case, and we think it was prejudicial error not to do so. Certainly the plaintiff was entitled to have its theory presented to the jury.

In plaintiff's Requested Instruction No. 7 was a request embodied upon the theory of a waiver of the defense of duress. It is well-established that duress may be waived and the contract ratified by the injured party after the duress has been removed.

17 C. J. S., Page 529,
Section 169

70 C. J. S., Page 134

White vs. Scarritt,
111 S. W. 2d 18

The evidence in this case showed that a month after the alleged duress the defendant paid the \$1500.00, in accordance with his agreement; that thereafter he paid another \$50.00; that between June 4, 1950 and December 1, 1950 the defendant repeatedly acknowledged the obligation by letters as well as in friendly conversations with Mr. Hagman. (Tr. 93, 97, 98)

Counsel for respondent may claim that the issue of a waiver was not pleaded. We take the position that under the new rules no waiver need be pleaded because there is no provision in the new rules for the filing of a reply. Under the old practice matters of confession and avoidance had to be set forth in a reply, but now no reply is provided for and surely one does not have to plead anticipatory defenses as a part of the complaint.

Second, we think the questions of waiver is raised by the pleading. Defendant says the plaintiff was guilty of duress. Plaintiff denies there was duress. Any fact which showed there was no duress is admissible under the general issue.

Third, plaintiff did file a reply to the counterclaim of the defendant, wherein defendant sought to recover the \$1550.00 paid, and as to this issue the pleading was sufficient to raise the question of a waiver.

To each and all of the foregoing instructions and requests the plaintiff duly expected. (Tr. 133 to 135)

Point 7. It is plaintiff's contention that by reason of the manifest errors committed by the Trial Court the Court should have granted plaintiff's motion for judgment notwithstanding the verdict as to both the validity of the promissory note and the dismissal of the defendant's counterclaim, but in any event plaintiff contends that the motion for judgment should have been granted as to the defendant's counterclaim.

Respectfully submitted

LeRoy B. Young of

THATCHER & YOUNG

Attorneys for Plaintiff and Appellant