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Duress by Third Party--Economic Compulsion Applied by Beneficiary of Duress--Avoidance of Release Therefor

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Under the present decision the client cannot collude with the other party litigant for the purpose of defeating the attorney’s rights. An earlier West Virginia case also points this out as an exception to the general rule that the client has absolute control over the settlement of the dispute.7 There it is said, in effect, that the contract does not amount to an assignment of an interest in the chose itself, but gives the attorney such an inchoate right therein, after the suit is brought, as cannot be defeated by collusion and fraud between the parties.

In Missouri the doctrine is established that such agreements may or may not be a violation of public policy, depending on the circumstances of each case.7 These decisions assert the protection such contracts afford by preventing the perpretation of fraud on attorneys, and by serving as obstructions to imposition on needy and ignorant clients by shrewd adversaries. However, where there is indication of bad faith on the part of the attorney, the Missouri court intimates that the agreement would be against public policy.8

The dissenting opinion in the present case convincingly points out the likely result of the rule as adopted by the majority. Merely declaring the restraint on compromise inoperative without voiding the other provisions of the contract assesses no penalty on those who engage in a practice condemned by public policy. Attorneys may still use this obnoxious device without incurring any risk. At least, they have nothing to lose by its insertion in the agreement, since the remaining provisions may be enforced. Can it not, then, be said that a practice, admittedly against public policy, is permitted? It is the opinion of the dissent that such provisions should destroy the entire contract, and the attorney be allowed to recover for services rendered only on a quantum meruit basis.

V. K. K.

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6 Burkhart v. Scott, 69 W. Va. 694, 73 S. E. 784 (1911).
7 Lipscomb v. Adams, 193 Mo. 550, 91 S. W. 1046 (1906); Wright v. Kansas City, etc. By., 141 Mo. App. 518, 126 S. W. 517 (1910); Beagles v. Robertson, 135 Mo. App. 306, 115 S. W. 1042 (1909).
8 Wright v. Kansas City, etc. By., Beagles v. Robertson, both supra n. 7.
lease executed in consideration of $800. X, insurance adjuster, knew of T’s conduct at the time of settlement but did not collude with T in any way. Later P in a suit under the wrongful death act sought to avoid the release on the ground of duress. Held, two judges dissenting, that a written release may be set aside for duress exercised by a third party with the participation or knowledge of the releasee. Carroll v. Petty. 1

A distinction must be made between a situation in which one, who having exercised duress and thereby having first secured for himself a benefit, transfers his ill-gotten gains to another; 2 and the state of facts presented in the instant case, i.e., duress imposed by one person and the increment thereof flowing directly to a third person without further intervention by the party imposing the duress. In dealing with cases falling within this latter category courts and writers have propounded the general rule that duress to nullify a contract must be the act of the adverse party or must be imposed with his knowledge, and taken advantage of by him for the purpose of obtaining the agreement. 3 To this broad legal proposition exceptions 4 and variation must be noted. 5 If the beneficiary has given no consideration for the advantage bestowed upon him, the transaction will be avoided, even though he was not cognizant of the wrongful conduct of a third party. 6 If value has been given, duress inflicted by a stranger to the dealings will not invalidate the agreement as against an innocent beneficiary; 7 conversely, knowledge on the part of the beneficiary generally will serve as a basis for setting aside the contract, although consideration is present. 8 As another qualification to the general rule, — where duress has been employed by a third party in behalf of the bene-

1 2 S. E. (2d) 521 (W. Va. 1939), Fox and Hatchor, JJ., dissenting.
2 The decisive question being whether the transferee is a bona fide purchaser; if so, the transaction will be affirmed, by the modern American rule. See Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596 (1887) for a full discussion of the point.
4 Cobb v. Vaughan, 141 Va. 100, 126 S. E. 77, 43 A. L. R. 177 (1925) holding that the beneficiary must in some way have been responsible for the act done.
5 Exceptions and variations pointed out by 5 WILLISTON, CONTRACTS (1937) § 1622.
6 Martin v. Evans, 163 Ala. 657, 50 So. 997 (1909); 5 WILLISTON, CONTRACTS § 1622.
7 Smith v. Commercial Bank, 77 Fla. 163, 81 So. 154, 4 A. L. R. 862 and note (1919); Beals v. Neddo, 2 Fed. 41 (C. C. D. Kan. 1880); Ladew v. Payne, 82 Ill. 221 (1873).
8 Gilley v. Denman, 185 Ala. 561, 64 So. 97 (1913); Edmonds v. McCoy,
ficiary and the exact result intended has been obtained, courts have annulled contracts arising from such wrongful pressure, irrespective of the good faith of the beneficiary. 9

In the present case, where the duress was directed toward an end entirely distinct from the procurement of the release, doubtless the result was affected by the peculiar state of facts presented and by their repellent background. As indicated by the holding, one placed in a position knowingly to take advantage of a situation produced by the unconscionable conduct of another proceeds at his own risk in dealing with the victim. As a matter of fact, any indication of overreaching on the part of the beneficiary seems to be treated as economic compulsion — as a veritable financial upper-hand closed upon one rendered vulnerable thereto by the antecedent duress imposed by a third party.

As an incident to the chief problem of the present case, our court, first reaffirming the proposition that fraud may be pleaded by way of replication for setting aside a release, 10 holds that a fortiori duress may be so pleaded.

W. E. N.

INSURANCE — INCONTESTABILITY CLAUSE — EXCEPTIONS AS TO DOUBLE INDEMNITY AND DISABILITY BENEFITS. — More than two years after issuance of a policy P insurance company sues to rescind, on the ground of fraudulent misrepresentation in the application, the provisions for disability benefits and double indemnity. D relies on a clause in the policy, which provides that 'This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits.' Held, that such incontestability clause does not preclude

8 Rodes v. Griffith, Rodes & Co., 102 W. Va. 79, 135 S. E. 244 (1926); Lipman, Wolfe & Co. v. Phoenix Assur. Co., 258 Fed. 544 (C. C. A. 9th, 1929); Talley v. Robinson, 63 Va. 314 (1872), by dicta that accomplishment of intended purpose is sine qua non to relief for duress by third party.