NOTES

TORTS: SCOPE AND ADEQUACY OF EXISTING REMEDIES FOR IMPROPER DEBT COLLECTION ACTIVITY

Collection activity as a natural adjunct of a credit-fed economy must be recognized as an area of continuous growth and fluctuation. That creditors are entitled to pursue extrajudicially the collection of outstanding debts cannot be argued, since cost and time factors often weigh heavily against resort to formal court action.[1] However, it is equally clear that creditors' extrajudicial efforts cannot be given unbridled license at the expense of legitimate rights of debtors.[2] That courts have long recognized a need for protecting debtors from overzealous collection activities is evidenced by a large aggregate of decisions in the reports, often referred to as the "rough collection" cases.

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1. One creditor in his letter to the debtor's employer stated: "Now there are two ways open to us to enforce collection. One way is to take the debtor to court; this involves a loss of time and additional court costs, to which naturally we do not like to resort unless absolutely compelled. The other method which we prefer is to appeal to a man in authority like yourself." Keating v. Conviser, 127 Misc. 531, 532, 217 N.Y. Supp. 117 (Sup. Ct. 1926).

2. Justice Smith of the Michigan Supreme Court candidly points out the questions which arise as a result of creditors engaging in extrajudicial methods of collecting their debts. He states:

> The problem presented in the collection cases is considerably older than the theory upon which recovery is here sought [right of privacy]. . . . How far may a creditor go in the collection of his debt? The time is not long distant when imprisonment for debt was commonplace. It has been said . . . that during the period of its employment, until around 1830, from 3 to 5 times as many persons were imprisoned for debt as for crime, and most of the sums involved were, as in the case before us, very small. The wave of reform which abolished such practices has resulted, with few exceptions, in the abolition of the criminal sanction. The civil remedies, of course, remain, at the other extreme. But between the 2 poles is a vast shadowland of doubt and uncertainty. How far may a creditor, for the purpose of collecting his debt, go in exposing his debtor to public contempt and humiliation? How much extra-legal pressure may be applied? May he go to the debtor's pastor, to his employer, to his neighbors, to all whose esteem is important, to those forming the inner circle of his spiritual defenses, and expose the debtor's alleged disregard of his obligations? May the creditor, to them, complain that the debtor owes him $21.98 and has doggedly refused to pay although "he has been given every reasonable opportunity to pay or make satisfactory arrangements"? That he is, in short, either a deadbeat, or broke, or both?

Hawley v. Professional Credit Bureau Inc., 345 Mich. 500, 514, 76 N.W.2d 835, 841-42 (1956) (dissenting opinion).

Debtors have sought redress in the bulk of these cases through use of traditional, well established tort theories which often prove inadequate or outmoded when applied to today's expanding repertoire of collection techniques. This note will analyze and evaluate the various legal theories upon which creditors have been held civilly liable for overly aggressive and illegal collection methods which fall short of assault and battery.[3] Particular attention will be devoted to the scope of these theories and to the more common fact situations in which there appears to be overlap in application.

Abuse of Process

The action of abuse of process lies when legally issued process is used for some purpose other than that which it was designed by law to accomplish. The essential elements of this tort are some ulterior purpose plus a wrongful, improper use of the process.[4] In contrast to the action of malicious prosecution, which lies when factually unsupportable prosecution occurs,[5] abuse of process requires neither termination in favor of plaintiff, nor a lack of probable cause on the part of defendant.[6] The conduct upon which liability is founded occurs *after* the process is issued,[7] and there need be no showing of malice in having the process issued.[8] An additional requirement that the defendant must benefit or the plaintiff suffer injury as a result of the improper use was held essential by one court.[9]

The cases in which creditors have been held liable on the theory of

3. There are several criminal theories which have been used to punish creditors for various collection methods. If a creditor furtively takes goods of the debtor as payment of a just debt, the essentials of larceny are present. Gettinger v. State, 13 Neb. 308, 14 N.W. 403 (1882). If, however, money equal to the debt is openly taken in the belief that the owner would not object, then there is no larceny. See Perkins, Criminal Law 229 (1957). It is not robbery to collect payment of a valid debt by force, although it may well be a statutory felony, common law misdemeanor, or common assault. Ibid. The forceful taking of property to satisfy an uncertain, unliquidated, or non-bona fide debt is robbery. Ibid. One can also be guilty of blackmail though he honestly believes the money is justly owed. State v. Richards, 97 Wash. 587, 167 Pac. 47 (1917). Particular attention should be paid to the various criminal extortion statutes. See Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939); Perkins, Criminal Law 326 (1957).

4. Prosser, Torts § 100, at 668-69 (2d ed. 1955) (hereinafter cited as Prosser).

5. Id. at 667.

6. Id. at 668.

7. Id. at 668-69. Since imposition of liability for abuse of process is aimed at protecting the integrity of the judicial machinery, the production of evidence which proves improper use of legally issued process seems essential. See Restatement, Torts § 682 (1938).

8. Prosser § 100, at 668.

9. Gore v. Gorman's, Inc., 148 F. Supp. 241 (W.D. Mo. 1956) (interpreting Kansas law).

abuse of process fall generally into three categories:[10] (1) institution of criminal proceedings against the plaintiff;[11] (2) seizure of the plaintiff's person in a civil action;[12] and (3) seizure of the plaintiff's property by an appropriate writ.[13] In each of these situations the collateral purpose of having the process issued is to collect the debt—a purpose which approaches extortion[14] since payment is sought not in the action instituted, but ancillary to such action.[15] As a result of such conduct, a debtor may recover for any humiliation, indignity, damage to his reputation, or other legally compensable harm which he suffers.[16]

In the typical factual situation in which an abuse of process occurs, a creditor causes a warrant to be issued for the debtor's arrest (upon grounds which probably exist so as to avoid liability for malicious prosecution)[17] or will procure a writ to attach property which the debtor needs in his vocation. Then the warrant or writ is presented to the debtor with advice that there is a "way out";[18] if the debtor pays he will not be arrested or his property will not be attached, but failure to pay will result in arrest and prosecution or attachment of the property. A finding of his guilt in a criminal action does not preclude the debtor from bringing an action of abuse of process if he establishes improper use of the process, i.e., negotiating for payment of the debt after the process' issuance.[19]

It is highly improbable that creditors will frequently resort to this

10. Note, 16 N.C.L. Rev. 277, 280-81 (1938).

11. E.g., in McClenny v. Inverarity, 80 Kan. 569, 103 Pac. 82 (1909), the debtor was arrested for taking mortgaged property from the county and was released upon payment of $250, the actual debt being only $145.

12. E.g., in Lockhart v. Bear, 117 N.C. 298, 23 S.E. 484 (1895), the creditor, to collect a disputed debt, made an affidavit alleging that the debtor in an attempt to defraud his creditors was about to leave the state. The debtor refused to pay and creditor then sued out writ of arrest and bail.

13. E.g., in Mullins v. Matthews, 122 Ga. 286, 50 S.E. 101 (1905), the tenant's furniture was seized under color of distress warrant to coerce payment of disputed rent.

14. See McClenny v. Inverarity, 80 Kan. 569, 103 Pac. 82 (1909), where the court stated: "The evidence disclosed the fact that a warrant for the arrest of the plaintiff upon a criminal charge was used to collect a debt, and, it seems, to extort an additional amount." Id. at 571, 103 Pac. at 83.

15. See Prosser § 100, at 669.

16. For a discussion of damages in abuse of process actions see McGann v. Allen, 105 Conn. 177, 184, 134 Atl. 810, 813 (1926).

17. See Prosser § 100, at 667-68.

18. The debtor was so advised in McClenny v. Inverarity, 80 Kan. at 572, 103 Pac. at 83, supra note 14.

19. In Ledford v. Smith, 212 N.C. 447, 193 S.E. 722 (1937), liability was imposed even though no evidence was adduced which showed improper use after the criminal proceedings had begun. The case has been criticized on this point. See Note, 16 N.C.L. Rev., supra note 10, at 278 n.2.

means of collecting debts because of the danger of incurring liability for malicious prosecution, and also because there are seldom grounds for issuance of process except the debt itself. An action for abuse of process will not lie when a debtor is merely *threatened* with litigation and no process is actually issued or improperly used. Furthermore, improper use cannot be established by malice alone[20] and this often protects a creditor from liability. It can be readily seen that because of these limitations abuse of process is frequently an inadequate remedy when applied to collection cases.

DEFAMATION

Broadly defined, defamation is "an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held."[21] The mode of communication—oral or written—has produced a dichotomy in, and confusion of, defamation law which legal scholars have attacked unremittingly.[22] An oral defamatory remark is denominated slander; a written remark of this character is termed libel. At common law it was necessary in slander actions to prove actual damages of a pecuniary nature ("special damages"), unless there was an imputation of: (1) a serious crime; (2) certain loathsome diseases; (3) matters affecting the plaintiff in his business, trade, profession or office; or (4) in some jurisdictions, unchastity to a woman.[23] On the other hand, historically it was never required that special damages be proved in libel actions.[24] It remains a requirement of both actions that the remarks be made known to persons other than the plaintiff, i.e., that they be "published."[25]

Unless credit is necessary for the debtor in his business, or his reputation for honesty is essential in his calling,[26] an oral publication that

20. Prosser § 100, at 668.

21. Prosser § 92, at 572.

22. E.g., Green, Essays on Tort and Crime 49 (1933); 8 Holdsworth, History of English Law 333-36 (1925); Plucknett, A Concise History of the Common Law 427-45 (2d ed. 1936); Fisher, The History of the Law of Libel, 10 Law Q. Rev. 158 (1894); Veeder, History and Theory of the Law of Defamation, 3 Colum. L. Rev. 546 (1903).

23. Prosser § 93.

24. Id. at 587.

25. Prosser § 94, at 596-97.

26. The plaintiff must be affected directly in his business, trade, occupation or profession. See Prosser § 93, at 590-91. In Liebel v. Montgomery Ward & Co., 103 Mont. 370, 62 P.2d 667 (1936), the court held that the fact that a stenographer does not pay her debts does not injure her in her occupation as a stenographer.

This category of slander, in addition to the other three, exists for the purpose of permitting a plaintiff in slander actions to recover without proof of special damages. The trade or business category has been discussed in connection with

one owes a debt, or that he is a "deadbeat," must, in addition to imputing dishonesty, give rise to special, i.e., pecuniary, damages. In *Tuyes v. Chambers*,[27] the plaintiff alleged that the defendant called her a "deadbeat" and asserted that she was "no lady." This communication was made to plaintiff at the corner grocery store. The remarks were also made to plaintiff's daughter. Plaintiff was unable to prove that the remarks to her were overheard, and they were thus unpublished, but the communication to the daughter was found to have been a slanderous publication. The theory upon which liability was based is not clear from the opinion as the case also involved libelous conduct. However, it was suggested that mental anguish would have been sufficient as special damages if slander alone had been present.[28] Since mental anguish is not pecuniary in nature it is submitted that most jurisdictions would not allow recovery for slander in such an instance.

If written words communicated to another tend to create hatred, contempt or ridicule of the plaintiff, or lower the esteem in which he is held, recovery may be had in an action of libel. Words that are "libelous on their face"[29] and result in harm to the plaintiff's reputation, require no proof of special damages; but those words which require proof of extrinsic facts to disclose their libelous meaning[30] may

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libel actions by a few courts, apparently because these courts now require that special damages be proved when the communication is not "libelous on its face"; thus such communications are treated as slander with respect to the special damages requirement. See text supported by notes 29-31 infra. See also Holtz v. National Furniture Co., 57 F.2d 446 (D.C. Cir. 1932); Stannard v. Wilcox & Gibbs Sewing Mach. Co., 118 Md. 151, 84 Atl. 335 (1912).

27. 144 La. 723, 81 So. 265 (1919).

28. Id. at 731, 81 So. at 267.

29. "Libelous on their face" is used here rather than more common terms such as "libelous per se," or "actionable per se." Courts have used these terms in differing senses, and much confusion of meaning has resulted. See Note, 1957 Wash. U.L.Q. 358, 364 ("Authorities disagree which common law term precipitated the confusion, but they agree that misunderstood terminology was the ultimate cause."); Comment, 43 Geo. L.J. 537 (1955).

30. This is generally referred to as "libelous per quod"; in such cases one must plead the "inducement" (facts which make the words libelous), the "innuendo" (libelous meaning of the words revealed by the inducement), and the "colloquium" (a showing that the words refer to plaintiff). See Prosser, § 92, at 579-84; Note, 1957 Wash. U.L.Q. at 361.

The defendant's alleged conduct was so extreme in Thompson v. Adelberg & Berman, Inc., 181 Ky. 487, 205 S.W. 558 (1918), that the court had little difficulty in unveiling the libelous character of the publication. The petition stated that defendant in order to collect an $8.95 debt: "came upon her [plaintiff's] home grounds, in her use and occupation, and placed numerous yellow cards in the apertures and crevices of the front door of her residence . . . , also in the windows in the dining room . . . , and the front room windows . . . , and the windows on the railroad side, and in the dining room windows in the rear yard, and placed one in a stick which was driven in a flower mound about two feet from the

in many jurisdictions necessitate proof of special damages.[31] Creditors often publish the existence of a debt by some form of written communication but frequently escape liability because of the debtor's inability to plead and prove either the libelous character of such communication or special damages. For example, in *Judevine v. Benzies-Montanye Fuel & Warehouse Co.*,[32] defendant circulated in plaintiff's community handbills of flaming orange color on which plaintiff's debt of $4.32 was advertised for sale. The handbill did not show the period of time the debt had been outstanding, which fact would bear on the inference of dishonesty. In deciding for defendant the court stated: "No special damages are alleged in the complaint so that to constitute a cause of action for libel the matter published must be libelous per se."[33] The court was unable to draw an imputation of dishonesty from the handbill in question.

Since courts are often loath to infer a charge of dishonesty from the publication of a debt, even though it is delinquent, creditors thus are shielded further against liability for improper collection methods in defamation actions. The court in *Muetze v. Tuteur*[34] drew such an inference when the defendant association sent to the plaintiff two conspicuous envelopes of red paper, in addition to others, with the following markings on their face:

Return in twenty days to . . . ,
an organization of business and professional men
FOR COLLECTING BAD DEBTS

In addition to finding that the defendants had engaged in conduct calculated to coerce payment of the debt, the court reasoned that the "words imputed to the plaintiff a bad character, and a want of credit, which implied that he was a cheat and a swindler."[35] A closer question of the inference permissible from a creditor's communication is found

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sidewalk on the Lincoln Avenue side, which cards read in large type, and each word in capital initial letters 'Please Take Notice,' and then in larger capital letters 'OUR COLLECTOR,' and then in smaller letters 'was here for payment.' 'We would save you the annoyance of his further calls, if you will pay at the store.' Then, in large capital letters, 'THE UNION CLOTHING STORE.'" Id. at 488, 205 S.W. at 558-59.

31. See Prosser § 93, at 587-88.

32. 222 Wis. 512, 269 N.W. 295 (1936).

33. Id. at 517, 269 N.W. at 298.

34. 77 Wis. 236, 46 N.W. 123 (1890).

35. Id. at 244, 46 N.W. at 125. In State v. Armstrong, 106 Mo. 395, 16 S.W.

in the recent case of *Stickle v. Trimmer*.[36] Here, defendant sent a letter to plaintiff's employer. After soliciting the employer's cooperation in adjusting the alleged delinquent debts, the letter continued: "For some time we have endeavored, without success, to secure his [plaintiff's] cooperation. If he continues to ignore this obligation our customer may elect to use more drastic measures."[37] The trial court submitted the issue to the jury, and verdict and judgment were rendered for plaintiff. On appeal, the judgment was sustained, but the court closely examined the fact-finder's inference from the above-quoted portion of the creditor's letter. It concluded that "while a non-defamatory meaning could also be reasonably derived from the letter —that plaintiff merely was unable to pay—there was enough support for the more invidious inference in the entirety of the proofs to make the question as to how it was understood by the addressee an issue for the fact-finder."[38]

Another manner in which injury may occur to a debtor's reputation is the giving of false information about the debtor by a mercantile credit reporting agency to one of its subscribers. These agencies are accorded a "qualified privilege" and, except when malice or abuse is shown, are generally successful in defending against defamation ac-

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604 (1891), the defendant was found guilty of criminal libel when he caused the following envelope to be sent to the debtor's place of employment:

BAD DEBT Collecting Agency 218 La Salle St., Chicago	Chicago, Ills. March 26, 6:30 P. M. R. R.	U. S. Postage Stamp.
	[name of debtor] c/o Scruggs, Vandervoort & Barney,	
[debtor's home address]		St. Louis, Mo.

36. 50 N.J. Super. 518, 143 A.2d 1 (App. Div. 1958).

37. Id. at 521, 143 A.2d at 2.

38. Id. at 525, 143 A.2d at 4. Creditors were also held liable in libel actions for sending letters to employers in Holt v. Boyle Bros. Inc., 217 F.2d 16 (D.C. Cir. 1954); Keating v. Conviser, 246 N.Y. 632, 159 N.E. 680 (1927), reversing 127 Misc. 531, 217 N.Y. Supp. 117 (Sup. Ct. 1926); Neaton v. Lewis Apparel Stores, 267 App. Div. 728, 48 N.Y.S.2d 492 (1944). *Contra*, Patton v. Jacobs, 118 Ind. App. 358, 78 N.E.2d 789 (1948); Hawley v. Professional Credit Bureau, Inc., 345 Mich. 500, 76 N.W.2d 835 (1956).

A creditor was held liable under the "republication" doctrine when a libelous letter sent by him to debtor's employer was exhibited before a promotion board thirteen months after its original receipt, the one year statute of limitation on the original publication having run. Weaver v. Beneficial Fin. Co., 199 Va. 196, 98 S.E.2d 687 (1957), noted, 43 Va. L. Rev. 1132 (1957).

tions.[39] A different rule exists for mutual credit information associations—organizations composed of local merchants who wish to reduce their credit risks by reporting to each other the names of delinquent debtors, from whom credit is then withheld mandatorily by all. If, through mistake[40] or efforts designed to coerce payment of a debt,[41] the debtor's reputation is injured, both creditor and association are exposed to potential liability.

The defense of truth may also limit a debtor's right to recover in a defamation action. But even though a communication that one owes a debt is true, if a false imputation of dishonesty is found therein, or if the truthful statement regarding the existence of the debt is used maliciously or to coerce payment, then an action in defamation may lie, the truth notwithstanding.[42]

General confusion in existing defamation law, the requirements of publication and special damages, the inference which must be drawn from the communication, and the defenses of qualified privilege and truth, all combine to render libel and slander actions highly unreliable as possible avenues for recovery by injured debtors.

Right of Privacy

The theory of a tort action for an invasion of one's right of privacy originated in 1890.[43] Today it is accepted in over twenty states,[44] Missouri included,[45] and is specifically rejected in only three.[46] The right now seems to encompass four distinct categories of activity:[47] (1) an intrusion into one's physical solitude; (2) a publishing of that which violates the ordinary decencies; (3) a placing of one in a false but not necessarily defamatory position in the eyes of the public; and (4) an appropriation of a part of one's personality for commercial use.

39. See Smith, Conditional Privilege for Mercantile Agencies.—Macintosh v. Dunn, 14 Colum. L. Rev. 187 (1914); Note, 2 De Paul L. Rev. 69 (1952); Note, 11 S.C.L.Q. 256 (1959); Comment, 9 S.C.L.Q. 291 (1957).

40. E.g., J. Hartman & Co. v. Hyman, 287 Pa. 78, 134 Atl. 486 (1926).

41. E.g., Werner v. Vogeli, 10 Kan. App. 536, 63 Pac. 607 (1901); Traynor v. Seiloff, 62 Minn. 420, 64 N.W. 915 (1895); Masters v. Lee, 39 Neb. 574, 58 N.W. 222 (1894); Woodhouse v. Powles, 43 Wash. 617, 86 Pac. 1063 (1906); Muetze v. Tuteur, 77 Wis. 236, 46 N.W. 123 (1890).

42. See Prosser § 96, at 630-31. See also Turner v. Brien, 184 Iowa 320, 326-27, 167 N.W. 584, 586 (1918), in which the defense of truth regarding the publication of the existence of a debt is discussed.

43. This action was first proposed in a law review article. Warren & Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890).

44. See Prosser § 97, at 636.

45. See, e.g., Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911).

46. Prosser § 97, at 637.

47. Id. at 637-39.

The physical intrusion category covers two-party situations in which a creditor might, for example, continuously and at late hours call the debtor. An action for defamation would fail in such a situation, for there is a lack of the necessary publication,[48] yet some cases would allow recovery based on violation of the debtor's right of privacy.[49]

The majority of collection cases brought on this theory involve not physical intrusion, but rather an alleged publishing of that which violates the ordinary decencies. A debtor is faced here with the same publication requirement to prove an invasion of his right of privacy as is necessary under the theory of defamation.[50] The types of activities held actionable for invasion of privacy have included the voicing of loud, degrading remarks at the debtor's place of employment,[51] the telephoning of a debtor at his friend's home or his place of employment,[52] the placing of signs or bill-boards in shop windows advertising the debt,[53] and the publication of the debt in newspapers and magazines.[54]

The case of *Brents v. Morgan*,[55] presents a classic illustration of the invasion of a debtor's right of privacy by an overzealous creditor. The defendant-creditor placed a sign in the front window of his garage which stated:

> Notice
> [Name of debtor] owes an
> account here of $49.67.
> And if promises would pay
> an account this account
> would have been
> settled long ago. This
> account will be advertised
> as long as it remains
> unpaid.[56]

48. See text supported by note 25 supra.

49. See, e.g., Hush v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

50. Prosser § 97, at 641. This requirement does not apply to the "physical intrusion" situations.

51. See, e.g., Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959).

52. In Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 216 P.2d 571 (1950), a telephone call to a neighbor's home was considered as one factor. Although the opinion was based on an intentional causing of mental disturbance, the court stated that there was also an invasion of the debtor's right of privacy. See also Hush v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (telephone calls to debtor's place of employment as one factor).

53. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

54. Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941).

55. 221 Ky. 765, 299 S.W. 967 (1927).

56. Id. at 766, 299 S.W. at 968.

This is a clear example of a publication of that which violates ordinary decencies, and accordingly was held actionable in right of privacy.

In less clear cases, however, recovery often may be thwarted because of substantial limitations which courts have placed upon this theory. Many jurisdictions hold that the action must be based on written communications.[57] For that matter, the right of privacy theory was not originally designed to cover oral communications.[58] A few jurisdictions have now adopted the more liberal view that even though communications are wholly oral an action for invasion of privacy may lie.[59] In the recent case of *Biederman's of Springfield, Inc. v. Wright,*[60] the Missouri Supreme Court ruled that a counterclaim based on an alleged violation of a debtor's right of privacy stated a cause of action though all of the communications involved were oral. An additional limitation upon the theory lies in the fact that merely giving notice to an employer of a debt owed by an employee, or soliciting an employer's help in collecting a debt, is not sufficient as a basis for recovery in right of privacy.[61] A further limitation, and perhaps the broadest of all, is that the action lies only in cases in which the creditor's conduct is serious and outrageous.[62] The rationale supporting this is that there are some annoyances which must be suffered without legal redress if courts are to be uncluttered and able to dispatch justice rapidly in the more serious cases. Also, this limitation is felt to be a deterrent against manufactured claims motivated by the

57. See, e.g., Lewis v. Physicians & Dentists Credit Bureau, Inc., 27 Wash. 2d 267, 177 P.2d 896 (1947) (holding telephone calls provided no basis for an action in right of privacy).

58. Warren & Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193, 217 (1890).

59. See, e.g., Bowden v. Spiegel, 96 Cal. App. 2d 793, 216 P.2d 571 (1950).

60. 322 S.W.2d 892 (Mo. 1959). It is apparent that oral communications of an abusive nature can have just as much damaging effect on a debtor's reputation or tranquility as can abusive written material. Courts which do not recognize an action based upon right of privacy where only oral communications are present, and which further do not recognize the intentional causing of mental disturbance as a separate tort (see text at notes 67-78 infra), allow large areas of unreasonable collection conduct to escape legal redress. It is submitted that the intentional causing of mental disturbance is better adapted to cover such communications; but if this theory is unacceptable, a decision allowing recovery in right of privacy for oral communications certainly would be preferable to a decision denying any redress for the injury.

61. See, e.g., Patton v. Jacobs, 118 Ind. App. 358, 78 N.E.2d 789 (1948). See also Hawley v. Professional Credit Bureau, Inc., 345 Mich. 500, 76 N.W.2d 835 (1956), in which the employer's aid was solicited.

62. See, e.g., Davis v. General Fin. & Thrift Corp., 80 Ga. App. 708, 57 S.E.2d 225 (1950), in which it is stated that "there are some shocks, inconveniencies and annoyances which members of society in the nature of things must absorb without the right of redress." Id. at 711, 57 S.E.2d at 227.

substantial judgments which are sometimes given for mental pain alone.[63]

That the right of privacy theory may give a debtor some advantages over an action based on defamation is not denied. Truth is not a defense to this action,[64] and malice or the lack thereof is immaterial.[65] Further, proof of special damages is not required,[66] nor need physical injury occur. Still, despite these advantages, the right of privacy theory obviously leaves much to to be desired both in scope and force when applied to today's range of "rough collection" controversies.

INTENTIONAL CAUSING OF MENTAL DISTURBANCE

As a separate tort, intentional causing of mental disturbance is of rather recent origin, and has had relatively limited application in the courts.[67] Early cases[68] allowed recovery only if this action was linked with traditionally recognized torts such as defamation, abuse of process, or assault.[69] Today, courts which recognize the intentional causing of mental disturbance as a separate tort limit it to conduct of extreme or flagrant nature.[70] As a general rule, it may now be stated that no physical harm is required when a defendant's acts constitute an *intentional* causing of the plaintiff's mental disturbance, though physical injury is deemed essential if the conduct constitutes only a *negligent* causing of mental disturbance.[71] Courts, however, will carefully examine cases of the former class, in which no physical injury is present.[72] Any hesitancy to allow recovery in such cases stems from the fear that counts will become overcrowded with fictitious claims. This, of course, has some validity, but to deny justifiable claims because of such fear tacitly discredits the courts' fact-finding process.

This tort action is still in an early stage of growth. The question of exactly where the line should be drawn between trivial insult and out-

63. Prosser § 97, at 641.

64. See, e.g., Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

65. Lewis v. Physicians & Dentists Credit Bureau, Inc., 27 Wash. 2d 267, 177 P.2d 896 (1947). See Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).

66. In Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892, 898 (Mo. 1959), the court stated that "pleading the falsity of the charges and special damages . . . are rendered unnecessary."

67. See Prosser § 11.

68. The first cases allowing recovery under this theory involved insults made to passengers by common carrier employees. Ibid.

69. See Borda, One's Right to Enjoy Mental Peace and Tranquility, 28 Geo. L.J. 55 (1939).

70. Prosser, Insult and Outrage, 44 Calif. L. Rev. 40, 53 (1956).

71. The Restatement of Torts has now specifically rejected physical harm as an essential to an action for the intentional causing of mental disturbance. Restatement, Torts § 46 (Supp. 1948).

72. Ibid.

rageous or flagrant abuse presents a major problem. As under other theories, a defendant will not be held liable for doing nothing more than using *reasonable* efforts to collect a debt. Bad manners alone will not sustain the action. But, as in the case of *Digsby v. Carroll Baking Co.*,[73] when a creditor goes beyond the line of legitimate and reasonable effort, and in fact becomes grossly abusive and threatening, liability has been found. The remark made by the defendant in the *Digsby* case was both abusive and extreme—he told a pregnant debtor that if he could not get payment in any other way he would "take it out in trade."[74]

Another example of conduct sufficient to constitute extreme or flagrant abuse appears in the case of *Gadburg v. Bleitz*.[75] In this case an undertaker delayed the cremation of the body of the debtor's son, attempting in this way to secure payment of a past due account. The debtor at the time thought that her son's body had already been cremated. When informed that it had not been, and further that it would not be until payment was made, the debtor-mother suffered great mental shock. The court allowed recovery stating that in this instance there was no need for physical injury since the acts of the creditor were both wilful and extreme.

A perusal of the cases reveals that the particular type of debtor involved has important bearing on the question of extremeness. This is evidenced by the multitude of cases allowing recovery by female plaintiffs, more particularly pregnant and widowed plaintiffs.[76] The reason for this is that the sensibilities of such plaintiffs differ considerably from those of persons of stronger make-up. As a correlative of this factor, the type of defendant involved is also given at least implicit consideration. Professional collection agencies appear to be viewed more critically than either corporate or non-corporate business creditors.[77] In addition, though a single act may be serious enough to satisfy "extremeness," the repetition of a less aggravating act or the combination of this with other abusive acts will weigh heavily toward the satisfaction of this requirement.[78] Though the question of extremeness presents some difficulty, it seems safe to state that the intentional

73. 76 Ga. App. 656, 47 S.E.2d 203 (1948).

74. Id. at 657, 47 S.E.2d at 205.

75. 133 Wash. 134, 233 Pac. 299 (1925).

76. See, e.g., Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S.E.2d 203 (1948) (pregnant debtor). For a discussion of this factor, see Prosser, Intentional Infliction of Mental Suffering, 37 Mich. L. Rev. 888 (1939).

77. See Note, 24 U. Chi. L. Rev. 572, 585 (1957). See also Wade, Tort Liability for Abusive and Insulting Language, 4 Vand. L. Rev. 63, 72 (1950).

78. It is evident from a reading of the cases that collectors often use a combination of techniques in attempting collection of debts.

causing of mental disturbance in its particular application to "rough collection" cases is a rapidly growing area of the law.

CONCLUSION

The vast majority of cases have involved debts of comparatively small amounts.[79] The reason for this is that when greater sums are involved creditors are more prone to resort to judicial machinery. It should be noted further that quite frequently the debts involved in the "rough collection" cases have been disputed.[80] Courts seldom have adverted expressly to this fact in deciding the cases. But the fact of good faith dispute, especially when evidenced by tender or part payment, should have, and in a few cases implicitly has had,[81] some bearing on the ultimate question of the creditor's liability.

The one common factor present in practically all cases in this area is conduct calculated to *coerce* payment of the debt. In the area of defamation courts denominate the interest protected from such coercion as that of "reputation"; in the area of right of privacy the interests protected are those of "physical solitude" and "freedom from that which violates common decencies"; and the interest protected by the theory of intentional causing of mental disturbance is "mental tranquility." It is submitted that the primary interest underlying all of these areas is the debtor's right of freedom from unreasonable invasions of his mental tranquility. Since the theory of intentional causing of mental disturbance protects this underlying interest it is believed to be the most appropriate theory for the many and varied situations in the "rough collection" area.

The present law as applied to "rough collection" cases is impregnated with technicality and confusion, and varies greatly among jurisdictions. A uniform theory of tort liability would do much to add both consistency and predictability to collection cases. Clearly, there are many activities engaged in by creditors which result in mental disturbance, yet recovery is denied because the facts alleged do not "state a cause of action."[82] In the two-party situations defamation will not lie without publication, and although an action in right of privacy might be allowed, it often fails if the communication is oral. The action for intentional causing of mental disturbance suffers neither of these limitations. As Professor Prosser has indicated, as acceptance of this theory spreads, it may easily supplant other existing remedies in this

79. See Note, 24 U. Chi. L. Rev. 572, 585. In only a very few cases did the debt exceed $100.

80. See, e.g., Muetze v. Tuteur, 77 Wis. 236, 46 N.W. 123 (1890).

81. See, e.g., Werner v. Vogeli, 10 Kan. App. 536, 63 Pac. 607 (1901).

82. See text supported by notes 48, 49 supra.

area.[83] It is suggested, therefore, that in order to recover, the debtor should be required only to plead and prove conduct which: (1) was intentionally abusive; (2) was extreme; and (3) caused injury, whether mental, physical, or both.

83. Prosser § 11. "When the 'new tort' of the intentional infliction of mental suffering becomes fully developed and receives general recognition, the great majority of the privacy cases may very possibly be absorbed into it." Id. at 639.