THE FORCIBLE COLLECTION OF A DEBT.*

The proposition of law that a creditor may by force compel his debtor to pay him what he owes seems upon first examination to be one which would lead to grave consequences. It would seem that to thus permit persons to take the law into their own hands and assume the functions of court, judge, jury, and sheriff, would be advancing the doctrine of self help to an extent dangerous to the public policy of the state. However, such is not the case, as an exhaustive review of the cases will show. The purpose of this note is to consider the criminal consequence of the forcible collection of debts and review the leading cases on the subject in view of determining on what grounds the courts have refused to extend the rule and why persons collecting their debts by force are apt to be convicted of robbery even though there is seemingly a valid defense. The courts in these cases have refused to convict, except where the taking was under a bona fide claim of right and in good faith. The grounds of the defense were, that if there was a claim of right, this would defeat the intent, which is the essential element of the crime.

When we consider that it is well established that a person may take the property of another under a claim of right and not be guilty of larceny,[1] that he may take property, believing that he has the right, in security of a debt, with immunity from criminal prosecution,[2] and that a claim of right is a valid defense against embezzlement;[3] it is not strange that the courts have established the rule that persons may collect their debts with the use of force and enjoy the same defenses.[4]

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1. 41 L. R. A. (n. s.) 550 (note). Witte v. State, 9 Mo. 671. 13 A. L. R. 142 (note). State v. Holmes, 17 Mo. 247. 17 R. C L. 246 (cases cited). State v. Mathews, 20 Mo. 55. 36 C. J. 761 (cases cited). 2 Bishop (Crim. Law, page 442). Reg. v. Wade, 11 Cox C. C. 549. Slight evidence of intent defeats the defense; Com. v. Peakes, 123 Mass. 449. Reg. v. Jenner, 7 L. J. (o. s.) M. C. 79. People v. Soloman, 12 App. Div. 627. McDaniel v. State, 8 Smedes & M. 401. Holding taking must be in good faith.

2. 13 A. L. R. 142 (cases cited), but see Reg. v. O'Donnell. 36 C. J. 765-6 (cases cited). 7 Cox C. C. 337. 41 L. R. A. 553 (note).

3. 41 L. R. A. 556 (note). 13 A. L. R. 145 (note). 20 C. J. 436 (cases cited). State v. Reilly, 4 Mo. App. 392.

4. 1. 13 A. L. R. 151 (note). 2. 34 Cyc. 1797-8 (cases cited). 3. 23 R. C. L. 1144. 4. 24 Am. & Eng. Cyc. of Law & Pro. 1004. 5. 2 Bishop Crim. Law (new edition) (a) sec. 1162, (b) sec. 849. 6. Russell on Crimes, 1129. 7. 10 L. R. A. (n. s.), 744 and note. 8. 35 A. S. R. 242 and note. 9. 70 Am. Dec. 180.

That a creditor may assault his debtor and take the amount of his debt finds its foundation in the Roman Law. There, as today, the wrongdoer escaped punishment because of the lack of a criminal intent.[5] The Common Law with its love of technicality naturally followed the Roman Law and adopted the proposition on the same grounds, that the lack of the *animus furandi* defeats the crime. Russell says, "A creditor who assaults his debtor and compels him to pay his debt cannot be convicted of robbery."[6] Bishop lays down the rules dealing with robbery and larceny for debt collection as follows:

> "One does not commit robbery who by violence compels a debtor to pay him what he owes."[7] "One who takes another's goods to compel him, though in an irregular way, to do what the law requires him to do with them—pay his debt—is in no legal principle a felon, though doubtless a trespasser. . . . In reason one has no more privilege to steal the effects of his debtor than those of any other person. But trespass is not theft except when done with felonious intent."[8]

These authorities seemingly place no limit on the action of the creditor and permit almost any kind of violence when collecting a debt. The courts, however, have not made the rule that broad as we shall see later.

The best authorities for the rule laid down by Bishop and Russell are found in the English decisions. It has been held that where a creditor "violently" assaulted his debtor, forcing payment of a debt in money and checks, that he could not be convicted because there was no felonious intent made out.[9] In a prosecution for extortion the court said, "If it appears that the object is to compel the delivery of accounts of moneys honestly believed to be due and owing, there is no evidence of intent.[10] Even where the assault was committed by the father of the creditor, the court held that there was such a semblance of a claim of right that it could not be an assault with an intent to rob.[11] In another case the taking of property to which the claimant in fact had no right but to which he believed that he was entitled was held not robbery, lacking in the *animus furandi*.[12] But English

5. Justinian Institutes, Book IV, sec. 2.
6. Footnote 4, No. 6.
7. Footnote 4, No. 5 (a).
8. Footnote 4, No. 5 (b).
9. Reg. v. Hemmings, 4F&F 50. See Reg. v. Holloway, 3 Car. & K. 946. "Felonious intent may be explained to mean there is no color of right or excuse for the act."
10. Reg. v. Coghlan, 4F&F 316.
11. Reg. v. Boden, 1 Car. & K. 395.
12. Rex. v. Hall, 3 Car. & P. 409.

courts have held that taking to secure the payment of a debt, that is, holding the property of another until the sum was paid, was sufficient to prove larceny.[13]

The authorities in this country are not uniform, and different courts reach different conclusions on the same facts. The case most cited for holding the offense not robbery is *State v. Hollyway.*[14] In this case the defendant was indicted for robbery. He had sold the prosecutor calves. The prosecutor was a storekeeper and the defendant agreed to allow him to deduct a small store account from the money due. After receiving the calves, the prosecutor bought a note of the defendant which, when a settlement was demanded, he proposed to set off against the amount due. The defendant refused to accept such a settlement and by force and threats compelled the storekeeper to pay the amount agreed upon. The court said, "We do not see how it can be said to be robbery where the defendant by putting fear in compels his debtor to pay that which the defendant in good faith believes to be a just and honest debt then due." This decision represents the weight of authority in this country. It lays down the "good faith" rule which courts have used to prevent the abuse of this privilege by unscrupulous and law breaking creditors. The Missouri cases present an unbroken line of decisions from *State v. Holmes* in 1852 to *State v. Culpepper* in 1922; all holding that in larceny, robbery, or embezzlement the taking under a bona fide claim of right and in good faith will show a lack of the intent sufficient to defeat the prosecution.[15] In *State v. Brown* on a trial for robbery the court held that failure to give the following instruction was error and reversed that case: "If the defendant took the money in good faith claiming that the aggrieved party owed them in any sum whatever and they offered to return all except the amount owed, then the defendant was not guilty of robbery."[16] Later in *State v. Carrol* taking more than was due and in a stealthy manner was held to be sufficient evidence of bad faith to warrant a conviction of robbery.[17] The Culpepper case affirms *State v. Brown.* In that case the payment was

13. Reg. v. O'Donnell, 7 Cox C. C. 337.

14. State v. Hollyway (1875), 41 Iowa 200, 20 Am. Rep. 586. Analysis v. People, 188 Pac. 1113, 68 Colo. 74, same holding.

15. 1. State v. Holmes, 17 Mo. 379. 2. State v. Brown, 104 Mo. 365, 16 S. W. 406. 3. State v. O'Connor, 105 Mo. 121, 16 S. W. 510. 4. State v. McGinnis, 158 Mo. 105, 59 S. W. 83. 5. State v. Adair, 160 Mo. 368, 60 S. W. 187. 6. State v. Carrol, 160 Mo. 368, 60 S. W. 1087. 7. State v. Broderick, 59 Mo. 318. 8. State v. Culpepper (1922), 293 Mo. 249, 238 S. W. 801. 9. State v. Williams, 95 Mo. 247, 8 S. W. 217.

16. See note 15, No. 2.

17. See Note 15, No. 6.

forced by threatening the debtor with death, but the court said that if the defendant believed that the money was due him he was not guilty of robbery, there being no *animus furandi.*[18]

In a Georgia case a defendant was indicted for the murder of a creditor who was killed while trying to collect a debt from the defendant. The defense contended that the defendant was resisting robbery. The prosecution claimed that there was such a claim of right as to make it only a simple trespass. The facts were that the creditor insisted upon his right to take his payment in meat of the debtor (the debt owed was 25c) and was in the act of hacking the meat off, when the defendant killed him. The defendant had offered to pay the money if the creditor would go home with him and get it. A friend had also offered to pay the money for him. Under these facts the court said, "It is true that such a taking, although wrongful and violent, would not be robbery if the claim of right was in good faith, and if the trespass was for no other purpose than to satisfy the claim, in such case the *animus furandi* would be lacking. But it is otherwise, if the claim of right was a mere pretext covering an intent to steal."[19] The court then held that this question should have been submitted to the jury. The other American cases in support of the proposition merely apply to similar facts, the same rule, and reach the same conclusions by similar reasoning.[20]

The case most cited in opposition to the weight of authority as laid down in the cases discussed, is *Fannin v. State.*[21] There the defendant leveled a pistol at the prosecutor and compelled him to give him a ten dollar bill. He returned $2 and the prosecutor owed him $8. The only purpose was to collect the debt. While the court remanded the case on other grounds it says in the course of the opinion:

> "No man has the right, as we understand the law, to take the law into his own hands and at the point of a six shooter, putting his debtor in fear of his life, or serious bodily injury, collect a debt, however just, and then defend against it on the ground that the property was not fraudulently taken because the appellant owed him money and would not pay him. This is

18. See note 15, No. 8.

19. Crawford v. State, 90 Geo. 701, 17 S. E. 628.

20. State v. Adair, 160 Mo. 391. State v. McLain, 159 Mo. 340. Brown v. State, 28 Ark. 726. State v. Deal, 64 N. C. 270. State v. Carmans Tapp., 65 (Ohio). Glenn v. State, 49 Tex. Cr. 349, 92 S. W. 805. People v. Hughes, 11 Utah 100, 39 Pac. 492.

21. Fannin v. State, 51 Tex. Crim. 41 Rep., 10 L. R. A. (n. s.) 744, 123 Am. St. Rep. 874, 100 S. W. 916.

more than simple trespass and will be dangerous doctrine to hold that a man can thus collect his debts."[22]

While *Fannin v. State* is no longer the law,[23] the court there sets forth the most obvious objection to the rule which today leaves the debtor with his only remedy in an action of assault or some other civil suit, excepting, perhaps, a prosecution for disturbing the peace. There are, however, other respectable authorities to be found opposing the permission of larceny or robbery as a means of debt collection. It has been held in Tennessee that it is no defense to robbery that the defendant owned the property; the lower court excluded an offer to prove ownership, saying, "Every man must seek to redress his own wrongs by due process of law. One having lost property may, when he finds it, lawfully retake it, if in the act of recaption he commits no breach of the peace or violates the person or personal rights of another."

The upper court in affirming says, "Men are not permitted to redress their own wrongs, or to restate themselves to lost rights at their own will and pleasure; others have rights also. The process of the law and courts are open to them and to these resort must be had; not to force and acts of violence."[24]

In a Nebraska case the defendant stole an iron wheel and defended on the ground that the owner of the wheel owed him money. "Such a supposition," says the court, "even if true, was neither a justification nor an excuse. The law does not permit a creditor to make collection of what is due him by larceny of his debtor's goods."[25] While the law is the other way it is obvious that the better reasoning and the more desirable rulings are expressed in the few cases just reviewed. It is only by introducing the "good faith" rulings into the other cases that the courts have prevented serious results attending such holdings. The courts seemingly realize this and have refused to extend the doctrine to cases where the person is trying to collect unliquidated and uncertain damages by the use of force. In a Georgia case the defendant claimed that the person assaulted had killed his

22. Same case, page 45

23. Barton v. State (1921), 227 S. W. 317, 13 A. L. R. 147. On practically same facts overrules Fannin v. State, holding assault on debtor for purpose of collecting a debt, not an assault with intent to rob.

24. Black v. State, 11 Tenn. 3 Yerg. 588. See, also, State v. Logan, 104 La. 760, where def. was convicted for extortion after a forcible debt collection. Also, State v. Thompson, 2 Tenn., page 97. See People v. Smith, 5 Park. Crim. Rep. 490 (N. Y.), where def. was convicted of obtaining money under false pretenses, although injured party was indebted to him for amount obtained.

25. Gettinger v. State, 13 Neb. 308. Also, McKenzie v. State, 8 Ga. App. 24, 68 S. E. 622.

dog and sought to collect $10 in payment. The money was paid over at the point of a revolver.[26] The upper court says that the *animus furandi* is the essential element of robbery, but that it was for the jury to determine whether the taking was by force or intimidation and not for the court to say as a matter of law. "The words intent to steal mean to wrongfully appropriate to their own use and if they by intimidation forced him and he from intimidation paid over the money and they took it, intending to keep or use it, then they would be guilty or otherwise they would not."[27] The lower court had previously charged that if there was a bona fide claim of right and belief that the debt claimed was owing him he was not guilty.

In a 1923 California case the defendant sought to collect unliquidated damages for an alleged criminal assault upon his wife. The court says:

> "We refuse, however, to extend this somewhat mooted doctrine to cover cases where the taking of property is for the purpose of forcibly collecting uncertain liquidated damages for an alleged criminal assault. To hold otherwise would amount to an invitation to those aggrieved by the criminal acts of others to assume the junctions of judge, jury, and sheriff, to violently and forcibly compensate for the injury, or assumed injury, inflicted, to any extent deemed adequate by the aggrieved person alone, and that such violence would amount to no more than mere trespass or simple assault."[28]

Interesting conclusions are to be drawn from these cases. While a person may collect a debt by force he must do so under a bona fide claim and in good faith. The sum owed must be certain, a mere belief that one is entitled to damages for a certain act not being sufficient. The debt need not be an actual existing obligation, but in the mind of the trespasser that there was a bona fide belief that an obligation existed. Upon just what theory the courts, in this state, have held that taking more than is due is robbery, and taking property in payment is not, is difficult to understand. Obviously it is unlikely that a person could obtain property of the exact value as the amount of the debt. However, the defense open to a creditor who assaults his debtor for purposes of debt collection has not led to serious consequences of frequent breaches of the peace. The debtor

26. 1. Hollander v. State, 8 Ga. App. 202, 68 S. E. 861. 2. Tipton v. State, 212 Pacific 612.
27. Note 26, No. 1.
28. Note 26, No. 2.

has ample remedy in civil actions of assault, or trover for money or the goods taken against his consent, and since the court will make out an intent from the circumstances of the case, if it is at all possible, there is little fault to find with the law as it is today.

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PARENTS' LIABILITY FOR INJURIES CAUSED BY FAMILY CAR.

Is the mother who allows her son to drive her car liable for an injury caused by the negligence of a friend whom the son has allowed to drive the car?

This question was answered in the affirmative in a recent Kentucky case, *Thixton v. Palmer.*[1] A mother allowed her son to have her car to take a boy friend and two girls riding. During the evening the son climbed into the back seat and allowed his friend to drive the car. The friend, while driving, negligently allowed the front wheels of the auto to become lodged in the street car tracks, and while trying to extricate the car, it veered over to the curb and injured a boy on a bicycle. The injured boy sued the mother and recovered. The court said the negligence of the friend whom the son allowed to drive was the negligence of the son, basing that conclusion on agency and master and servant precedents where the servant allowed a stranger to execute or help to execute his duties, and held the mother liable for the negligence of her son on the so-called "family car" doctrine.

Thus, the case is authority for two propositions. One, that a parent who allows her son to drive the family car is liable for the negligence of the son while driving, and the other, that a parent is liable for the negligence of a third party whom the son has allowed to drive. The writer will discuss the liability of the parent for the negligence of a son driving the parent's car as exemplified in the "family car" doctrine in order to show the basis for the ruling that the negligence of the friend whom the son has allowed to drive is the negligence of the son for which the parent is liable.

As to the liability of the parent for the negligent acts of the son while driving his car: it is fundamental tort law that a parent is not liable for the torts of his child. To make a parent liable there must

1. 276 S. W. 971.