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Credit Transactions - Debtor and Creditor - Improper Collection Practices

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NOTES

CREDIT TRANSACTIONS—DEBTOR AND CREDITOR—IMPROPER COLLECTION PRACTICES.—In a credit sale transaction, the congenial relationship existing between buyer and seller, as well as the creditor's optimistic expectation of prompt payment are often short lived. Virtually without exception, the average businessman will attempt to obtain payment by means other than court action. It is at this point that the prudent creditor would do well to recognize that collection practices, however efficacious, which transgress certain ill defined bounds have not infrequently born fruit in the form of a law suit rather than in remittance of a balance due.

Included among the grounds upon which a creditor's liability for the utilization of improper collection methods has been predicated are: (1) libel or slander, (2) invasion of the right of privacy, (3) intentional infliction of mental anguish, and (4) assault by agent.

I. Libel or Slander

Truth of a publication is generally recognized as a complete defense to an action based upon either libel or slander, irrespective of the motive inducing the publication.[1] When this defense cannot be interposed, it must be determined whether the publication is slanderous or libelous *per se,* or whether it will be necessary to prove some special damage in order to sustain the action.

Slanderous words are actionable only by virtue of falling within certain time honored categories[2] or upon proof that their publication has caused special damages.[3] Hence, the statement that, "Your credit is no good", has been held not to be slanderous *per se* when made to a law stenographer, as her occupation was not one where credit was especially vital.[4]

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1. Restatement, Torts § 582 (a) (1936); *see* Schnabel v. Meredith, 378 Pa. 609, 107 A.2d 860, 862 (1954). A few states, including North Dakota, require that there must have been some justifiable purpose for the publication. See, *e. g.*, N. D. Const. Art. I, §9; Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919).

2. The charge of having committed a previous crime, of having certain loathsome diseases, any imputation affecting one adversely in his business, trade, profession, or office, and in some jurisdictions, of which North Dakota is one, the imputation of unchastity or impotence, constitutes the four kinds of slander *per se.* See N. D. Rev. Code §14-0204 (1943); Prosser, Torts, 799, 801, 804 (1941).

3. Campbell v. Post Publishing Co., 94 Mont. 12, 20 P.2d 1063 (1933); *see* Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292, 295, 296 (1952). The term "special damages" has reference to actual financial loss as distinguished from general damages such as wounded feelings, resulting pain and illness, or injury to reputation. Prosser, Torts, 793, 805, 806 (1941).

4. Liebel v. Montgomery Ward & Co., 103 Mont. 370, 62 P.2d 667 (1936). See Ringgold v. Land, 212 N.C. 369, 193 S.E. 267 (1937) (The statement that, "You are a . . . dishonest man who gets a man's goods and not pay for them . . . you are a common d - - - s - - - o - b - - - -", was held not actionable in the absence of a showing of special damages).

Theoretically at least, substantial damage is presumed to follow any libelous publication.[5] There would consequently seem to be little reason for differentiating between "libel" and "libel *per se*" for the purpose of requiring a showing of special damage when the statement is not libelous "per se." Nevertheless, a distinction has been drawn, for example, between those to whom credit is important in the prosecution of a business and those to whom it is not. As to the latter, a libelous declaration that a debt is owed,[6] or of a failure[7] or inability[8] to pay a debt, is actionable only upon proof of special damage.[9] As to the former, such an averment will be considered actionable *per se*.[10] Any libelous publication will, however, be considered libelous *per se* if, by imputing that the debtor is unwilling to pay his debts or that he is unworthy of credit, it tends to destroy his reputation for integrity and fair dealing.[11]

5. *See* Frechette v. Special Magazines, 136 N. Y. S.2d 448, 453 (N. Y. 1954). N. D. Rev. Code §14-0203 (1943) Civil Libel Defined. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

6. M. Rosenberg & Sons v. Craft, 182 Va. 512, 29 S. E.2d 375 (1944).

7. Hollenbeck v. Hall, 103 Iowa 214, 72 N.W. 518 (1897) (A creditor wrote to his debtor's employer that the debtor had "cowardly slunk" behind the defense of statutory limitation when sued and that the creditor would prefer not to be connected in an official capacity with anyone giving employment to men of such character. Held not libelous, the court stating that there was nothing disgraceful about being in debt and that as the law recognized the defense of the statute of limitations as being honorable, an accusation that one had used it could not possibly amount to defamation).

8. Nichols v. Daily Reporter Co., 30 Utah 74, 83 Pac. 573 (1905) (Plaintiff was a candidate for delegate to a convention. Defendant published a card on one side of which were the words, "Vote for Honest Jake Bosch for Delegate", and on the other side of which was printed, "Explanatory. Mr. C. A. Nichols owes the Daily Reporter a balance of $34.25 for printing done in 1894. Draw your own conclusions and vote for Mr. Nichols if you think he is not able to pay this debt." Held not libelous *per se*).

9. Estes v. Sterchi Bros. Stores, 50 Ga. App. 619, 179 S.E. 222 (1935); Hudson v. Slack Furniture Co., 318 Ill. App. 15, 47 N.E.2d 502 (1943) (Publication of a false wage assignment held not libelous *per se* as to a telegrapher); Hollenbeck v. Ristine, 105 Iowa 488, 75 N.W. 355 (1898) (Suit based on same publication as in Hollenbeck v. Hall, *supra* note 8. Held actionable when special damages are shown).

10. *Cf.* Wayne Works v. Hicks Body Co., 115 Ind. App. 10, 55 N.E.2d 382 (1944); Yelle v. Cowles Publishing Co., 278 P.2d 671 (Wash. 1955).

11. Ferdon v. Dickens, 161 Ala. 181, 49 So. 888 (1909) (Creditor has written his agent, a bank, as follows: ". . . We return the papers in the Ferdon case with the request that you present them again, and if not paid, please turn them over to some justice of the peace with instructions to sue on the knowledge that Mr. Ferdon is about to leave the state for the purpose of defrauding his creditors. The account is long past due, and if Mr. Ferdon's intentions were honest and sincere, he would have remitted a long time ago . . . he can pay you just as well as paying us if he has any honesty or sincerity of purpose to pay." Held libelous as imputing an unwillingness to pay a just debt); Thompson v. Adelberg & Berman, Inc., 181 Ky. 487, 205 S.W. 558 (1918) (Creditor placed a number of large yellow cards around debtor's house bearing notice that a collector had been there seeking payment and that payment of the account would prevent the annoyance of further calls); Zier v. Hofflin, 33 Minn. 66, 21 N.W. 862 (1885) (Creditor published under "advertisements" in a newspaper, "Wanted, E. B. Zier, M.D., to pay a drug bill."); Woodling v. Knickerbocker, 31 Minn. 268, 18 N.W. 387 (1883) (Defendant placed on furniture in front of his store two placards, one of which read, "This was taken from Dr. Woodling, as he would not pay for it . . .", and the other of which read, "Moral: Beware of Deadbeats."); Muetze v. Tuteur, 77 Wis. 236, 46 N.W. 123 (1890) (Dun letters were sent in red envelopes conspicuously printed "for collecting bad debts").

Reporting a delinquent debtor to a mutual credit organization is usually privileged.[12] But the privilege, which is conditional only,[13] may be lost if the publication is made in bad faith[14] or as a means for coercion of payment.[15]

II. Invasion of the Right of Privacy

The right of privacy,[16] unknown at common law, has, since 1890,[17] gained steadily increasing recognition in the United States.[18] Truth, which is generally a good defense to an action based on defamation,[19] is not a defense to an invasion of the right of privacy,[20] and malice,[21] or its absence,[22] as well as mistakes,[23] is immaterial.

In *Brents v. Morgan*,[24] the plaintiff was awarded damages for injury to his right of privacy when the defendant displayed in the window of his business establishment a sign five feet by eight feet upon which appeared statements to the effect that the plaintiff owed the defendant a past due account; that if promises would discharge the obligation it would long since have been liquidated; and that the account would be advertised until paid. And when a merchant caused the publication in a local newspaper of a notice that a customer owed a past due grocery account, both the merchant and the newspaper were held liable on the same theory.[25]

But in *Judevine v. Benzies-Montanye Fuel Co.*,[26] recovery was denied a plaintiff whose account had been advertised, via orange colored handbills, as being for sale to the highest bidder.

12. *See* Diamond v. Krasnow, 136 Pa. 68, 7 A.2d 65, 69 (1939).
13. See Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S.W. 257 (1911) (A communication is qualifiedly privileged when it concerns a subject in which the communicator has a legitimate interest and when it is made to another who has a corresponding interest); Prosser, Torts, §94 (1941).
14. Werner v. Vogeli, 10 Kan. App. 538, 63 Pac. 607 (1901); *cf.* Fulton v. Atlantic Coast Line R. R., 67 S.E.2d 425 (S. C. 1952).
15. Tuyes v. Chamers, 144 La. 723, 81 So. 265 (1919) (A creditor caused his debtor's name to be placed on a list of delinquent debtors and then threatened to widely publicize the list).
16. Banks v. King Features Syndicate, 30 F.Supp. 352, 353 (S.D. N. Y. 1939) (The right of privacy is generally defined as "the right to be let alone; the right of a person to be free from unwarranted publicity."); Themo v. New England Newspaper Publishing Co., 306 Mass. 54, 27 N.E.2d 753, 755 (1940) ("The fundamental difference between a right of privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation . . .").
17. An article by Warren and Brandeis in 4 Harv. L. Rev. 193 is generally credited with having defined the right of privacy as the basis for an independent tort.
18. *See* Hazlitt v. Fawcett Publications, 116 F. Supp. 538, 542, 543 (D. Conn. 1953).
19. See note 1 *supra*.
20. *See* Voneye v. Turner, 240 S.W.2d 588, 590 (Ky.).
21. *See* Sidis v. F-R Publ. Corp., 113 F.2d 806, 809, 810 (2d Cir. 1940).
22. *See* Lewis v. Physicians & Dentists Credit Bureau, Inc., 27 Wash.2d 267, 177 P.2d 896, 899 (1947) ("Personal ill-will is not an ingredient of the offense . . .").
23. *See* Kerby v. Hal Roach Studios, 53 Cal. App.2d 207, 127 P.2d 577, 581 (1942).
24. 221 Ky. 765, 299 S.W. 967 (1927).
25. Trammel v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941).
26. 222 Wis. 512, 269 N.W. 295 (1936).

The debtor has likewise failed to prevail where a creditor has written[27] or phoned[28] the debtor's employer in regard to the indebtedness, or has billed the debtor by telegram in the mistaken belief that a debt was past due.[29]

It is significant that an aggrieved debtor has seldom successfully maintained an action based upon a purported invasion of his right to privacy. The suggestion that, ". . . privacy becomes important because no other remedy is available,"[30] would seem to be particularly applicable to suits by oppressed debtors.

III. Intentionally Inflicted Mental Anguish

That the acclaim[31] with which writers have heralded the decision in *Wilkinson v. Downton*[32] has not been without influence upon the judiciary is evidenced by the fact that an increasing number of courts, especially in recent years, have granted redress for disruption of emotional tranquillity.[33] With few exceptions,[34] negligently infllicted mental disturbance, when unaccompanied by some tangible physical harm, is not actionable.[35] But when mental disturbance has been intentionally provoked, resultant physical injury, although greatly enhancing the likelihood of substantial damages, is no longer universally considered indispensable to recovery.[36] Even so, the courts have realistically recognized that minor wounds of hypersensitive sensibilities are not torts, and have restricted liability to acts of a particularly flagrant character.[37]

Exemplifying such reprehensible conduct is that of an undertaker who delayed cremation of the body of a debtor's son in a

27. Voneye v. Turner, 240 S.W.2d 488 (Ky. 1951).
28. Lewis v. Physicians & Dentists Credit Bureau, Inc., 27 Wash.2d 267, 177 P.2d 399 (1947).
29. Davis v. General Finance and Thrift Corp., 80 Ga.App. 708, 57 S.E.2d 225 (1950).
30. Prosser, Torts 1054 (1941).
31. See, *e.g.*, Wade, *Tort Liability for Abusive and Insulting Language*, 4 Vand. L. Rev. 63 (1950); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939); Magruder, *Mental and Emotional Disturbance in the Field of Torts*, 49 Harv. L. Rev. 1033 (1936); Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich L. Rev. 497 (1923).
32. [1897] 2 Q.B. 57 (This is the leading case allowing recovery for intentionally inflicted mental suffering when followed by physical injury).
33. Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939); Erwin v. Milligan, 188 Ark. 658, 67 S.W.2d 592 (1934); Emden v. Vitz, 88 Cal. App2d 313, 198 P.2d 696 (1948); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Great Atlantic and Pacific Tea Co. v. Roch, 160 Md. 189, 153 Atl. 22 (1931); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926).
34. *E.g.*, Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930) (negligently sent telegram); Clemm v. A. T. & S. F. R. R., 126 Kan. 181, 268 Pac. 103 (1928) (negligently mishandled corpse). *Contra*: Western Union Tel. Co. v. Speight, 254 U.S. 17 (1920) (negligently sent telegram); Kneass v. Cremation Society of Washington, 103 Wash. 521, 175 Pac. 172 (1918) (negligently mishandled corpse).
35. *E.g.*, Espinosa v. Beverly Hospital, 114 Cal. App.2d 232, 249 P.2d 843 (1953).
36. Curnett v. Wolf, 244 Iowa 683, 57 N.W.2d 915 (1953). *Contra*: Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953).
37. Prosser, Torts 65 (1941).

ghoulish attempt to obtain payment of a past due account.[38] In one of the few other debt collection cases[39] in which recovery has been allowed for mental suffering alone the court observed that:

> "The rule seems to be well established that where an act is willful or malicious, as distinguishd from being merely negligent, recovery may be had for mental pain, though no physical injury results."[40]

However well established the rule may be, its manifest difficulty of application has resulted in its infrequent utilization in the debt collection cases.

The courts are understandably less reluctant to act when the "mental anguish" precipitates some physical disturbance which tends to render less likely the possibility of a fabricated suit.[41] The prevailing view has been embodied in the decision of a recent California case:[42]

> "The important elements are that the act is intentional, that it is unreasonable, and that the actor should recognize it as likely to result in illness. Given these elements the modern cases recognize that mere words, oral or written, which result in physical injury to another are actionable."[43]

Notwithstanding the unassailability of this statement as a general exposition of law, if the fright inducing the physical injury is

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38. Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925) (Recovery was allowed for mental suffering alone). Recovery was also allowed for mental suffering, though not followed by physical injury, in *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934) (Creditor, for a period of nearly two years, sent collection letters to the debtor, to his employer, and to his neighbors. One read, "Honest men pay their debts. Dishonest men do not pay their debts. You owe us $140. Classify yourself." Others were in the form of pseudo-legal notices or were printed on bright red paper).

39. Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932) (Collection letters were sent to the plaintiff threatening to sue, to appeal to the plaintiff's employer and to ". . . bother him until he is so disgusted with you that he will throw you out the back door", and to ". . . tie you up tighter than a drum.").

40. *Id.* 242 N.W. at 28.

41. Duty v. General Finance Co., 273 S.W.2d 64 (Tex. 1954) (Creditor left red cards in debtor's door; called debtor's mother and brother long distance collect; accused debtor of being a deadbeat and threatened to blacklist him with a credit association; threatened to garnishee debtor's wages and to cause him to lose his job; flooded debtor with collection letters at home and at work; caused special delivery letters and telegrams to be delivered at midnight); Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936) (Collector's statement to debtor that she was a G -- D --- deadbeat and that she would pay when he brought the sheriff resulted in the premature birth of a dead child).

42. Bowden v. Spiegel, Inc., 96 Cal. App.2d 897, 216 P.2d 571 (1950) (Defendant telephoned plaintiff's neighbor late at night and asked to speak with plaintiff, stating that the call was an emergency call. When plaintiff reached the telephone, defendant said, "Please bear up. I know this is going to be a shock; it is as much a shock to me to have to tell you as it will be to you." Plaintiff answered that she could take the message, whereupon defendant stated, "This is the Federal Outfitting Company—why don't you pay your bill?" Plaintiff owed nothing, and recovered for mental shock and resultant physical injury).

43. *Id.* 216 P.2d at 572.

produced by a creditor's threat that he will exercise a legal right to protect his interests, recovery has been denied.[44]

IV. Assault by Agent

The liability of a principal for an assault made by his collector upon a debtor is, of course, a question of agency, and determination of whether the collector was acting within the scope of his employment is usually for the jury.[45] While each case must necessarily stand upon its own facts, it appears to be the general rule that when the assault has as its sole motivation the furtherance of the agent's personal interests,[46] or when brought about entirely by reason of the collector's personal feelings of enmity toward the debtor,[47] the courts will refuse to hold the principal liable. In ascertaining the agent's actual authority, it is usually held that the mere hiring for the purpose of collecting debts does not vest the agent with the authority to resort to assault as a means of obtaining payment.[48] However, if it appears that authority to use force was actually given, or that the use of force was not unusual in the employer's business, there is no question but that the principal is liable for the agent's misconduct.[49] Obviously, the same result will obtain if there has been a ratification of the wrongful act.[50]

V. Conclusion

The dictum that, "There is a growing tendency to check offensive collection methods",[51] appears to have little real support. Examination of the cases reveals that the creditor rather than the debtor occupies the more favorable position, particularly during reecnt years. As has been indicated, this does not mean that a creditor may harass his debtor in a manner wholly untrammeled

44. Carrigan v. Henderson, 192 Okla. 254, 135 P.2d 330 (1943); Peoples Finance and Thrift Co. v. Harwell, 183 Okla. 413, 82 P.2d 994 (1938) (Plaintiff gave birth to a premature child following a collector's threat to take plaintiff's furniture if payment was not made. It was held that there could be no recovery as the defendant was merely threatening to do what he had a legal right to do).

45. Empire Clothing Co. v. Hammons, 17 Ala. App. 60, 81 So. 838 (1919); Manol v. Moskin Bros. Inc., 203 Wis. 47, 233 N.W. 579 (1930).

46. McDermott v. American Brewing Co., 105 La. 124, 29 So. 498 (1901) (The debt occasioning the assault was the sole responsibility of the agent); Rohrmoser v. Household Finance Corp., 231 Mo. App. 1188, 86 S.W.2d 103 (1935) (Collector suggested to plaintiff that coition could be profitable and tore off part of plaintiff's dress. The Court rejected the contention that the agent was proposing to plaintiff that she become a prostitute so as to obtain funds to pay the agent's principal, stating that the assault had for its obvious purpose the establishing of sexual relations between the agent and plaintiff, a radical departure from the master's business).

47. Jax Beer Co. v. Tucker, 146 S.W.2d 436 (Tex. Civ. App. 1940).

48. Citizen's Finance Co. v. Walton, 239 S.W.2d 77 (Ky. 1951); Hill v. McQueen, 204 Okla. 394, 230 P.2d 483 (1951); Restatement, Agency, §245 (1933).

49. Goodyear Tire and Rubber Co. v. Paddock, 219 Ind. 672, 40 N.E.2d 697 (1942); *see* Moskins Stores, Inc. v. De Hart, 217 Ind. 622, 29 N.W.2d 948 (1940).

50. *See* Reece v. Ebersbach, 152 Fla. 763, 9 So.2d 805, 806 (1942).

51. *See* Clark v. Associated Retail Credit Men, *supra* note 33 at 67.

by legal restrictions. What it does mean is that in the absence of conduct so unreasonable as to be almost entirely without any conceivable justification, an irate debtor will find expenditure of funds in satisfaction of his obligation to be a more rewarding investment than prosecution of a law suit against his overzealous creditor.

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TORTS—MALICIOUS PROSECUTION—THE REQUIREMENT OF SPECIAL INJURY.—The action of malicious prosecution is a specific tort, classified by Cooley as a wrong affecting personal security.[1] A cause of action for malicious prosecution is based on breach of that legal duty which every man owes to another to refrain from instituting proceedings when malice is present and he has no probable cause to justify his action. It has been stated that such a prosecution is one that is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure.[2] The action of malicious prosecution has been referred to as one not favored by the law[3] but it is agreed that when the requisite elements exist the action will lie.

The elements of an action for malicious prosecution are: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the present defendant against the present plaintiff; (2) its bona fide termination in favor of the present plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and, (5) damage resulting to the present plaintiff.[4] The burden is upon the plaintiff to show the concurrent existance of these requirements.

The question of the quantum of damage the plaintiff must suffer when the action is founded on the malicious prosecution of a civil suit[5] is a perplexing one. One view is that an action will not lie unless there has been an arrest of the person, seizure of property or other special injury which would not necessarily result in all suits prosecuted to recover for like causes of action.[6]

1. Cooley, Torts 381 (4th Ed. 1932).
2. *See* Burt v. Smith, 181 N. Y. 1, 73 N.E. 495, 496 (1905); Kunz v. Johnson, 74 S. D. 577, 57 N.W.2d 116, 119 (1953).
3. *See, e.g.*, Ball v. Rewles, 93 Cal. 222, 28 Pac. 937, 938 (1892); Alexander v. Petty, 108 A.2d 575, 577 (Del. 1954); Davis v. Brady, 218 Ky. 384, 291 S.W. 412 (1927); North Point Construction Co. v. Sagner, 185 Md. 200, 44 A.2d 441, 444 (1945).
4. *See* Turner v. J. Black & Sons, 242 Ala. 127, 5 So.2d 93, 94 (1941); Kunz v. Johnson, *supra* note 2 at 118.
5. The discussion of damage herein is confined to damage arising from the prosecution of a civil suit. The conflict concerning quantum of damage is not present when the suit complained of was a criminal action.
6. *See, e.g.*, Counihan v. Ferrell, 89 Ga. 795, 81 S.E.2d 215 (1954); Schwartz v. Schwartz, 285 Ill. App. 560, 2 N.E.2d 751 (1936), *affirmed*, 366 Ill. 247, 8 N.E.2d