

1951

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

Utah Supreme Court

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FILED

Case No. 7680

AUG 21 1951

Clerk, Supreme Court, Utah

**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.

BRIEF OF RESPONDENTS

HOWELL, STINE AND OLMSTEAD,
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W. S. Berryessa.

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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.

STATEMENT OF FACTS

This being an action at law in which a jury in the lower court has rendered its verdict, if there is any substantial evidence to support the verdict this court will not interfere, even though in its judgment, if it were to pass on the facts, the verdict would have been otherwise, or is, in its opinion against the weight of the evidence. As this court has succinctly stated in the case of *Harris v. Ogden Steam Laundry Company* 39 Utah 436, 117 P. 700, and has in substance reiterated many times:

“We cannot interfere in cases that are doubtful with regard to the facts any more than we can in cases that are clear upon the facts. The test is as to whether there is any substantial evidence upon every material issue which must be established in order to authorize a recovery.

If there is, we, like the losing party in the case, must submit to the verdict, although like he, we might think it should have been the other way."

We accordingly restate the facts in accordance with the evidence most favorable to the defendant, as it was the prerogative of the jury to believe such evidence, rather than possibly conflicting evidence offered by plaintiff.

Respondent, W. S. Berryessa, is the father of Frank Berryessa. Frank was an office employee of the Ben Lomond Hotel in Ogden. Plaintiff had issued a surety bond guaranteeing the integrity of Frank. In the forepart of January, 1950, the hotel discovered a shortage in Frank's accounts. Frank notified his father and W. S. Berryessa went to the hotel and met with I. F. Keller, the hotel auditor. It was then assumed that the shortage was in the cash account only, and amounted to \$2,186.00. So far there is no dispute as to the facts.

At this point, however, plaintiff in his statement of facts says:

"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 * * *. Defendant insisted on signing a note to the Hotel Company for the amount of the assumed shortage, aggregating \$2,000.00."

We call the court's attention, however, to the defendant's precise testimony in regard to this matter:

Q. (By Mr. Young) And didn't you at that time say to Mr. Keller in substance and effect,

“I don’t want you to even tell the bonding company about this shortage”?

A. No, I didn’t.

Q. And didn’t you say, “If you won’t tell the bonding company about this matter, I’ll pay every cent of that shortage”?

A. No, sir.

Q. Either in substance or effect?

A. No, sir.

(Tr. 32-33).

A little later Mr. Berryessa went to the office of Mr. Campbell Eccles, manager of the Hotel, and there signed a note payable to the Hotel in the principal amount of Two Thousand One Hundred Eighty-six (\$2,186.00) Dollars, which was the then assumed amount of the shortage. The circumstances surrounding the signing of this note, as testified to by defendant under cross-examination, are as follows:

A. I signed the note with the understanding that was the full amount that was short and that the bonding company wouldn’t be notified. Mr. Eccles told me the bonding company wouldn’t be notified. I could straighten up that shortage and Frank would be able to work out and pay that back. That was the understanding I had. He said that it would be kept quiet. It wouldn’t be advertised, and that was the reason I signed that note.

Q. Yes. In other words, you at that time asked Mr. Eccles not to notify the bonding company of this shortage.

A. I didn't ask him. He offered that.
(Tr. 34-35).

Later the hotel auditor determined from an examination of the ledger accounts that the amount of the shortage totaled in excess of \$6,000, and at that time Mr. Berryessa again met with Mr. Keller, the hotel auditor, and Mr. Eccles, the hotel manager. In this connection plaintiff in its statements of facts makes the following observation as being the fact:

"However, defendant insisted that whatever the amount, he was prepared to make it good".

We again call the court's attention to the testimony of Mr. Berryessa with regard to that matter.

Q. And didn't you then say in substance and effect, I don't want any publicity given to this matter. I'll pay every cent of it.

A. No sir; I didn't say that. That is impossible. I knew I couldn't pay that.

Q. You didn't make a statement either to that effect either to Mr. Eccles or Mr. Keller.

A. It was never brought up for me to pay that amount.

(Tr. 35).

Mr. Eccles thereupon advised Mr. Berryessa that in view of the large amount of the shortage it would be necessary that the bonding company be notified, which he did through the bonding company's representative Mr. Hagman. Subsequent meetings with Mr. Hagman were held, at one of which, namely, March 3, 1950, Mr. Hagman received from Frank Berryessa a written state-

ment acknowledging his misappropriation of a total of Six Thousand Eight Hundred Sixty-five and 28/100 (\$6,865.28) Dollars (Defendant's Exhibit 1).

Later Frank requested his father to accompany him to a meeting with Mr. Hagman in Mr. Hagman's office in Salt Lake City, and at that time Mr. Hagman and Frank discussed the signing of a note, which note would bear not only Frank's signature, but that of his father, Mr. Berryessa, and his brother-in-law, Roy Patterson. Mr. Hagman prepared such a note which called for quarterly payments of Two Hundred Fifty (\$250.00) Dollars. Frank took the note with him and mailed it to his brother-in-law Roy Patterson in New Mexico, but Patterson returned the note unsigned. (Tr. 18-19). Thereafter and early in June, apparently on June 4, 1950, Frank and his father, this defendant, again went to Mr. Hagman's office in Salt Lake City, at which time Frank advised Mr. Hagman that Patterson had sent the note back unsigned. Mr. Hagman wanted Mr. Berryessa to sign the note, but Mr. Berryessa refused. The defendant then testified (Tr. 21) that upon Mr. Berryessa's refusal to sign the note "Mr. Hagman got angry and swore, and pounded his desk with his fist, and said 'You can't come here and tell me what you will do' ". Mr. Berryessa thereupon told Mr. Hagman that it was impossible for them to meet quarterly payments of \$250, and in response to a question propounded by Mr. Hagman stated that payments of \$50 a month could be made. Mr. Hagman then told Mr. Berryessa that at \$50 a month it would take forever to pay off the full amount of the shortage, but that if Mr. Berryessa would pay \$2,000 in cash and thereby reduce the amount to

\$4,865.20, a note co-signed by Mr. Berryessa in that amount and payable in \$50 monthly installments would be accepted. Mr. Berryessa thereupon agreed to pay \$2,000, and co-sign with Frank upon the note in the amount of \$4,865.20, which is the note here sued upon. Further in regard to his agreement to sign this note and make the \$2,000 cash payment, Mr. Berryessa testified (Tr. 21) as follows:

“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.”

(Tr. 21-22).

Apparently on the next day, June 5, 1950, Mr. Hagman caused the note to be prepared and forwarded the same to Mr. Berryessa in Ogden, and Mr. Berryessa signed the note on June 6 and returned it to Mr. Hagman. He did not have the \$2,000, but took immediate steps to raise the same by borrowing upon some property he had. Because of other expenses he succeeded in having but \$1,500 of the \$2,000 he had agreed to pay. He got a cashier’s check in the amount of \$1,500, which he delivered to Mr. Hagman on or about July 3, 1950. (Defendant’s Exhibit 2), at that time explaining why he was \$500 short. To make up this shortage he delivered to Mr. Hagman his personal check in the amount of \$500, but asked Mr. Hagman to delay presenting it for payment for a reasonable time to permit him to raise the money to cover it, and Mr. Hagman agreed to this arrangement. The \$500 check was never presented for payment and was in possession of defendant at the time the action was brought. (Defendant’s Exhibit 3). Sub-

sequently, Mr. Berryessa saw Mr. Hagman on two or three occasions primarily in connection with payments upon the note between the time that the note was signed in June, 1950, and the bringing of this action in December, 1950. Five \$50 payments were made thereon, one by Mr. Berryessa out of his own funds, and the other four payments out of funds received by him from Frank's wife. These five payments constituted the installment payments due for July, August, September, October and November. The installment payment due on December 1st was not made, and in December plaintiff purportedly elected to mature the entire principal, because of such default, and brought this action for the full amount of such note, less the payments that had been made thereon.

Defendant defended upon the ground that the note was void as his signature thereon was obtained by duress, and that the note was not supported by any lawful consideration. He counter-claimed against the plaintiff for the return of the \$1,500 he had paid, and the return of his \$500 check, and upon the jury's verdict in his favor judgment was entered by the court in favor of the defendant upon the note and for the return by plaintiff to defendant of the \$1,500 paid and the \$500 check.

As further bearing upon the circumstances under which the note was signed, the \$500 check delivered, and the \$1,500 paid, Mr. Berryessa testified that he would not have signed the note but for the statements and threats made by Mr. Hagman as to what would happen to Frank if he did not do so, nor would he have paid the \$1,500 or given his \$500 check but for such

person for a felony, or under threats of arrest or prosecution, would be void as against public policy.”

And generally, 10 C.J.S., Bills and Notes, Page 630:

“Bills and notes for the concealment of a crime or the suppression or hindering of a criminal prosecution are against public policy and cannot be enforced between the immediate parties, whether the maker was innocent or guilty. If an agreement not to prosecute criminally forms any part of the consideration, it is immaterial that there was an existing indebtedness which could have been a consideration for the instrument, as where the bill or note was given for money embezzled or stolen by the maker.”

Plaintiff's particular point here is that the court erred in permitting the defendant to testify that he would not have signed the note or paid the money but for plaintiff's threats and promises, because it called for a conclusion of the witness.

As the court well recognizes, the line of demarcation between a fact and a conclusion is often difficult of discernment, and, in the last analysis, every statement of fact is to some extent founded on inference or induction. As stated in 32 C.J.S., Evidence, Page 101,

“Much effort is expended during the trial of causes to confine the testimony of witnesses to statements of what they saw, heard, or otherwise observed, as distinguished from the inferences or opinions formed as a result of such observations. The distinction is, however, one which it is in many cases impossible to draw, for the reason that the most simple statement of fact involves an element of coordination, induction,

or inference, the fact and the inference being frequently so blended that they cannot be separated. The modern tendency is to regard it as more important to get the truth of the matter than to quibble over distinctions which are in many cases impracticable, and a witness is permitted to state a fact known to or observed by him even though his statement involves a certain element of inference.”

And again in 20 Am. Jur., Evidence, Page 643:

“The general rule excluding opinions of witnesses is simple in statement, but not so simple in application, for it is not always easy to distinguish in the testimony of a witness facts within his knowledge or observation from his opinions on facts. As a general rule, a witness may testify directly to a composite fact, although in a sense his testimony may include his conclusions from other facts. In the multitudinous affairs of everyday life, it is extremely difficult to distinguish between ‘opinion’ on the one hand and ‘fact’ or ‘knowledge’ on the other. Moreover, objections that proposed testimony states a conclusion only are sometimes pushed to captious extremes. The true solution seems to be that such questions are left for the practical discretion of the trial court.”

Direct application of the foregoing rules to situations similar to the present are to be found in the cases of *Ballard v. Burton* (Vt.) 24 A. 769, wherein the court held it proper for a witness to testify what he would or would not have done, but for another’s promise; and *Western Union Telegraph Co. v. Mitchell*, (Tex.) 44 S. W. 274, wherein it was held proper for a witness to testify what he would have done had a telegram been delivered to him.

More directly in point from a factual standpoint is the case of *Daum v. Urquart*, (S. D.) 249 N. W. 738, which involved an action for the recovery of money allegedly obtained by duress. In this case the plaintiff, while testifying as a witness, was asked if he "would have voluntarily given to the defendant Urquart the sum of \$7,000 if it had not been for the duress, coercion and threats that were given to you there in that office". The question was objected to on the ground that it invaded the province of the jury. The objection was overruled, and the plaintiff said he would not have done so. Error was predicated upon this ruling. The court held as follows:

"It is the theory of the defense that plaintiff admitted that he had taken considerable sums of defendant's money and that he desired to make restitution, and that it was this desire on his part that prompted him to pay the \$7,000. It was for the purpose of showing what really prompted him to pay the money that this question was asked. In *Clark v. Mosier*, 35 S. D. 54, 150 N. W. 475, we held that this question calls for neither a conclusion nor a self-serving declaration, but for a statement of fact. It was for the purpose of showing the inducement that prompted plaintiff to pay the money. It was not binding on the jury and did not prejudice the defendant. The jury was free to draw its own conclusions as to whether he paid the money because his will had been overcome by Crawford and Carter or whether he was prompted by the desire to pay an honest debt."

And *Clark v. Mosier* (S. D.) 150 N. W. 475:

“While on the witness stand, plaintiff was asked whether or not he would have released the cattle if defendant had not agreed to pay the damage. This was objected to on the ground that it calls for a conclusion and a self-serving declaration of the witness. The objection was overruled, and rightly so. The question is not objectionable on either of these grounds. It calls for neither a conclusion nor a self-serving declaration, but for a statement of fact. That plaintiff released the cattle and thereby surrendered his lien thereon was an admitted fact; and the purpose of the question was to show the inducement that prompted plaintiff to forego such security and to show that he acted solely on defendant’s promise to pay.”

In the case of *St. Paul Mercury Indemnity Co. v. Guntzburger*, (Minn.) 271 N. W. 478, in which the trial court found duress, and the Supreme Court of Minnesota affirmed, the following was not found improper:

“And he (Hawkland) handed me the note and I refused to sign, and finally says I, ‘Now, what you going to do if I don’t sign that note?’ ‘Well,’ he says, ‘we will turn him over to the bonding company, and you know what that means.’ Says I, ‘Yes, I think that means State’s prison.’ And he said ‘Yes.’ Well, my grandson sat right there and (I) looked in his eyes. I could see him. He faced me. Mr. Hawkland was sitting right about this way from me. And I see the tears was running down his (Lowell’s) cheeks, and that is what got me, and I signed it. I didn’t want my name dragged in that I have a grandson in the State’s prison.

‘Q. And you had been talking about this matter, as you say, all through the evening, the couple hours that he was there? A. Yes, more or less.

‘Q. Now, if this had not been said to you, would you have signed that note otherwise, Mr. Guntzburger? * * * A. I don’t think I would.

‘Q. Is that why you signed the note? A. That is why I signed the note.

‘Q. And did you believe that if you did not sign it your grandson would be turned over to the bonding company and prosecuted and sent to prison? A. I sure did believe it, that is what they would do, and I was thinking of the two children he has got and his wife. * * * ’.

We submit, accordingly, that there was no error in the reception of this testimony.

POINT II

Plaintiff’s second point of argument is that the trial court erred in refusing to receive in evidence its proffered Exhibit I, although plaintiff’s argument is limited substantially to the bare statement that such ruling constituted error. We will pursue the matter somewhat further.

It is not, and was not, defendant’s contention that any duress or coercion entered into the relation of the parties to the matter then under investigation prior to the meeting in Mr. Hagman’s office in early June, 1950, and the issues were so framed. The stage was set, however, long prior to that; for it will be recalled that in early March plaintiff’s agent, Mr. Hagman, obtained

from Frank Berryessa his signed admission of guilt in the misappropriation of the hotel's funds. With that in his possession Mr. Hagman was in a position to crack the whip as and when, in his opinion, circumstances dictated.

He did not do so immediately. The first proposal was that the plaintiff company be reimbursed by way of a note to be signed by Frank and co-signed by W. S. Berryessa and his son-in-law, Roy Patterson. This proposal came from Mr. Hagman at the meeting in his office among himself, Mr. Berryessa and Frank on April 19th. (Hagman testimony, Tr. 89). Mr. Berryessa likewise testified as to this and to the effect that at the time this Patterson note was discussed Mr. Hagman didn't even inquire if Mr. Berryessa would sign it, but was concerned only as to whether Patterson would sign. (Tr. 39-40). Mr. Hagman did not deny this, and the inference is clear that Mr. Hagman, then having Frank's signed admission of guilt, knew he could bend Mr. Berryessa to his will at pleasure, but Patterson, being out of the state and in the family only by marriage, was a different matter.

The upshot of it was, of course, that Patterson didn't sign the note, and Mr. Hagman was so informed at the meeting in early June, on which occasion Mr. Berryessa told Mr. Hagman that he wouldn't sign it either. Here it was that Mr. Hagman found it expedient for the first time to display the iron glove Frank's signed confession of guilt had clothed him with. In Mr. Berryessa's words, he pounded the table with his fist and swore, and said "You can't come here and tell me what you will do". And then, having made his position of

dominance clear, he mellowed a little, and was willing to discuss somewhat milder terms of payment and a different note, but in connection therewith made it clear to Mr. Berryessa that if he didn't sign the new note, and make the other payments discussed, Frank would be criminally prosecuted, but if he did, no prosecution would follow. (Tr. 21-54).

Now, it's against this background that the letter Exhibit I was offered and refused. This exhibit is a letter from Mr. Berryessa to Mr. Hagman dated May 22, 1950, and relating to the then pending Patterson note. It was prior to the time that the exercise of any duress is claimed, and related to a transaction that is not the subject of this litigation, and, as a matter of fact, was never consummated.

The only question here involved was whether the note of June 6th, which is the subject of this litigation, and whether the payments subsequently made, which came out of the June 6th meeting, resulted from duress. It was not, accordingly, prejudicial error for the lower court to exclude evidence tending to show that no duress was exercised in connection with the proposed Patterson note, because no duress in connection therewith is claimed.

It is interesting to note, too, that plaintiff's counsel, in connection with his discussion with the court as to the admissability of Exhibit I, was laboring under the mistaken impression that the pleadings claimed duress prior to the early June meeting, but after examining the pleadings and satisfying himself of his error in that regard, he pursued it no further by argument, but submitted it to the court. (Tr. 56-57).

POINT III.

Plaintiff's third point is directed toward the contention that at the conclusion of defendant's evidence defendant's defense of duress and lack of consideration had not been sustained by the evidence.

At this point, of course, only defendant's evidence as to duress and lack of consideration was in, such being affirmative defenses as to which defendant had the burden. The evidence was uncontradicted, but whether it is taken in its uncontradicted state, or in the light of conflicts arising through the later testimony of plaintiff's witnesses, there was at all times a case for the jury.

Defendant testified in substance that plaintiff's agent told him that if he didn't sign the note his son Frank would be criminally prosecuted and sent to the penitentiary. Bearing in mind that Mr. Hagman then had in his possession Frank's signed confession of guilt, and Mr. Berryessa knew he had it, it is apparent that Mr. Hagman had the power to enforce his threats, and Mr. Berryessa had reason to believe such threats would be carried out. This factual situation if true, and it was for the jury to find the truth, established duress sufficient to invalidate the note under all the decisions. We refer again to this court's decision in *Payson Building & Loan Society v. Taylor, supra*:

"The statements made to the defendants that Lee R. Taylor would be arrested and imprisoned with the consequent disgrace and humiliation that would result from such threatened arrest and imprisonment was sufficient to put the husband and wife in fear and to cause them to act contrary to their respective wills and inclinations.

Such being the allegations and the proof, a case of duress is made out sufficient to avoid the validity of the executed instruments.”

We have, of course, no quarrel with the cases of *Ellison v. Pingree*, 64 Utah 468, 231 P. 826, or *Fox v. Piercey*,Utah....., 227 P. (2) 763, upon which plaintiff states it relies principally. In the Pingree case this court upheld a lower court finding of no duress, but Pingree himself had testified that he did not enter into the contracts because of any threats. This court there observed:

“In our judgment the district court was clearly right in holding that under Mr. Pingree’s own statements he utterly failed to establish duress as that term is understood and applied by the courts. In his testimony he asserted over and over again that, stating it in his own language, ‘it wasn’t fear of him (Poppenhusen) sending me to the penitentiary’ that induced him to enter into the contracts or either of them, and that he was ‘not scared’ of Mr. Poppenhusen. This statement is made so often, and in so many ways, that there is absolutely no room for doubt that it was not fear of imprisonment or loss of liberty, or of any personal injury, violence, or harm that induced Mr. Pingree to sign the contracts.”

In *Fox v. Piercey* this court adhered to what it referred to as the modern rule, as follows:

“It must appear that the threat or act is of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person.”

The facts of the instant case meet this test.

Now as to the defense of lack of consideration. For immediate purposes, that is, for the question of plaintiff's motion for a directed verdict, if the defense of duress was good the motion was properly denied irrespective of the defense of lack of consideration. We submit, however, that the defense of lack of consideration likewise was established.

Plaintiff's position is stated to be (Page 20 of Brief) that the extension of additional time to Frank in which to make the payment in and of itself constituted sufficient consideration for defendant's signing the note. We submit that this is not true when, as here testified to by the defendant, there is present the promise *that if the note is signed Frank would not be criminally prosecuted.*

We have heretofore stated the general rule on this point as it appears in 10 C. J. S., Bills and Notes, Page 630:

"If an agreement not to prosecute forms any part of the consideration, it is immaterial that there was an existing indebtedness which could have been a consideration for the instrument, as where the bill or note was given for money embezzled or stolen by the maker."

See also 7 Am. Jur., Bills and Notes, Page 270, as follows:

"Illegality of consideration for a bill or note exists, and the instrument cannot be enforced, at least by one not a holder in due course, where it is given to conceal, suppress, or compound a public offense, regardless of whether

such offense was actually committed, even though it is also given in settlement of a civil liability from the same act that constitutes the offense, for it is well settled that criminal process cannot be used to collect a private debt. Thus, a bill or note given to repay embezzled money in consideration of an agreement, express or implied, to conceal the embezzlement, not to prosecute, or to stifle the prosecution is void."

We submit, accordingly, that the defense of illegal consideration was established. The inducement of the promise not to prosecute tainted the entire transaction with illegality, and the fact that there existed what might otherwise have been a valid consideration does not remove the taint of illegality.

POINT IV

Plaintiff's fourth point is that there was insufficient evidence to go to the jury upon the question of recovery back of the \$1,500 paid by defendant to plaintiff, and the \$500 check delivered to plaintiff, and, accordingly, its motion to dismiss defendant's counterclaim should have been granted.

Defendant's right to recover back such money and such check stands upon exactly the same footing as his liability under the note, for, as we have seen, property obtained from another under duress may be recovered. It remains only to be seen whether there was any substantial evidence of duress against defendant on the part of plaintiff's agent Hagman in obtaining the \$1,500 and the \$500 check.

We refer again to the fact that the delivery of this money and check, as well as the signing of the note, grew out of the meeting of June 4 with Mr. Hagman, and at which meeting, according to defendant's evidence, Hagman threatened criminal prosecution and imprisonment of Frank if defendant didn't sign the note and pay the \$2,000. Certainly if the \$1,500 and the \$500 check had been delivered to Hagman at that time there would be no doubt but that a case of duress had been made out. Plaintiff contends, however, that as substantially a month had elapsed since the threats no proof of duress or coercion at the later date was shown.

In answer to this we go back to the fundamental concept that if there were any facts shown from which coercion on this later date might be inferred, it was for the jury to determine.

As stated in 17 Am. Jur., Duress and Undue Influence, Page 906:

“Whether duress existed in the particular transaction is usually a matter of fact.”

And in 11 C.J.S., Bills and Notes, Page 219:

“Duress is generally a question of fact for the jury, as is also the question of continuance of the duress at a time when a letter of defendant promising payment of the previously executed notes was written, and where there is sufficient evidence in support of a defense of duress, a direction of verdict for plaintiff is improper.”

The court in the case of *Meyer v. Guardian Trust Co.* (C. C. A. 8th) 296 F. 789, states it thus:

“It is quite apparent from the record that in the admitted and offered testimony there was evidence from which a jury could find that defendant in error assigned said notes because of threats that his son would be prosecuted and sent to the penitentiary for alleged forgery as to the first notes given. Whether Angus, the party making such threats, was or was not the agent of the defendant in error, is immaterial on this branch of the case. If the mind and will to contract of defendant in error was destroyed by the threats, and if while in such condition he signed the notes, then there was duress. Whether or not such was the fact was a question to be determined by a jury.”

We refer, accordingly, to the factual situation. On June 4th Mr. Hagman made the threats. At that time he had Frank's signed confession of guilt. Thus he then not only made the threats of what would happen to Frank if the note was not signed, and the money paid, but he had the instrument in his possession (Frank's confession) which made it possible for him to carry his threats into fulfillment. The power of fulfillment which he had on June 4th when the threats were made he still held on June 6th when the note was signed, and on July 4th when the \$1,500 was paid and the \$500 check delivered. He had stated once what would happen if the note was not signed and the money paid — he had the power to carry his threats into execution. It was wholly unnecessary for him to repeat his threats. Defendant had been once informed, and was not unmindful of the consequences.

Having once made the threats, and having the power to effect the consequences, we submit that it

was wholly a question for the jury as to whether the note was signed, the money paid, and the check delivered under duress, and the lower court did not err in denying plaintiff's motion to dismiss.

The threat here involved was not one of but passing moment, which disappeared upon removal from the immediate presence of the person threatening, as might be in a case of threatened physical violence. Here was a threat which constituted a continuing cloud — an ever-present danger. It was as effective when defendant was in Ogden as when he was in Salt Lake. It was as ever present on July 4th, as it was on June 6th, and on June 4th, when the threats were first made.

We do not quarrel with decisions reached by other juries and other courts on other factual situations, as reflected in cases cited by plaintiff. All we say is that it was for this jury to decide, and this decision has been made.

POINT V

Plaintiff's fifth point of argument is that the lower court erred in submitting to the jury defendants' defense of illegal consideration under instructions (Instructions 1 and 6) which in effect told the jury that even though they found that the note was not given under duress, still if they found that the consideration therefor was a promise by plaintiff's agent that if the note was signed by Mr. Berryessa Frank would not be criminally prosecuted, such consideration was illegal and the note invalid as to the defendant W. S. Berryessa. The instructions complained of are as follows:

“Instruction No. 1.

You are instructed that the defendant, W. S. Berryessa, admits signing the note sued upon but raises two defenses to his liability thereon. The first defense is that his signature was obtained as a result of the duress upon him of the plaintiff's agent, J. G. Hagman, Jr., and that but for such duress he would not have signed the note. The duress as claimed by the defendant consisted of threats by plaintiff's agent, J. G. Hagman, Jr., that if the defendant, W. S. Berryessa, did not sign the note his son, Frank Berryessa, would be criminally prosecuted and sent to jail. 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 preponderance of the evidence is a sufficient and adequate defense to plaintiff's action against the defendant, W. S. Berryessa."

"Instruction No. 6

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 believe 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 defalcations, the note is invalid as to the defendant, W. S. Berryessa, and you must so find.

The burden of proof is on the defendant in this case to prove that the consideration for which the defendant signed the note was the suppression of a criminal prosecution against defendant's son."

We do not understand that plaintiff contends that that portion of such instructions 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."

incorrectly states the law, but rather, in plaintiff's own words (page 25 of its brief):

"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.”

We submit that the issue of want of consideration, as well as of duress, in the signing of the note was properly submitted to the jury. The defense of want of consideration was specifically pleaded as a defense (Paragraph 9 of Defendant's Answer, Tr. 005) and there was evidence to support it.

In considering this phase of the matter it should be borne in mind that defendant claims there were two things done that induced him to sign the note. The first is that plaintiff's agent threatened that if the note was not signed, Frank would be criminally prosecuted. *This is the duress.* The second is that plaintiff's agent promised that if the note was signed Frank would not be criminally prosecuted. *This is the illegal consideration.* They are separate and distinct. The jury might find that the threat was not made, in which case the defense of duress was not sustained, but nevertheless find that the promise not to prosecute was made, in which case the note is still invalid because of the illegality of the consideration therefor.

We refer first to the only case cited by plaintiff in support of its contention of error on this point, *Brane v. First National Bank* (Kan.) 20 P. (2) 506. This case did not in anywise involve instructions or submission of defenses to the jury, but on the contrary went up on demurrer and involved only the question of whether the complaint stated a cause of action in duress. The complaint alleged that defendant represented

“that if the plaintiff would pay or secure said defendant the sum of \$4,000, that said defendant would accept same in full settlement of the claim against said son-in-law, and that the payment and security of the same would protect said son-in-law from criminal prosecution.”

The court held that this did not state a cause of action in duress, saying:

“Does this contain the threat necessary to constitute duress? It contains no threat whatever, unless the negative is to be inferred from the last clause, that, if the payment and security are not made and furnished, the son-in-law would be prosecuted criminally. Inferences from facts pleaded are not generally substitutes for necessary allegations.”

In the present case both the defense of duress and of lack of consideration were pleaded, and evidence offered on both. They were separate and distinct, and each, in and of itself, sufficient. The pleading of these separate defenses was proper under the Utah Rules of Civil Procedure. Rule 8 (c) provides:

“(c) Affirmative Defense. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, *duress*, estoppel, *failure of consideration*, fraud, *illegality*, injury by fellow servant, laches, license, payment, release, resjudicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense”. (italics added)

Rule 8 (c) (2) provides:

“(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.”

As we have previously seen, if the promise not to prosecute forms any part of the consideration it is immaterial that there may be other consideration of a legal nature. 10 C. J. S., Bills and Notes, Page 630:

“If an agreement not to prosecute criminally forms any part of the consideration, it is immaterial that there was an existing indebtedness which could have been a consideration for the instrument, as where the bill or note was given for money embezzled or stolen by the maker.”

Also *Kirkland v. Benjamin* (Ark.) 55 S. W. 840

Buck v. Paw Paw First National Bank (Mich.)
27 Mich. 293, 15 Am. Rep. 189

Swinburne v. Dahms (Ohio) 162 N. E. 776

Ogden v. Ford (Calif.) 176 P. 165.

The case of *United States Fidelity & Guaranty Co. v. Charles, et al*, (Ala.) 31 So. 588, is on all fours factually with this case. We quote from the opinion:

“The first and third pleas, to which demurrers were interposed by plaintiff and overruled by the court, set up the illegality of the consideration of the notes sued on. These pleas aver that the notes were given in consideration of an agreement and promise made by the payee not to prosecute the principal maker of said notes, viz., one Caldwell, for the embezzlement by him of \$650 from the Standard Building & Loan Association of Montgomery, Ala., in the employment of which company he was engaged as a bookkeeper. It is further shown by said pleas that the payee guaranty company was security upon the employment bond of said Caldwell at the time of said embezzlement by him, and as such surety paid to said building and loan association the sum so embezzled. That there was an implied contract, under the law, on the part of Caldwell, to pay to the said guaranty company the amount so paid by it to the building and loan association for his said default, there can be no doubt, and that upon such implied contract a right of action existed and a recovery could be had by the guaranty company against said Caldwell is equally clear, but that is not the contract here sued upon. The contract sued upon is an express contract made by said Caldwell, together with the defendants as his sureties, which is based upon a consideration which is, at least in part, illegal. It is contended by counsel for appellant that the only difference between the contract implied by law and the express contract sued upon is one of evidence. In this contention appellant’s counsel is mistaken. The express contract, besides carrying with it the obligation of the defendants as sureties, also provides for a waiver of exemptions, neither of which existed in the implied contract. The plaintiff, in his action, relies wholly

upon the express contract, and upon it he must stand or fall, without any regard to the implied contract which the law raised up between plaintiff and the principal debtor out of the circumstances of the default and embezzlement. It is a well-settled principle of law that a consideration in part illegal will avoid the entire contract. 1 Brick. Dig. p. 382, Sec. 116, and cases there cited. The fact that there was a contractual relation existing between Caldwell and the guaranty company, by virtue of the latter's suretyship upon a bond for the faithful performance of duty by Caldwell to his employer, the Standard Building & Loan Association, cannot vary the principle laid down in the authorities above cited, or purge the contract of the illegality of consideration. When the guaranty company paid the amount of the default to the loan company, it then occupied the same relation to the embezzler, as to an implied promise by him to refund, as existed between the embezzler and the loan company, from whom he embezzled the funds, before said guaranty company settled the defalcation. It is the promise, as an inducement to the contract sued upon, that the payee will abstain from criminal prosecution of the principal maker, that taints the consideration of the note; being opposed to public policy and offensive to the law."

We submit, accordingly, that the lower court not only did not err in submitting both of defendant's affirmative defenses to the jury, but it would have been error for it not to have done so.

53 Am. Jur., Trial, Page 458:

“A court instructing the jury may not ignore or withdraw from the jury issues of fact which are in the case and supported by evidence, a ground of liability, or a proper defense.”

And on page 460:

“Each party to an action is entitled to an instruction upon his theory of the cases if there is evidence to sustain it.”

POINT VI

Plaintiff's sixth point is that the lower court erred in refusing to give its requested instructions Nos. 1 and 2, which were in effect for a directed verdict. We have heretofore demonstrated that there was competent evidence to the effect that the note was obtained as a consequence of the duress and illegal promise of the plaintiff's agent, Hagman, and the \$1,500 payment made and the \$500 check given under the same circumstances. This raised issues of fact, and their submission to the jury was proper.

Plaintiff further contends that the court in giving its Instruction No. 4, by which it defined duress, and which was word-for-word plaintiff's definition of duress as submitted in its Request No. 3, it erred in omitting the purely gratuitous observation requested by plaintiff as follows:

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

The court not only did not err in leaving that statement out of its instructions, but we submit it would have been error to have included it. The question was whether

duress as defined by the court was operating upon the defendant at the time the note was signed and the payment made. That question the jury had to determine. For the court to suggest to the jury by this statement that duress was not here present would have constituted an usurpation of the jury's province, and been error. Whether duress "ordinarily" will or will not invalidate a note entered into after an opportunity for deliberation is purely argumentative, and it is fundamental that argument has no place in an instruction.

53 Am. Jur., Trial, Page 439:

"Argument, which lies properly within the domain of counsel in the case, finds no place in instructions of the court. A court should not give, and may properly refuse, argumentative instructions."

Plaintiff also contends that the lower court erred in refusing to give its Requested Instruction No. 6, although conceding that it was partially covered by the court's instruction No. 5. The court's instruction No. 5 is as follows:

"No. 5.

You are further instructed that even though you should believe, by a preponderance of the evidence in this case, that at some time previous to the execution of the promissory note, the payment of one thousand five hundred (\$1,500.00) dollars, and the giving of the personal check for five hundred (\$500.00) Dollars, the said Hagman did make threats to initiate criminal prosecution of defendant's son and that the same constituted duress as that term has been heretofore defined, yet you must find for, the plaintiff in

this case unless you further believe, by preponderance of the evidence, that said duress, if you should find as a fact that there was duress, existed and continued to exist over the mind of the defendant at the time he actually signed the said note and the time he paid the one thousand five hundred (\$1,500.00) dollars, and the giving of the check for five hundred (\$500.00) dollars.”

By this instruction the court clearly and with certainly advised the jury that the defendant could recover his \$1,500 and \$500 check *only* by proving by a preponderance of the evidence that the same was paid and delivered over under duress then present and operative. Having so stated it in the affirmative, we do not conceive it to be error for the court to have omitted to state the same principle in the negative, which is all plaintiff's Request No. 6 called for in addition to that given.

As stated in 53 Am. Jur., Trial, Page 444:

“Instructions should not be repeated, since the tendency is to mislead and confuse the jury by placing undue emphasis on particular points, but a violation of the rule is not reversible error unless it reasonably appears that the jury was misled. Statements of law should not be given undue prominence by repetition or otherwise.”

Plaintiff further contends that the lower court erred in refusing to give its Request No. 7 to the effect that

“if you should further find from the evidence in this case that the defendant W. S. Berryessa thereafter, and after any threat of duress had been removed, voluntarily made a payment of \$50.00 on said obligation, then I instruct you that such payment, if freely and voluntarily made,

would constitute a waiver of his defense of duress and your verdict should be in favor of the plaintiff."

The principle of law thus offered to the court is to the effect that the subsequent \$50.00 payment, if voluntarily made, would not only in and of itself not be recoverable, but would validate the entire transaction, that is, the signing of the note, the paying of the \$1,500, and the delivery of the check. Insofar as recovery of the \$50.00 itself is involved, we are not here concerned with it, because the court did not submit it to the jury, and the defendant lost as to it. As to the proposition that the \$50.00 payment, if voluntarily made, would validate the remaining transactions consummated under duress, we submit that such is not the law and the requested instruction is bad. It should be borne in mind that there were really two transactions, although all growing out of the June 4th meeting, namely, the signing of the note for \$4,865.20, and the later payment of \$1,500 and the delivery of the \$500 check, which were not on account of the note, but over and above the amount thereof. Assuming that the note was signed, the \$1,500 was paid, and the check delivered, all under duress, a subsequent voluntary payment on the note could not under any circumstances be deemed a waiver of the duress insofar as the \$1,500 and the check is concerned. This in and of itself rendered the instruction bad in *toto*.

An equally fundamental reason why the request states bad law, is that it is predicated upon the assumption that the note, if obtained by the duress or upon the consideration claimed by defendant, is merely voidable,

and thus subject to validation through subsequent conduct by the defendant that would constitute a waiver of the defense.

We do not dispute that contracts obtained under certain types of duress, or upon certain illegal considerations may be only voidable, but such is not the case where the duress is the threat of a criminal prosecution, or the consideration the suppression of a crime through a promise not to prosecute. Under those circumstances the contract is void, not voidable, because contrary to public policy, and thus cannot be ratified through subsequent conduct.

7 Am. Jur., Bills and Notes, Page 968:

“Thus a bill or note given to repay embezzled money in consideration of an agreement, express or implied, to conceal the embezzlement, not to prosecute, or to stifle the prosecution is void.”

10 C. J. S., Bills and Notes, Page 628:

“As between the immediate parties or their privies, a bill or note founded upon an illegal consideration * * * is void and unenforceable.”

and at Page 630:

“Bills and notes for the concealment of a crime or the suppression or hindering of a criminal prosecution are against public policy and cannot be enforced between the immediate parties, whether the maker was innocent or guilty.”

Henry v. State Bank of Laurens (Ia.) 107 N. W. 1034:

“Moreover, if the note and deed were void

because contrary to public policy, their delivery even without duress would not make them valid. This is hornbook law requiring no citation of authorities in its support.”

POINT VII

Plaintiff's final point is that the lower court erred in denying plaintiff's motion for judgment notwithstanding the verdict. This, we feel, has been fully and completely covered elsewhere in this brief, and the lower court did not err in this regard.

CONCLUSIOIN

For the reasons hereinabove set out, it is submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

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