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ATTORNEY AND CLIENT—WHAT CONSTITUTES EXTORTION IN COLLECTION LETTERS

The problem of collection letters and the possibility of incurring criminal liability under extortion statutes, is not what one might term a new problem to the majority of attorneys. A recent California case¹ gives us some indication of the nature of the issues involved.

Libarian, an attorney, after having lost a case involving a wage dispute, wrote to his client's employer stating in effect that the employer had perjured himself on the witness stand. However, were the employer to pay the disputed wages and the court costs involved in the recent trial, his perjury would go unpunished. On the basis of this letter Libarian was found guilty of having violated his oath and duties as an attorney of law, and of having perpetrated an act of moral turpitude and dishonesty within the meaning of the applicable sections of the Business and Professions Code. He was subsequently suspended from the practice of law for six months.

Though basically dealing with extortion as a ground for disbarment, the *Libarian* case likewise suggests the following question: To what extent may one refer to criminal liability or threaten criminal prosecution in attempting to collect a debt or prosecute a claim before subjecting oneself to criminal liability under WIS. STATS. (1951), sec. 340.45?

ANALYSIS OF THE OFFENSE

Most states have covered the problem of threatening letters by statutes, Wisconsin doing so in WIS. STATS. (1951), sec. 340.45.² The statute itself sets up but two elements as comprising the offense: (1) a malicious threat to accuse or do injury; (2) intent to (a) extort money or any pecuniary advantage, or, (b) compel a person to do or omit an act against his will.

The Wisconsin court in *State v. Schultz*,³ makes it clear that the threat to accuse or to do injury is in and of itself, the basis of the of-

¹ *Librarian v. State Bar*, 239 P. 2d 865 (Cal. 1952).

² WIS. STATS. (1951), sec. 340.45, "Threats to accuse of crime or injure. Any person who shall, either verbally or by any written or printed communication, maliciously threaten to accuse another of any crime or offense, or to do any injury to the person, property, business, profession, calling or trade of another, with intent thereby to extort money or any pecuniary advantage, whatever, or with intent to compel the person so threatened to do any act against his will or omit to do any lawful act, shall be punished by imprisonment in the state prison not more than two years nor less than one year or by fine not exceeding five hundred dollars or less than one hundred dollars."

³ "We think that the gist of the offense under the statute is the threat to accuse another of any crime or offense or to threaten to do an injury to the person, property, business, profession, calling or trade with the intent to extort money or pecuniary advantage or compel the person so threatened to do an act against his will or omit to do a lawful act, being a mere incident to the threat and dependent upon it, and where there is no such threat as contemplated by the statutes alleged or proved, no offense under the statute is established." *State v. Schultz*, 153 Wis. 644, 114 N.W. 505 (1908).

fense. However, the same court in *O'Neil v. State*,⁴ although not making mention of the *Schultz* case makes it quite clear that while a threat meets the formal requirements of the statute, a malicious intent to do one of the acts as outlined in the statute must be conclusively proved. The subsequent emphasis in later cases, e.g., *Stockman v. State*,⁵ on the matter of proof of malicious intent behind a threat, would seem to give us some indication of the relative importance of the two elements.

ADDITIONAL FACTORS

In connection with these two basic requirements, some courts have given added importance to several factors usually attendant upon any extortion case. Wisconsin, in most cases, disregards them as irrelevant and immaterial. Perhaps the most significant of these is whether one can be convicted of extortion while engaged in an honest attempt to collect a debt due or 'believed due. On this point states are "hopelessly divided"⁶ and individual statutes must be consulted in each particular state.

Some indication as to the rule in Wisconsin has been given in *O'Neil v. State*.⁷ The Wisconsin court, citing a Massachusetts case,⁸ decided under a statute⁹ similar to Wisconsin's,¹⁰ remarks:

"The first instruction asked, that the defendant must have ma-

⁴ ". . . it also follows that the court did not err in denying defendant's request to instruct the jury that 'the defendants had a right to demand money of Mrs. Lehman in settlement of their claim, and to tell her if she did not pay damages they would institute criminal proceeding against her.' To render that correct and applicable as an instruction, it should have been stated that defendants had such right if in making their demand and threat they were not acting so maliciously with intent to thereby extort money." *O'Neil v. State*, 237 Wis. 391, 296 N.W. 96, 135 A.L.R. 719 (1940).

⁵ "The question was whether Mrs. Klemp sought to settle the claim for civil damages which she in good faith supposed she had against Wolfe or whether she extorted money under threat of criminal prosecution." *Stockman v. State*, 236 Wis. 27, 293 N.W. 923 (1940). cf. *People v. Thompson*, 27 N.Y. 313 (1884); *State v. Bruce*, 24 Maine 71 (1844).

⁶ See Note, 135 A.L.R. 719 (1940).

⁷ *Supra*, note 4.

⁸ *Commonwealth v. Coolidge*, 128 Mass. 55 (1880); cf. *People v. Beggs*, 178 Cal. 79, 172 P. 152 (1918). "It is the means employed which the law denounces, and though the purpose may be to collect a just indebtedness arising from and created by the criminal act for which the threat is to prosecute the wrongdoer, it is nevertheless within the statutory inhibition. The law does not contemplate the use of criminal process as a means of collecting a debt. To invoke such process for the purpose named is, as held by all authorities, contrary to public policy."

⁹ GEN. STATS. MASS. (1860), Chap. 160, Sec. 28. "Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, shall be punished by imprisonment in the state prison not exceeding fifteen years, or in the house of correction not exceeding ten years, or by fine not exceeding five thousand dollars, or by such imprisonment and fine."

¹⁰ *Supra*, note 2.

liciously intended to obtain that which in justice and equity he knew he had no right to receive, and the other, which differs only in form from that, that the defendant was not guilty if he believed that Chaplin actually owed him, could not properly have been given without qualification; and the language of the presiding judge was entirely accurate when he said that the law did not authorize the collection of just debts by the malicious threatening to accuse the debtor of a crime."

Thus it would seem that the mere fact that the debt was due and that the person was making a sincere attempt to collect it, would not in and of itself be sufficient to warrant approval of the method employed. However, the question of the intent behind the threat and the demand would, as we shall see, play a great part in deciding the issue before the Wisconsin courts.

Another factor considered by some states is whether or not the money demanded is actually obtained. Such is not the requirement in Wisconsin. The court in *O'Neil v. State*,¹¹ commenting on cases¹² which have arisen under "threat" statutes¹³ similar to Wisconsin's,¹⁴ remarks:

" . . . and as there is nothing in these provisions which can be deemed to make the actual obtaining of money an essential element of the crime, the decisions under statutes requiring that as an essential element are not in point."

The issue of the accused's guilt or innocence is another factor considered by some courts. While proof of the accused's guilt as to the crime with which he is charged may be material in determining the intent of the extortionist,¹⁵ his actual guilt is immaterial and will not constitute a defense to the charge of extortion. Such is the opinion of

¹¹ *Supra*, note 4.

¹² *Commonwealth v. Corcoran*, 252 Mass. 465, 148 N.E. 123 (1925); *People v. Thompson*, *supra*, note 5.

¹³ MASS. GEN. LAWS (1921), Chap. 265, Sec. 25. "Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage, or with intent to compel the person so threatened to do any act against his will shall be punished by imprisonment in the state prison for not more than fifteen years, or in the house of correction for not more than two and one half years, or by a fine of not more than five hundred dollars, or both."

N. Y. REV. STATS. (1881), Part IV, Chap. I, art. 6, sec. 2. "Every person who shall either verbally or by written or printed communication threaten to communicate or to publish in any manner or to use information or documents or statements that are alleged to be injurious to the person's reputation or to the business standing of any other person, with intent by any such threatening to extort any property or to derive any pecuniary or valuable benefit whatever to the person making such threat, or to any other person or persons shall, upon conviction be adjudged guilty of a misdemeanor and punished as here-in-after described."

¹⁴ *Supra*, note 2.

¹⁵ *Mann v. State*, 47 Ohio St. 556, 26 N.E. 226 (1890); *cf. Elliot v. State*, 36 Ohio St. 318 (1881).

the New York court in deciding a case¹⁶ under a "threat" statute¹⁷ similar to Wisconsin's.¹⁸

"The fact that the person who in writing or orally makes such a threat for such a purpose believes, or even knowing that the person threatened has committed the crime of which he is threatened to be accused does not make the act less criminal. The moral turpitude of threatening for the purpose of obtaining money, to accuse a guilty person of a crime which he has committed is as great as it is to threaten for a like purpose, an innocent person of having committed a crime. The intent is the same in both cases—to acquire money without legal right, by threatening a legal prosecution. The fact that the defendant believes in the complainant's guilt is no defense and is not even a mitigating fact."

To a certain extent, some courts consider the manner in which the threat is made, i.e., written, printed, or oral, in determining the severity and extent of criminal liability. New York is typical of that group of states.¹⁹ Wisconsin, on the other hand, by the very wording of its statute²⁰ excludes any differentiation or distinction either as to the nature of the crime or the degree of criminal liability attendant thereto.

Several possibilities that may arise under Wis. STATS. (1951), sec. 340.45, are illustrated by the following cases:

DEMAND COUPLED WITH AN EXPRESS THREAT

In *Stockman v. State*,²¹ Wolfe sold beer to a Mrs. Klemp's minor daughter. The evidence in the case indicated that as a price for her silence Mrs. Klemp expressly demanded \$100.00 and the cancellation

¹⁶ *People v. Eichler*, 75 Hun. 26, 26 N.Y. Supp. 998 (1894).

¹⁷ N. Y. REV. STATS. *supra*, note 13.

¹⁸ *Supra*, note 2.

¹⁹ CONSOLIDATED LAWS OF N. Y. ANNO. (1951), Penal Law Sec. 856. "A person who, knowing the contents thereof and with intent, by means thereof, to extort or gain any money or other property or to do, abet or procure any illegal or wrongful act, sends, delivers or in any manner causes to be forwarded or received, or makes and parts with for the purpose that these may be sent or delivered, any letter or writing threatening,

1. To accuse any person of a crime; or
2. To do any injury to any person or to any property; or
3. To publish or connive at publishing any libel; or
4. To expose or impute to any person any deformity or disgrace,

Is punishable by imprisonment for not more than fifteen years." (As amended L. 1909, C. 368, eff. Sept. 1, 1909; derived, Penal Code Sec. 558, L. 1881, C. 676.) Penal Law Sec. 857 Attempt to extort money or property by oral threats. "A person who, under circumstances not amounting to robbery or an attempt at robbery, with intent to extort or gain any money or other property, orally makes such a threat as would be criminal under any of the fore-going sections of this article or of article five-hundred and forty-one if made or communicated in writing, is guilty of a misdemeanor. The provisions of this section do not apply to matters given by section eight-hundred and fifty-one of this article." (As amended L. 1911, C. 121, eff. Sept. 1, 1911; derived, Penal Code Sec. 560, L. 1881, C. 676.)

²⁰ *Supra*, note 2.

²¹ *Stockman v. State*, *supra*, note 5.

of a liquor bill amounting to \$11.94. As a defense to the charge of extortion, Mrs. Klemp pleaded that she merely attempted settlement of a disputed bill and took the \$40.00 agreed upon as satisfaction for civil damages arising out of sale of beer to her minor daughter. Thus, the question is posed as to whether a demand for a sum of money coupled with an express threat of criminal prosecution is, in and of itself, sufficient to constitute an offense under Wisconsin's "threat" statute.²² The decision in this case would indicate that it is not. Though found guilty, the question of the intent behind Mrs. Klemp's act was the deciding factor in the case. As the court said:

"The question was whether Mrs. Klemp sought to settle a claim for civil damages which she in good faith supposed she had against Wolfe or whether she extorted money under threat of criminal prosecution."

As previously pointed out, the same importance is placed upon the intent factor in the case of *O'Neil v. State*.²³ On the other hand, earlier in the opinion the court, in citing *People v. Beggs*,²⁴ placed a great deal of emphasis on the form of the threat and means employed—"It is the means employed which the law denounces . . ." However, the court's subsequent emphasis on the question of intent would lead us to believe that it, rather than the form and means employed, is the deciding factor in an extortion prosecution.

DEMAND PLUS THREAT REFERRING TO BASIS OF DEMAND

In *People v. Beggs*,²⁵ the California court in sustaining a conviction for extortion, considered the problem of a demand for a sum of money accompanied by threatened criminal procedure based on the very act establishing the debt for which satisfaction is demanded. One Da Rosa had stolen goods from one Steining, the value of which was estimated at \$50.00. Beggs, an attorney, in writing to Da Rosa, demanded \$2,000.00 as settlement and threatened him with imprisonment if it were not paid. In sustaining a conviction for extortion, the court approved an instruction that the following was the duty of the jury:

". . . to convict the defendant, even though he should also find that he believed that Da Rosa was guilty of the theft of Steining's goods in an amount either less than, equal to, or greater than any sum of money obtained from Da Rosa. . . . It is the means employed which the law denounces, and though the purpose may be to collect a just indebtedness arising from the created by the criminal act for which the threat is to prosecute the wrongdoer, it is nevertheless within the statutory inhibition."

²² *Supra*, note 2.

²³ *Supra*, note 4.

²⁴ *People v. Beggs*, *supra*, note 8.

²⁵ *People v. Beggs*, *ibid.*

Consequently, it might be concluded that a demand for a sum of money, accompanied by threatened criminal procedure based on the very act establishing the debt for which satisfaction is demanded, could possibly fall within the meaning of the offense as outlined in WIS. STATS. (1951), sec. 340.45.

DEMAND COUPLED WITH A VAGUE THREAT

The question of an express demand accompanied by a rather vague, questionable threat has not as yet been specifically decided by the Wisconsin court. The New York courts under "threat" statutes²⁶ similar to Wisconsin's,²⁷ have entertained a considerable number of these cases. In practically all of them the major question involved was whether the supposed "threat" constituted a threat as contemplated in the statute. In the case of *People v. Thompson*,²⁸ Thompson, an attorney, had appeared for the complainant at a preliminary hearing before a magistrate. Subsequently thereto, purporting to be an Assistant District Attorney and writing from the District Attorney's office, he wrote to the accused's father to the effect that his son was in danger of an indictment, and that he could prevent it and had already done so for the time being. Stating that it would be desirable if he were to send a gift to those who had helped him, Thompson wrote: "If you will send me \$75.00 or a note to that amount payable in three months, it would be very acceptable." Pointing out that this would save considerable expense as well as prevent scandal, Thompson tried to create the impression that he was only concerned with the boy's welfare and the family's reputation. However, the court in sustaining the conviction on the extortion charge, said:

"The statute cannot be invaded under the guise of friendship. No precise words are needed to convey a threat. It may be done by inuendo or suggestion. To ascertain whether a letter conveys a threat, all its language together with the circumstances under which it is written and the relations between the parties may be considered, and if it can be found that the purpose and natural effect of the letter is to convey a threat, then the mere form of words is unimportant."

A similar situation is found in *People v. Gillian*.²⁹ Gillian, knowing

²⁶ N. Y. REV. STATS. *supra*, note 13; *Supra*, note 19.

²⁷ *Supra*, note 2.

²⁸ *People v. Thompson*, *supra*, note 5; *cf.* *People v. Wicks*, 98 N.Y. Supp. 163 (1906). An attorney at law (Wicks) employed as counsel in an action for false arrest, upon a fee contingent upon success—after two trials and one appeal—under an assumed name, upon stationery engraved with and from a locked post office box hired under an assumed name, in the guise of friendship, with suggestion of perjury, certainly of ultimate defeat, continued unpleasant notoriety and increased expense, repeatedly urges the defendant against whom he is conducting the litigation to make a settlement—a settlement which will insure him one-fourth of the amount paid. Wicks was found guilty of extortion.

that the complainant had had sexual relations with one other than his wife, and intending to extort money from him, wrote the following letter:

"I am in a tight place just now for the sume of One Hundred dollars in cash . . . Must ask you to loan me that amount until fall and then I can pay you back with interest . . . You will not refuse me this loan. You know you cannot afford to refuse me . . . I do not wish to reveal my identity, for reasons, perhaps, which you can guess . . . P.S. Neither old John or any of the family knows anything about this. This is the straight goods, and your money will be returned in the fall, with interest."

When in commenting upon the nature of this letter and upon the threat implied therein, the New York court concluded as follows:

"The rule undoubtedly is that the threat of the character mentioned under the statute must be made in the letter or writing delivered to the complainant, and if this is not to appear to the satisfaction of the jury the prosecution must fail. But as we understand the rule, parol evidence proof may be introduced by the people for the purpose of showing that by the use of the language, figures and phrases employed by the writer, he threatened to make the charge as set forth in the indictment, and that the person to whom it was addressed so understood its meaning . . . The gist of the offense is the attempt to extort money by a malicious threat to accuse of some crime. The words used do not constitute the offense without the accompanying intent to extort."

It seems likely to assume that Wisconsin will follow the example of the New York court in regard to demands accompanied by vague threats and rule that to ascertain whether a letter conveys a threat, its language, circumstances and the relations between the parties involved ought to be considered; that the mere words involved are unimportant if the intent to threaten is readily perceived.

A THREAT WITHOUT AN EXPRESS DEMAND

The court in *People v. Wicks*,³⁰ while pointing out that the defendant's requests for a settlement of a civil suit then pending was in effect a demand, made this statement:

"There was no demand in the Wightman case.³¹ . . . There was no demand in the Eichler case.³² There was no demand or anything in the Thompson case³³ . . . so long as there is an intent by threat to extort or gain money the mere form of words is of no consequence."

The question then arises: Is a threat, in and of itself, without an ac-

²⁹ *People v. Gillian*, 2 N.Y. Supp. 476, 21 N.E. 1117 (1888).

³⁰ *People v. Wicks*, *supra*, note 19.

³¹ *People v. Wightman*, 104 N.Y. 598, 11 N.E. 135 (1887).

³² *People v. Eichler*, *supra*, note 16.

³³ *People v. Thompson*, *supra*, note 5.

companying express demand sufficient to meet the requirements of Wis. STATS. (1951), sec. 340.45? May the demand be inferred and proven by reference?

The situation in the *Wightman* case³⁴ was briefly as follows: *Wightman*, an attorney, in behalf of May A. Thatcher is purported to have written to the complainant. After stating that the writer had been informed by May Thatcher that there had been sexual intercourse between her and the complainant and that she was pregnant by him, proceeds as follows:

"I suppose you are aware that under these conditions you are liable for the support of the child and the mother's expenses during her sickness. Are you willing to make suitable provisions for such liability and thereby avoid publicity or will it be necessary to take legal steps in the matter?"

The defendant was tried and convicted of the crime of extortion.

In *People v. Eichler*,³⁵ *Eichler*, an attorney, was convicted of having attempted to extort money by threat to accuse the complainant of a crime. The indictment was based on the following letter:

"Please call at my office at 7 O'Clock this evening in reference to the Meyer matter, without fail. Otherwise I will be obliged to proceed against your criminally."

As we previously learned in the *Thompson* case,³⁶ *Thompson*, an attorney, made a rather express demand for a sum of money:

"If you will send me \$75.00 or a note of that amount payable in three months it would be very acceptable."

But can we conclude that a demand has been evidenced in the preceding cases? A rather express demand may be found in the *Eichler* case, i.e. he demanded that the complainant call at his office that evening. The same, in a sense, is true of the *Wightman* case. There the demand was not as express as it might have been, but a demand that he pay for the child's support and the mother's expenses was nevertheless evidenced. Thus, demands have actually been found to be present in all three cases. It is, perhaps, difficult to visualize a case arising in the courts wherein a demand, express or implied, is not attendant upon the threat involved. However, were it to present itself we might safely presume that the Wisconsin courts would very likely follow the same procedure as they would probably follow in considering a vague threat, i.e. parol evidence would probably be admitted to show that the language employed by the writer conveyed a demand to the person addressed, and that he had intended that it should do so.

³⁴ *People v. Wightman*, *supra*, note 22.

³⁵ *People v. Eichler*, *supra*, note 16.

³⁶ *People v. Thompson*, *supra*, note 5.

EVALUATION AND CONCLUSION

The intent of the legislature in drafting a statute such as Wis. STATS. (1951), sec. 340.45, in its present as well as its previous forms, seems clear: The use of threats of criminal prosecution and injury is not to be permitted. The threat, in and of itself, violates the spirit and principle of the law. However, the fact that proof of a malicious intent is required before one may be convicted under the statute would seem to indicate that the legislature recognizes the possibility that certain well-meaning individuals, either through their carelessness or for lack of information, will at one time or another write or verbally make such demands or threats as to place themselves within the formal requirements of the statute. The "intent" element makes the statute effective in prohibiting the use of threats, but at the same time allows for the possibility of a lack of good judgment or want of information on the part of one who otherwise would have been termed an offender.

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