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SELF-HELP IN THE COLLECTION OF DEBTS AS A DEFENSE TO CRIMINAL PROSECUTION

Adverse economic conditions present the spectacle of petty creditors going to unusual lengths to collect. Some apply cajolery, trickery, threats, even force in attempting to secure payments. But save in instances of self-defense, recaption and reprisals, entry on lands, the abatement of nuisances, and distraint, the right to self-redress is not recognized,¹ because

The public peace is a superior consideration to any one man's private property; and * * *, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right * * * shall never be exercised where such exertion must occasion strife and bodily contention, or endanger the peace of society.²

To repress completely the exercise of self-help is seemingly impossible, and perhaps undesirable.³ Human nature revolts against too stringent control but generally acquiesces to aid the law when individual rights and benefits are concerned. In cognizance of this problem, this note attempts to survey criminal law problems resulting from the unauthorized collection of debts.

Larceny. According to some courts, it would seem that the gravamen of the offense of larceny is the lack of color of right or excuse in taking and carrying away the personal property of another.⁴ These courts have adopted the general rule that one who openly and avowedly takes the property of another without the latter's consent is, no matter what technical name be applied to the acts, not guilty of larceny, provided the property be taken

1. 3 Holdsworth, *History of English Law* (3rd ed. 1923) 278 et seq. This has not always been the situation. There has been a gradual evolution from the time when the law was unable to prevent self-help of the most violent kind, through a period of *strictum jus*, to the present-day moderate status.

2. Pollock and Maitland, *History of English Law* (2d ed. 1923) 574.

3. 3 Blackstone, *Commentaries* 1021.

4. 2 Holdsworth, *History of English Law* (3rd ed. 1923) 100. The American Law Institute apparently recognizes the necessity of tolerating the existence of self-help. See Restatement, *Torts* (1934) secs. 88-111, 128; Restatement, *Restitution* (1937) sec. 4 (a).

4. State v. Sawyer (1920) 95 Conn. 34, 110 Atl. 461, 13 A. L. R. 139; Regina v. Holloway (Exch. 1848) 2 Car. & K. 942, 175 Eng. Rep. 395; Riley v. State (Okla. Cr. App. 1938) 78 P. (2d) 712; 1 Bishop, *New Criminal Law* (8th ed. 1892) 896, sec. 849. Cf. People v. Barnes (1913) 158 App. Div. 712, 143 N. Y. S. 885, where the president of a corporation, which was indebted to him, was found guilty of larceny when he took funds equal to the indebtedness, but not as payment of it.

in settlement or partial settlement of a bona fide debt due him from the owner of the property.⁵ Furthermore, if the creditor, although mistaken, honestly believes that he has a right to collect a debt in this manner,⁶ or that the owner approves of the application of the property to the debt,⁷ there can be no larceny because of the absence of any *animus furandi*.

If the property is taken as security for the debt, and the creditor intends to restore it to the debtor when the debt is paid, there is a sufficient color of right or excuse for the act and the taking is not larceny.⁸ But this defense is lost if the taker refuses to allow the debtor to reclaim on payment of the sum due.⁹

Some courts, which follow the above theory, hold that one of the essentials of larceny is a secret taking.¹⁰ They conclude therefore that an open taking is a good defense to the charge of larceny, and that the open taking can be used only as evidence of a trespass.¹¹ Other jurisdictions, though following the general

5. *Johnson v. State* (1883) 73 Ala. 523; *Buchanan v. State* (Miss. 1889) 5 So. 617; *Lawrence v. State* (1882) 11 Tex. App. 306; 1 Bishop, *New Criminal Law* (8th ed. 1892) 896, sec. 849, which states the general rule thus: "In larceny, if the object of the taker was to compel through an irregular way, the owner of the goods to do what the law required him to do with them, namely, pay his debt, there is no legal principle rendering the act a felony."

6. Cases holding no larceny in the presence of bona fide belief: *Brand v. State* (1935) 26 Ala. App. 286, 158 So. 769; *Johnson v. State* (1883) 73 Ala. 523; *People v. Eastman* (1888) 77 Cal. 171, 19 Pac. 266; *People v. Morley* (1928) 89 Cal. App. 451, 265 Pac. 276; *State v. Bond* (1854) 4 Iowa 540; *Commonwealth v. Stebbins* (1857) 8 Gray (74 Mass.) 492; *Lawrence v. State* (1881) 11 Tex. App. 306; *Wolf v. State* (1883) 14 Tex. App. 210; *Young v. State* (1895) 34 Tex. Cr. Rep. 290, 30 S. W. 238; *Fogel v. State* (1932) 101 Tex. Cr. Rep. 594, 50 S. W. (2d) 333; *State v. Williams* (1910) 68 W. Va. 86, 69 S. E. 474, 32 L. R. A. (N. S.) 144. Cases holding larceny committed in the absence of bona fide belief: *Commonwealth v. Peakes* (1918) 231 Mass. 449, 121 N. E. 420; *Gettinger v. State* (1882) 13 Neb. 308, 14 N. W. 403; *People v. Solomon* (1896) 12 App. Div. 627, 42 N. Y. S. 573. The belief must be a reasonable one. *Lancaster v. State* (1866) 3 Cold. (Tenn.) 340, 91 Am. Dec. 288.

7. *State v. Williams* (1888) 95 Mo. 247, 8 S. W. 217, 6 Am. St. Rep. 46; and see *Bunch v. State* (1917) 81 Tex. Cr. Rep. 171, 194 S. W. 144 (where defendant took money to pay owner's room rent).

8. *In re Bayles* (1920) 47 Cal. App. 517, 190 Pac. 1034; *State v. Sawyer* (1920) 95 Conn. 34, 110 Atl. 461, 13 A. L. R. 139; *Simpson v. State* (1895) (Tex. Cr. App. 1906) 96 S. W. 925.

9. *Young v. State* (1895) 34 Tex. Cr. Rep. 290, 30 S. W. 238.

10. *People v. Ranney* (1932) 123 Cal. App. 403, 11 P. (2d) 405.

11. *Johnson v. State* (1883) 73 Ala. 523. One of the requisite elements of the crime of larceny is a trespass. Miller, *Criminal Law* (1934) 340, sec. 109. There may be a criminal trespass at common law, however, even though the taking does not constitute larceny. *People v. Sheasbery* (1927) 82 Cal. App. 459, 255 Pac. 836; *State v. Sawyer* (1920) 95 Conn. 34, 110 Atl. 461, 13 A. L. R. 139; *People v. Hillhouse* (1890) 80 Mich. 530, 45 N. W. 484; *State v. Delk* (1937) 212 N. C. 631, 194 S. E. 94; *Wolf v.*

rule, refuse to recognize this branch of the doctrine but allow evidence of secrecy to go to prove the fraudulent intent.¹²

A minority of courts maintains the conservative position that the defense cannot be made that the property was taken in satisfaction of, or as security for, a debt.¹³ They hold that the law does not under any circumstances "permit a creditor to make collection of what is due him by larceny of the debtor's goods."¹⁴ Courts maintaining this position overlook the fact that the defendant acted under the guise of an honest belief, and recognize only the existing situation wherein the taker seized the property with intent to appropriate to his own use.

The distinction between the minority and majority rulings is illustrated in *Commonwealth v. Stebbins*,¹⁵ where the court refused to instruct the jury that if the creditor appropriated or intended to appropriate the money taken to the payment of a note which or any part of which the debtor was legally liable to pay, it would not be such a conversion to her use as would be necessary to constitute larceny. Instead the court charged that if the creditor took the "money under an honest belief that she had a legal right to take this specified money in the way and under the circumstances that she did take it,"¹⁶ she would not be guilty of larceny.

No uniformity is found in the statutes of the various states in defining "larceny." Some specifically require a felonious intent to "steal, take, carry, lead, or drive away the personal property of another."¹⁷ Others simply declare a certain act to con-

State (1883) 14 Tex. App. 210; 2 Wharton, *Criminal Law* (1932) 1441, sec. 1125. Unlike larceny criminal trespass does not require an unlawful intent. State v. Deal (1870) 64 N. C. 270. Some states have passed statutes supplementing and often overlapping the common law crime. Like larceny statutes, not all require criminal intent. Sears and Weihofen, *May's Criminal Law* (1938) 147, sec. 113. See notes 17 and 18, *infra*.

12. Johnson v. State (1883) 73 Ala. 523; People v. Eastman (1888) 77 Cal. 171, 19 Pac. 266; Buchanan v. State (Miss. 1889) 5 So. 617; Butler v. State (1878) 3 Tex. App. 403; 2 Wharton, *Criminal Law* (1932) 1471, sec. 1154.

13. McKenzie v. State (1910) 8 Ga. App. 124, 68 S. E. 622; State v. Williams (1888) 95 Mo. 247, 8 S. W. 217, 6 Am. St. Rep. 46; Commonwealth v. Peakes (1919) 231 Mass. 449, 121 N. E. 420; Gettinger v. State (1882) 13 Neb. 308, 14 N. W. 403; People v. Solomon (1896) 12 App. Div. 627, 42 N. Y. S. 573; Greene v. Fankhauser (1910) 137 App. Div. 124, 121 N. Y. S. 1004; Futler v. State (1878) 3 Tex. App. 403.

14. Gettinger v. State (1882) 13 Neb. 308, 14 N. W. 403, 405.

15. (1857) 8 Gray (74 Mass.) 492.

16. *Id.* at 493.

17. Cal. Penal Code (1937) sec. 484. See *Ex parte Bayles* (1920) 47 Cal. App. 517, 190 Pac. 1034; People v. Morley (1928) 89 Cal. App. 451, 265 Pac. 276; 1 Wharton, *Criminal Law* (1932) 197, sec. 143, n. 19.

stitute larceny, without mentioning intent as an element.¹⁸ Only under statutes of this latter type has it been held that the majority rule does not apply.¹⁹ The intent required is merely the intent to do the prohibited act.²⁰ The reason for this discrepancy in the statutes is apparently that where the defense of a bona fide intent is allowed, the injured party can usually be amply compensated in damages in a civil proceeding for the wrongful detention of his property. This view neither condones nor invites the commission of crime, inasmuch as the accused must pay the penalty for the perpetration of any applicable crimes.

Robbery. Robbery includes the elements of the crime of larceny,²¹ differing only in respect to the taking, which is by force or intimidation.²² As with larceny, the courts have disagreed on whether the collection in such manner of a debt honestly believed to be due constitutes robbery.

The overwhelming weight of authority holds that an indictment for robbery, or assault to commit robbery, will fail where there is an intent on the part of the defendant to collect or obtain security for a bona fide debt.²³ To constitute robbery there must

18. N. Y. Penal Code (1930) sec. 1306. See 1 Wharton, *Criminal Law* (1932) 197, sec. 143, n. 18.

19. *J. W. Matthews & Co. v. Employers' Liability Assur. Corp.* (1908) 127 App. Div. 125, 111 N. Y. S. 76; *Greene v. Fankhauser* (1910) 137 App. Div. 124, 121 N. Y. S. 1004.

20. *Greene v. Fankhauser* (1910) 137 App. Div. 124, 121 N. Y. S. 1004.

21. *State v. Byers* (1926) 136 Wash. 620, 241 Pac. 9.

22. *People v. Clary* (1887) 72 Cal. 59, 13 Pac. 77; *State v. Wasson* (1905) 126 Iowa 320, 101 N. W. 1125; *Commonwealth v. Clifford* (1851) 8 Cush. (62 Mass.) 215.

The courts generally hold that the application of force with intent to collect a debt is at least an assault and battery. *Ward v. State* (1856) 28 Ala. 53; *Wilkerson v. State* (1915) 12 Ala. App. 100, 68 So. 475; *Butts v. Commonwealth* (1926) 145 Va. 800, 133 S. E. 764. But in those jurisdictions where an intent to do bodily harm is required, evidence that the accused acted to collect a debt may be admissible as a defense. *Miller, Criminal Law* (1932) 302, sec. 98 (b); *Sears and Weihofen, May's Criminal Law* (1938) 257, sec. 157.

23. Cases involving intent to collect: *Bauer v. State* (1925) 45 Ariz. 358, 43 P. (2d) 203; *Crawford v. State* (1892) 90 Ga. 701, 77 S. W. 628, 35 Am. St. Rep. 242, 9 Am. Cr. Rep. 587; *State v. Hollyway* (1875) 41 Iowa 200, 28 Am. Rep. 586; *State v. Brown* (1891) 104 Mo. 365, 16 S. W. 406; *State v. Carroll* (1900) 100 Mo. 368, 60 S. W. 1087; and see *Note* (1924) 31 A. L. R. 1081. Cases involving intent to obtain security: *Johnson v. State* (1883) 73 Ala. 523; *People v. Eastman* (1888) 77 Cal. 171, 19 Pac. 266; *State v. Hollyway* (1875) 41 Iowa 200, 20 Am. Rep. 586; *Buchanan v. State* (Miss. 1889) 5 So. 617; *Young v. State* (1896) 37 Tex. Cr. Rep. 457, 36 S. W. 272; *Butts v. Commonwealth* (1926) 145 Va. 800, 133 S. W. 764. One retaking property stolen from him is not guilty of robbery. *Analytis v. People* (1920) 68 Colo. 74, 118 Pac. 1113; *Johnson v. State* (1923) 24 Okla. Cr. Rep. 320, 218 Pac. 179; *Glenn v. State* (1906) 49 Tex. Cr. Rep. 349, 92 S. W. 806.

be an *animus furandi*, which cannot exist where the property is taken in good faith.²⁴

This view prevails even where the creditor attempts to take money, not from the debtor himself, but from the debtor's agent, so long as a semblance of right can be found to exist in the creditor.²⁵ But the defense of a lack of felonious intent fails in any event when one takes more than is due²⁶ or when there is no honest belief of ownership or agency.²⁷

It has been suggested that the courts are reluctant to convict a creditor of such a serious crime because of the extenuating circumstances which are present.²⁸ This would seem to have been the case where a poor farmer, faced with the necessity of obtaining food and medicine, took by threats of violence money due him which was being withheld because of a previously undisclosed note for the payment of which he was responsible.²⁹ Likewise, the taker would appear to be justified in forcibly collecting unpaid wages after being discharged when to his knowledge there existed no reason to withhold them.³⁰ An even more convincing case is presented where, after receiving legal advice, an installment collector retook property for failure to make payments.³¹ Thus, when a great need exists for immediate redress, or when there is an undisputed debt which would be difficult or costly to collect, a conviction of robbery would not seem to be justified. A civil suit will redress any unlawful conversion,³² and a criminal

24. *Bauer v. State* (1925) 45 Ariz. 358, 43 P. (2d) 203; *People v. Eastman* (1888) 77 Cal. 171, 19 Pac. 266; *People v. Sheasbery* (1927) 82 Cal. App. 459, 255 Pac. 836; *Regina v. Hemmings* (N. P. 1864) 4 Fost. & F. 50, 176 Eng. Rep. 462; *Crawford v. State* (1893) 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242, 9 Am. Cr. Rep. 587; *State v. Hollyway* (1875) 41 Iowa 200, 20 Am. Rep. 586; *State v. Brown* (1891) 104 Mo. 365, 16 S. W. 406; *State v. Culpepper* (1922) 293 Mo. 249, 238 S. W. 801; *Young v. State* (1896) 37 Tex. Cr. Rep. 457, 36 S. W. 272; *Butts v. Commonwealth* (1926) 145 Va. 800, 133 S. E. 764; and see *Note* (1924) 31 A. L. R. 1081.

25. *Regina v. Boden* (1844) 1 Car. & K. 395, 174 Eng. Rep. 863; *Chambers v. State* (1884) 62 Miss. 108; *Herber v. State* (1851) 7 Tex. 69.

26. *Crawford v. State* (1892) 90 Ga. 701, 17 S. W. 628, 35 Am. St. Rep. 242; *State v. Hollyway* (1875) 41 Iowa 200, 20 Am. Rep. 586; *State v. Brown* (1891) 104 Mo. 365, 16 S. W. 406; *State v. Carroll* (1900) 160 Mo. 368, 60 S. W. 1087. —

27. *Crawford v. State* (1892) 90 Ga. 701, 17 S. W. 628, 35 Am. St. Rep. 242; *State v. Hunt* (1877) 45 Iowa 673.

28. *Note* (1921) 13 A. L. R. 151.

29. *State v. Hollyway* (1895) 41 Iowa 200, 20 Am. Rep. 586.

30. *Butts v. Commonwealth* (1926) 145 Va. 800, 133 S. E. 764.

31. *People v. Sheasbery* (1927) 82 Cal. App. 459, 255 Pac. 836.

32. See in this connection *White v. Yawkey* (1896) 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199; *Murphy v. Hobbs* (1885) 8 Colo. 17, 5 Pac. 637; *Goulding v. Harbury* (1892) 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357; *Kenney v. Ranney* (1893) 96 Mich. 617, 55 N. W. 982; *Williams v. Deen* (1893) 5 Tex. Civ. App. 575, 24 S. W. 536.

suit for assault and battery or trespass will amply satisfy the demands of the state for any breach of the public peace.³³

The minority view is illustrated by *Fannin v. State*,³⁴ which holds it robbery for one to compel another to pay a sum of money which the assailant claims the other owes him, even though the claim is not disputed by the other. The court said that "no man has a right * * * to take the law into his own hands, and at the point of a sixshooter, putting his debtor in fear of life or serious bodily injury, collect a debt, however just."³⁵ Another argument was advanced in a Georgia case,³⁶ which, while adhering to the rule that *animus furandi* is an essential element of robbery, seems to have held that if the taking is by intimidation or force, it constitutes robbery. This view places emphasis on a radically different criterion in defining the crime. It appears that the logical conclusion of this line of reasoning would demand the abolition of all defenses where the slightest degree of force is used. Under this analysis, taking is lawful only if by voluntary consent of the owner or by due process of law.³⁷

Tipton v. State,³⁸ which adheres to the minority rule, makes a distinction between attempts to collect on liquidated and unliquidated obligations. The court argued there that to hold that the forcible collection of an unliquidated debt is not robbery would be "an invitation to aggrieved persons to assume the function of judge, jury, and sheriff to violently and forcibly compensate themselves for the injury or assumed injury inflicted, to

33. See *People v. Sheasbery* (1927) 82 Cal. App. 459, 255 Pac. 836; *Regina v. Hemmings* (N. P. 1861) 4 Fost. & F. 50, 176 Eng. Rep. 462; *Butts v. Commonwealth* (1926) 145 Va. 800, 133 S. E. 764; 2 Wharton, *Criminal Law* (1932) 1379, sec. 1085.

34. (1907) 51 Tex. Cr. Rep. 41, 100 S. W. 916, 10 L. R. A. (N. S.) 744, 123 Am. St. Rep. 874.

35. *Id.* at 45, 100 S. W. at 918.

36. *Holland v. State* (1910) 8 Ga. App. 202, 68 S. E. 861, 862, where the court said: "The words 'with intent to steal' mean to wrongfully appropriate to their own use; and if they by intimidation forced him, or he from intimidation paid over the money, and they took it intending to use it or keep it, then they would be guilty." Cf. *Tipton v. State* (1923) 23 Okla. Cr. Rep. 86, 212 Pac. 612, 31 A. L. R. 1074, which extends this theory by holding that "the taking of something of value from another, by means of force or fear of injury, is the gist of the offense of robbery; whether the motive leading up to the assault grew out of avarice, revenge, or curiosity is immaterial."

37. *Thomas v. State* (1933) 165 Miss. 897, 148 So. 225; *State v. Gill* (1898) 21 Mont. 151, 53 Pac. 184.

38. (1923) 23 Okla. Cr. Rep. 86, 212 Pac. 612, 31 A. L. R. 1074. In accord see *Thomas v. State* (1933) 165 Miss. 897, 148 So. 225; *Kinsey v. State* (1931) 50 Okla. Cr. Rep. 258, 296 Pac. 1002; *Fannin v. State* (1907) 51 Tex. Cr. Rep. 41, 100 S. W. 916, 10 L. R. A. (N. S.) 744, 123 Am. St. Rep. 874.

any extent deemed adequate by the aggrieved person alone, and that such violence would amount to no more than a mere trespass or simple assault."³⁹ Obviously the collection of unliquidated debts by force is of more doubtful propriety than the collection of liquidated debts. Therefore, the court in the latter instance may well be justified in being lenient, inasmuch as the taker does not put upon himself the burden of saying what and how much his debt and recovery should have been.

In most states the robbery statutes merely reassert the common law definition and require the same intent as under the common law.⁴⁰ The lack of a felonious intent is thus generally a valid defense.⁴¹ Recent legislation does not require that an intent be charged or proved,⁴² the only defenses under them being that the taking was with the consent of the one alleged to have been robbed.⁴³

Forgery. While the problem has rarely been presented, nevertheless there is a division of opinion as to whether it is a valid defense that the accused believed that he had a right to apply money obtained by forgery to the payment of a claim which he held against the person whose name he forged.

In some jurisdictions the criminal intent which the law infers from forging an instrument and using it as evidence against the person whose name is forged can be negated by proof that the debt was really a just one.⁴⁴ These courts hold that no crime exists, as there is neither the requisite intent to defraud⁴⁵ nor a prejudice of another's right.⁴⁶

In a greater number of jurisdictions, however, when similar acts of forgery are committed in order to collect on an outstanding indebtedness, the requisite criminal intent is found to exist. The intent to injure and defraud required, being a general intent

39. See 23 Okla. Cr. Rep. at 94, 212 Pac. at 616.

40. *People v. Shuler* (1865) 28 Cal. 490; *People v. Locke* (1936) 275 Mich. 333, 266 N. W. 370; *State v. Gorham* (1875) 55 N. H. 152; see also *R. S. Mo.* (1929) secs. 4058, 4059, and 4060.

41. *Bauer v. State* (1935) 45 Ariz. 358, 43 P. (2d) 203, which decision is reached on the basis of Arizona Rev. Code (1928) sec. 4602.

42. *People v. Emerling* (1930) 341 Ill. 424, 173 N. E. 474 (intent immaterial in robbery committed with dangerous weapon); *People v. Johnson* (1931) 343 Ill. 273, 175 N. E. 394. See also 1 Wharton, *Criminal Law* (1932) 197, sec. 143.

43. *People v. Goldberg* (1922) 302 Ill. 559, 135 N. E. 84.

44. *Sharer v. People* (1935) 96 Colo. 483, 44 P. (2d) 914; *Regina v. Bradford* (1862) 2 Fost. & F. 859, 175 Eng. Rep. 1321.

45. *Supra*, note 41. 2 Wharton, *Criminal Law* (1932) 1164, sec. 860, defines forgery as "making a false document, on which suit might be brought, with *intent to defraud*" (Italics supplied).

46. 4 Blackstone, *Commentaries* 247 defines forgery at common law as the "fraudulent making or altering of a writing to the *prejudice of another's right*" (Italics supplied).

to defraud any one, is held to be satisfied under any of the following circumstances: (1) where accused had or considered he had a just claim;⁴⁷ (2) where he believed that he had a right to resort to forgery in order to collect the debt;⁴⁸ (3) where he intended to apply the money obtained to the payment of the debt.⁴⁹ This result has been distinguished from that generally obtaining as to the offenses heretofore considered:

"In larceny, if the object of the taker is to compel, though in an irregular way, the owner of the goods to do what the law requires him to do with them, there is no legal principle rendering the act a felony." In a case of theft, the accused, by means of taking the property of his debtor, compels the payment of a debt. This is a matter between the debtor and creditor, and third parties are not involved. But had the accused in a theft case taken the property of another party to pay the debt due him from his debtor he would not be guiltless, because he could not appropriate the property of one man to pay the debt of another. In *Young's case* [*Young v. State*, a robbery case] the justification of the principle laid down is found in the fact that it is not a fraudulent appropriation; it is an appropriation to pay a debt, which relieves it of fraud. This might be the case for robbery for it is but an enhanced case of theft. But, unfortunately, *in forgery * * * the third party is the injured one.*⁵⁰

False Pretenses. False pretenses, being exclusively a statutory crime, must be viewed on a different basis from the preceding offenses. The injury lies in the intent to defraud.⁵¹ The principle applied is that if the sole purpose of a false pretense is to procure from the person deceived the performance of a duty owed by him to the creditor, as for example the payment of a liqui-

47. *Bush v. State* (1884) 77 Ala. 83; *Curtis v. State* (1898) 118 Ala. 125, 24 So. 111; *Claiborne v. State* (1888) 51 Ark. 88, 9 S. W. 851; *Quartermou v. State* (1914) 114 Ark. 452, 170 S. W. 225; *People v. Rittenhouse* (1922) 56 Cal. App. 541, 206 Pac. 86; *State v. Wooderd* (1866) 20 Iowa 541; *People v. Meyer* (1919) 289 Ill. 184, 124 N. E. 447; *Commonwealth v. Peakes* (1919) 231 Mass. 449, 121 N. E. 420; *People v. Mingey* (1907) 118 App. Div. 652, 103 N. Y. S. 627; *Plemons v. State* (1903) 44 Tex. Cr. Rep. 555, 72 S. W. 854; *Morville v. State* (1911) 63 Tex. Cr. Rep. 551, 141 S. W. 98.

48. *Commonwealth v. Peakes* (1919) 231 Mass. 449, 121 N. E. 420.

49. *Claiborne v. State* (1888) 51 Ark. 88, 9 S. W. 851; *Regina v. Wilson* (N. P. 1847) 2 C. & K. 527, 61 E. C. L. 527, 175 Eng. Rep. 219; *People v. Meyer* (1919) 289 Ill. 184, 124 N. E. 447; *People v. Mingey* (1907) 118 App. Div. 652, 103 N. Y. S. 627; *Morville v. State* (1911) 63 Tex. Cr. Rep. 551, 141 S. W. 98.

50. *Plemons v. State* (1903) 44 Tex. Cr. Rep. 555, 72 S. W. 854 (Italics supplied). The internal quotation is from 1 Bishop, *Criminal Law* (8th ed. 1892) 896. *Young v. State* is discussed supra, at note 9.

51. *People v. Haynes* (1835) 14 Wend. (N. Y.) 546, 28 Am. Dec. 530; *Brown v. People* (1879) 16 Hun. (N. Y.) 537.

dated debt which is in fact rightfully due, there is no intention to defraud.⁵² The argument advanced in favor of this conclusion is that "a falsehood does not necessarily imply an intent to defraud, for it may be uttered to secure a right, and, however much and severely it may be reprobated in ethics, the law does not assume to punish moral delinquencies as such."⁵³ Disregarding ethics, certainly it can be said that the creditor obtained nothing of value which he would not be entitled to as of right. Therefore, the court should instruct the jury to decide whether the defendant had an intent to defraud and effected that purpose, and whether, in order to accomplish it, he made use of fraudulent representations and succeeded by means of such representations.⁵⁴

In a case where the alleged creditor relies upon a fraudulently created debt, the defense does not hold.⁵⁵ The defense is available, on principles discussed above, only where there is an ascertained sum due, and not where the debt is unliquidated or entirely fictitious.⁵⁶

It has been held, however, that when the defendant did the acts which the statute declared to constitute the crime of false pretenses, he committed an offense against the state, and therefore could properly be indicted and punished without regard to the intent to collect a debt under which he acted.⁵⁷

Embezzlement. To constitute embezzlement, there must be, as in larceny and robbery, a fraudulent intent to deprive the owner of his property.⁵⁸ If the property is converted without concealment and under a bona fide claim of right, an action for conversion may lie,⁵⁹ but the conversion, in most jurisdictions, is not embezzlement, as the gist of the crime is lacking.⁶⁰ While it is

52. *Rex v. Williams* (N. P. 1836) 7 C. & P. 354, 173 Eng. Rep. 158, where a servant made a false representation to obtain payment of debt due his master; *Commonwealth v. Jeffries* (1863) 7 Allen (89 Mass.) 568; *Commonwealth v. McDuffy* (1879) 126 Mass. 407; *People v. Getchell* (1859) 6 Mich. 496; *People v. Genung* (1833) 11 Wend. (N. Y.) 18, 25 Am. Dec. 594; *People v. Thomas* (1842) 3 Hill (N. Y.) 169; *Commonwealth v. Thompson* (1843) 2 Clark (Pa.) 33; *Commonwealth v. Henry* (1853) 22 Pa. 253; *State v. Hurst* (1877) 11 W. Va. 54, 3 Am. Cr. Rep. 100; *State v. Williams* (1910) 68 W. Va. 86, 69 S. E. 474, 32 L. R. A. (N. S.) 420.

53. *People v. Getchell* (1859) 6 Mich. 496, 504.

54. *Commonwealth v. McDuffy* (1879) 126 Mass. 467.

55. *Commonwealth v. Burton* (1903) 183 Mass. 461, 67 N. E. 419.

56. *Ibid.*

57. *Commonwealth v. Coleman* (1915) 60 Pa. Super. 512, 519 (but this case could have been decided solely on grounds of a fraudulent debt).

58. *Miller, Criminal Law* (1934) 374, sec. 116.

59. See *People v. Lapique* (1898) 120 Cal. 25, 52 Pac. 40.

60. *People v. Lapique* (1898) 120 Cal. 25, 52 Pac. 40; *People v. Ephraim* (1926) 77 Cal. App. 29, 245 Pac. 769; *State v. Lanzon* (1910) 83 Conn. 449, 76 Atl. 1095; *State v. Collins* (1894) 1 Marv. (Del.) 536, 41 Atl. 144;

immaterial whether the indebtedness, if any, be for a liquidated amount,⁶¹ the appropriation must be in good faith, and not merely in reliance upon a trumped-up claim.⁶² Mere absence of concealment and secrecy is no defense if there is a fraudulent intent and no claim of right.⁶³

Some courts hold that the claim of right must be based on reasonable grounds.⁶⁴ Others require that the conversion be for the purpose of obtaining security and not for the taker's own use.⁶⁵ They find, in substance, that when one undertakes to insure himself against loss in the honest belief that he has a claim against another, there is a criminal conversion, though he acts in good faith. It is submitted that such an unauthorized conversion may be wrongful and in derogation of an existing civil right, yet not felonious or criminal because of the absence of any intent to commit a crime.

There is a considerable body of statutory law which expressly provides that the appropriation of property to satisfy an offset against the owner is not a defense to the charge of embezzlement,⁶⁶ although it may constitute a defense to the charge of larceny.⁶⁷

Conclusion. According to the general principles of the Anglo-American common law, the state should punish crimes. For its own welfare it is obligated to prevent further offenses and to protect the public, while at the same time it must reform offenders, terrify others, and teach law by example.⁶⁸

Staples v. Johnson (1905) 25 App. D. C. 155; Eatman v. State (1904) 48 Fla. 21, 37 So. 576; Brown v. State (1926) 97 Fla. 538, 109 So. 627; Brannon v. State (1929) 97 Fla. 488, 121 So. 793; Dunavant v. Commonwealth (1911) 114 Ky. 210, 137 S. W. 1051; Ross & Co. v. Innis (1864) 35 Ill. 487, 85 Am. Dec. 373; State v. Reilly (1877) 4 Mo. App. 392; Hanna v. Minn. L. Ins. Co. (1912) 241 Mo. 384, 145 S. W. 412; State v. McCawley (Mo. 1915) 180 S. W. 869; Smith v. Smith (1912) 45 Mont. 535, 125 Pac. 987; Van Etten v. State (1888) 24 Neb. 734, 40 N. W. 289, 1 L. R. A. 669; People v. Hopkins (1908) 126 App. Div. 843, 111 N. Y. S. 423; State v. Barnett (1914) 98 S. C. 170, 82 S. E. 795; State v. Lewis (1903) 31 Wash. 75, 71 Pac. 778.

61. Staples v. Johnson (1905) 25 App. D. C. 155.

62. LeMaster v. People (1913) 54 Colo. 416, 131 Pac. 269; State v. Reilly (1877) 4 Mo. App. 392.

63. People v. Connelly (1894) 4 Cal. Unrep. Cas. 858, 38 Pac. 42; Smith v. Smith (1895) 34 Tex. Cr. Rep. 265, 30 S. W. 236.

64. People v. Hughes (1926) 79 Cal. App. 697, 250 Pac. 869; State v. Mannix (1879) 9 Ohio Dec. 667.

65. People v. Husband (1877) 36 Mich. 306; State v. Lewis (1903) 31 Wash. 75, 71 Pac. 778.

66. Cal. Penal Code (1937) sec. 511; N. Y. Penal Code (1930) sec. 1306, the last sentence of which provides that the section "shall not excuse the retention of the property of another to offset or pay demands held against him"; Okla. Rev. Laws (1910) sec. 2678.

67. People v. Morley (1928) 89 Cal. App. 451, 265 Pac. 276.

68. 1 Wharton, *Criminal Law* (1932) 1.

In order to reach this goal under this orthodox theory it is imperative that the law recognize that a crime consists of an act and an intent.⁶⁹ The question of intent is the more difficult and important one. If this element is lacking, the general rule is that no offense has been committed.⁷⁰ This rule is not only humane, but a contrary one would be opposed to all the principles which underlie human conduct as respects the bearing of individuals towards each other, and also as regards their position towards the state. Accordingly, when wrongful intent is lacking, the act or omission which otherwise would constitute an offense is non-criminal.

It is submitted that no general lawless condition would result from giving full effect to this requirement of the mental element in criminal law by allowing the extralegal collection of a valid debt.⁷¹ Chaos has not followed from allowing one to take a specific chattel under a claim of right;⁷² that it would not result in this analogous situation has been proved in a majority of the states.

In jurisdictions where this defense is not allowed, severe penalties are inflicted for acts in pursuance of collecting a debt.⁷³ Frequently there are extenuating circumstances which justify leniency.⁷⁴ These facts are ignored, because as a defense to the major crimes of larceny, robbery, forgery, false pretenses, or embezzlement they are not generally noticed in the applicable statutes.⁷⁵ Until this situation is remedied, the punishment will remain in such states far out of proportion to the crime.⁷⁶

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69. Miller, *Criminal Law* (1934) 52, sec. 14.

70. *Id.* at 16, sec. 2.

71. *Contra*: Note (1909) 135 Am. St. Rep. 486; Comment (1923) 28 U. of Mo. Bull. L. Ser. 35; Comment (1933) 24 J. Am. Inst. of Crim. L. & Criminology 776; Comment (1934) 6 Miss. L. J. 431.

72. Courts are unanimous on this point. *Nickerson v. State* (1929) 22 Ala. App. 640, 119 So. 243; *Burke v. Watts* (1922) 188 Cal. 118, 204 Pac. 528; *Jarvis v. State* (1917) 73 Fla. 652, 74 So. 796; *Baugh v. State* (1929) 200 Ind. 585, 165 N. E. 434; *State v. Authement* (1916) 139 La. 1070, 72 So. 739; *Stanley v. Prince* (1919) 118 Me. 360, 108 Atl. 328; *People v. Shaunding* (1934) 268 Mich. 218, 255 N. W. 770; *State v. Homes* (1852) 17 Mo. 379, 57 Am. Dec. 269; *State v. Post* (1929) 152 Wash. 393, 273 Pac. 164. This theory is even recognized by statute in many instances. Okla. Rev. Laws (1910) sec. 2678 provides: "Upon the prosecution for embezzlement it is a sufficient defense that the property was appropriated in good faith, even though such claim is untenable."

73. See R. S. Mo. (1929) sec. 4065 (larceny), sec. 4058 (robbery), sec. 4025 (forgery).

74. See notes 28 to 31, *supra*.

75. See N. Y. Cahill's Consol. Laws (1930) 1675, ch. 41, secs. 1306, 1307; also see Okla. statute, quoted *supra*, note 72.

76. 1 Wharton, *Criminal Law* (1932) 1, n. 1, gives authority to prove that the "punishment should be proportionate to the crime."