

posed upon him by the Code must relate to specifications made within the limits set by the contract. Thus, if S were to specify only half gallon jars—assuming this to be the item upon which his profit is greatest—the question would arise whether the circumstances were such that this could be considered good faith conduct.

The agreement itself provides some evidence that selection of only one size was not contemplated by the parties. It would not be unreasonable for a court to conclude that by naming three sizes the parties implicitly looked toward some apportionment of the three in the total quantity purchased. Hence, in the absence of some showing by the seller to the contrary, a failure to specify in accordance with this expectation ought to be considered prima facie evidence of conduct not in good faith. Even if the seller were able to introduce sufficient evidence to overcome this initial burden the buyer might be in a position to offer evidence that at the time of the agreement an estimated apportionment was discussed or that the circumstances of prior dealing or of the trade were such that it was commercially unreasonable, and hence in bad faith, to select only half gallon jars.⁴⁴

While the problems presented by specifications and apportionment contracts are by no means among those which are the most difficult of solution in the sales field, those courts which have had occasion to consider these contracts have not, on the whole, been capable of applying to them a reasonable commercial interpretation. The Uniform Commercial Code has provided such an interpretation by recognition of the fact that modern commerce requires a high degree of flexibility, as well as the fact that "the essential purpose of a contract between commercial men is actual performance and [that] they do not bargain merely for a promise, or for a promise plus the right to win a law suit. . . ." ⁴⁵

⁴⁴ It should be pointed out that a finding that the seller's specifications were not commercially reasonable would not preclude him from all recovery. Good faith performance is a conditioning factor only as to the measure of his recovery. Thus, the damages claimed ought to be disallowed only to the extent that they are based upon reasonable selections.

⁴⁵ Comment to section 2-609.

INJURY AS AN ELEMENT IN CRIMINAL FRAUD

The facts of *Nelson v. United States*¹ are simple. Nelson, a retailer of household appliances, had overextended his unsecured line of credit with his supplier. In order to obtain further credit he offered his car as security for all debts outstanding as well as for further loans. In so doing he grossly overvalued his equity in the car, but even so his equity represented more than three times the value of the new loan. Subsequently the car was

¹ 227 F. 2d 21 (App. D.C., 1955).

involved in an accident and Nelson's equity was wiped out.² On the basis of these facts Nelson was indicted and convicted of obtaining property under false pretenses. The Court of Appeals for the District of Columbia affirmed the conviction over the vigorous dissent of Judge Miller.

The majority and the dissent agreed as to the basic elements of the crime of obtaining property under false pretenses: (1) a false representation, (2) reliance on the false representation, (3) an intent to defraud, and (4) an actual defrauding or injury.³ All concurred that there had been a false representation and that it had been relied upon. The majority and the dissenter also agreed that an intent to defraud could be inferred from the defendant's actions, although they differed as to how the evidence should be interpreted in this regard. A more basic disagreement concerned whether the facts showed an actual defrauding or injury. It is this last element which this comment will examine in an effort to understand the basis for the court's division in the *Nelson* case.

The historic origins of the requirement of an actual defrauding or injury are somewhat obscure. Perhaps it was an indirect consequence of the difficulty of proving, except by inference, an intent to defraud—uniformly required as an element of the crime of obtaining property under false pretenses.⁴ Without a requirement of actual injury the prosecution presumably could make out a case merely by showing the falsity of the representation and the victim's reliance upon it, leaving it to the jury to infer from these facts the defendant's intent to defraud. If that were all that were required, criminal prosecutions might successfully be brought against persons actually guilty of no more than puffing. The requirement of showing actual injury diminishes this risk and discourages frivolous prosecutions. Furthermore, the presence of an actual injury greatly increases the probability that the other

² Efforts to collect the loan were abortive. Judge Miller believed that the accident was irrelevant to the crime, since however the crime be defined it must have been complete at the time the loan was obtained. The majority neither agreed nor disagreed with this proposition. The trial judge, on the other hand, in a bench colloquy stated: "Until I heard that there had been a wreck and the car had been repossessed I thought maybe there was sufficient equity there to cover the loss sustained; and if that were the case there would be no defrauding." *Ibid.*, at 28. This comment proceeds on the assumption that the majority agreed with Judge Miller but regarded as non-prejudicial error the introduction of evidence as to the accident.

³ "Actual defrauding" and "injury" are herein used synonymously. Consult *Carlisle v. State*, 76 Ala. 75, 77 (1884). Cf. *Hope v. State*, 5 Ala. App. 123, 59 So. 326 (1912).

⁴ Arizona, California, and Idaho use the terms "knowingly and designingly": Ariz. Code (1939) § 43-5501; Penal Code of Cal. (Deering, 1949) § 532; Idaho Code (1948) § 18-3101. Louisiana requires an "intent to deprive," La. Rev. Stat. (1950) tit. 14, § 67, while South Dakota uses the term "designedly." S.D. Code (1939) § 13.4202. Although intent to defraud is not explicitly mentioned in the Georgia statute, the requirement has been read into the statutory definition. *McElmurray v. State*, 76 Ga. App. 604, 608, 47 S.E. 2d 139, 143 (1948). In all other states the statutes speak of "intent to defraud."

elements are present. For example, if there were an injury, it is more likely that a false representation occurred than if there had been no injury. Whatever its origins, in every American jurisdiction except Texas⁵ an actual defrauding or injury is now required either expressly by statute⁶ or, more commonly, by judicial gloss on a statute.⁷ And, in any event, it is clear that the

⁵ The Texas Penal Code Ann. (Vernon, 1953) c. 16, art. 1548, states: "It is not necessary in order to constitute the offense of swindling, that any benefit shall accrue to the person guilty of the fraud or deceit, nor that any injury shall result to the person intended to be defrauded, if it is sufficiently apparent that there was a wilful design to receive benefit or cause injury."

This statutory provision has caused a great deal of confusion. In *Blum v. State*, 20 Tex. Crim. App. 578, 592 (1886), the court took no notice of the statute and listed as two of the elements of swindling the intent to defraud and an actual act of fraud committed. This apparent conflict between statute and judicial approach was made overt in *Lively v. State*, 74 S.W. 321 (Tex. Crim. App., 1903). There the appellate court first held that it was not error on the part of the trial court to charge, as stated in the statute, that injury was not necessary to the crime of swindling but that only a design to defraud was required. On rehearing the court reversed this holding, this time making no mention of the statute. "We do not understand that, in a case of this character, appellant is tried solely on his intention to commit a swindle. He must commit an actual swindle." *Ibid.*, at 323. This result was based on the holdings in *Gaskins v. State*, 38 S.W. 470 (Tex. Crim. App., 1895), and *Perry v. State*, 39 Tex. Crim. 495, 46 S.W. 816 (1848), that the actual value of the security must be deducted from the value of the property obtained in order to determine the amount of pecuniary injury, and thus whether the swindling constituted a felony or misdemeanor. The *Lively* court interpreted these decisions as meaning that no crime could exist when the actual value of the security exceeded the value of the property received.

La Moyne v. State, 53 Tex. Crim. 221, 111 S.W. 950 (1908), finally reversed these earlier cases, and held that injury was irrelevant to the crime of swindling and that the actual value of the security could not mitigate the crime. The defendant had obtained some new farm implements by mortgaging other farm machinery and his crop of hay, both of which he claimed were unincumbered. He also claimed ownership of the farm he was working. In fact, he was a tenant farmer and there were prior liens on the machinery and crop. Although the value of his property in excess of the prior liens adequately covered the purchase, he was found guilty of swindling.

⁶ *Ariz. Code* (1939) § 43-5501; *Penal Code of Cal.* (Deering, 1949) § 532; *Ga. Code* (1953) § 26-7401; *Idaho Code* (1948) § 18-3101.

⁷ In a few states actual defrauding is not considered a separate element of the crime but is rather subsumed under the requirement of an intent to defraud on the theory that there can be no intent to defraud without an actual defrauding. For example, in *Thompson v. State*, 112 Neb. 389, 392, 199 N.W. 806, 807 (1924), the court stated, "Conceding that the oil stock was not lawfully issued to defendant and was worthless, still the other security put up was more than four times the amount of money obtained, and this security was absolutely good and was paid in full. McLean, as a matter of fact, was not defrauded, and we are at an utter loss to understand how it can be seriously contended, under the facts disclosed, that there could have been any intent to defraud." *Accord*: *Commonwealth v. Thompson*, 2 Clark (Pa.) 33 (1843); *State v. Williams*, 68 W. Va. 86, 69 S.E. 474 (1910); *State v. Hurst*, 11 W. Va. 54, 71 (1877). *Cf.* *State v. Davis*, 26 N.M. 523, 194 Pac. 882 (1921).

In the majority of jurisdictions, however, the courts have considered actual defrauding an independent element in the crime: *Burney v. State*, 5 Ala. App. 316, 59 So. 306 (1912); *State v. Asher*, 50 Ark. 427, 8 S.W. 177 (1888); *Stoltz v. People*, 59 Colo. 342, 148 Pac. 865 (1915); *State v. Briscoe*, 6 Pennewill (Del.) 401, 67 Atl. 154 (Gen. Sess., 1907); *Smith v. State*, 74 Fla. 594, 604, 77 So. 274, 277 (1917); *Bonnell v. State*, 64 Ind. 498, 510 (1878); *State v. Foxton*, 166 Iowa 181, 194, 147 N.W. 347, 352 (1914); *State v. Matthews*, 44 Kan.

majority in the *Nelson* case did not intend to repudiate the requirement of actual defrauding or injury.⁸

Of the relatively few cases involving criminal prosecutions for inducing a loan by overvaluing the collateral, only one has reached the same result as the *Nelson* case when the security though overvalued covered the amount of the loan.⁹ The "weight of authority" appears to proceed on the theory that since the security is adequate there could be no pecuniary loss and, therefore, no actual defrauding and no crime.¹⁰ The *Nelson* majority, on the other hand, apparently based its decision on the theory that if the victim received collateral which was quantitatively less than had been represented to him, he had been injured within the meaning of the requirement of actual defrauding.

A distinction similar to that made in defining injury in the security cases can be found in cases involving a creditor who has obtained his debtor's

596, 25 Pac. 36 (1890); *Frazier v. Commonwealth*, 291 Ky. 467, 165 S.W. 2d 33 (1942); *Simmons v. State*, 165 Md. 155, 167 Atl. 60 (1933); *Commonwealth v. Levine*, 280 Mass. 83, 181 N.E. 851 (1932); *People v. Wakely*, 62 Mich. 297, 28 N.W. 871 (1886); *State v. Talcott*, 178 Minn. 564, 227 N.W. 893 (1929); *Bruce v. State*, 217 Miss. 368, 64 So. 2d 332 (1953); *State v. Miller*, 212 Mo. 73, 111 S.W. 18 (1908); *State v. Brantingham*, 66 Mont. 1, 16, 212 Pac. 499, 504 (1923); *People v. Crissie*, 4 Denio (N.Y.) 525 (1847); *People v. Thomas*, 3 Hill (N.Y.) 169 (1842); *State v. Johnson*, 195 N.C. 506, 142 S.E. 775 (1928); *Griffith v. State*, 93 Ohio St. 294, 299, 112 N.E. 1017, 1019 (1915); *Tyler v. State*, 2 Humph. (Tenn.) 37, 39 (1840); *State v. Morris*, 85 Utah 210, 38 P. 2d 1097 (1934); *Anable v. Commonwealth*, 24 Gratt. (Vir.) *563 (1873); *State v. Sargent*, 2 Wash. 2d 190, 194, 97 P. 2d 692, 693 (1940); *Clawson v. State*, 129 Wis. 650, 109 N.W. 578 (1906); *Martins v. State*, 17 Wyo. 319, 98 Pac. 709 (1908). Also consult *Robinson v. United States*, 42 App. D.C. 186 (1914).

⁸ The majority in *Nelson v. United States*, 227 F. 2d 21 (App. D.C., 1955), approved the requirements set forth in *Robinson v. United States*, 42 App. D.C. 186 (1914).

⁹ *People v. Talbot*, 65 Cal. App. 2d 654, 151 P. 2d 317 (1944). The California statute expressly makes actual defrauding an element of the crime. Penal Code of Cal. (Deering, 1949) § 532.

¹⁰ *Wilson v. State*, 84 Ga. App. 703, 67 S.E. 2d 164 (1951); *Daniel v. State*, 63 Ga. App. 12, 10 S.E. 2d 80 (1940); *Thompson v. State*, 112 Neb. 389, 199 N.W. 806 (1924); *McGhee v. State*, 97 Ga. 199, 22 S.E. 589 (1895); *State v. Palmer*, 50 Kan. 318, 32 Pac. 29 (1893); *State v. Clark*, 46 Kan. 65, 26 Pac. 481 (1891); *People v. Wakely*, 62 Mich. 297, 28 N.W. 821 (1886). The *Palmer* case goes so far as to conclude that the defendant cannot be guilty if the security in the possession of the creditor before the additional loan is advanced is sufficient to cover the loan. The only fact distinguishing *Nelson* from these other cases is that in the former the security was fortuitously destroyed subsequent to the transaction for which the defendant was indicted: an occurrence which should have had no bearing on the criminality of the defendant. Consult note 2 *supra*. In *People v. Talbot*, 65 Cal. App. 2d 654, 151 P. 2d 317 (1944) (note 9 *supra*), however, there was no such subsequent loss.

Courts requiring a pecuniary loss in this type of case do not always require it in non-security situations. Consult, e.g., *State v. Mills*, 17 Me. 211 (1840), where A sold B a horse on the representation that it was the famous horse, Charley. Charley was known to B only by reputation. Actually the horse received by B was not Charley and A was prosecuted for obtaining property under false pretenses. The conviction of A was upheld, on the ground that although the horse received by B may have been as valuable as Charley, only Charley had the reputation for which B had bargained.

property and applied it to satisfy a past due debt despite representations that he would use it for some other purpose.¹¹ In this situation, as in the *Nelson* case, the victim has received something different from his expectations without having suffered any pecuniary loss. In the security situation the value of the hypothecated property, although covering the loan, is quantitatively less than that represented. In the debt situation the "property received" (an extinguishment of the debt), although equal to the value of the property expected, is qualitatively different. Those courts which do not require pecuniary loss have held in the debt situation that inducing the payment of debts by a fraudulent misrepresentation is a crime,¹² whereas those which require a pecuniary loss have refused to do so.¹³

¹¹ Cases cited notes 12, 13 infra. The victim in these cases is under a legal obligation to return the property or repay the debt, whereas the creditor in the security overvaluation case can ask for any amount of security he wishes for the protection of the loan.

¹² *State v. Cook*, 113 Wash. 391, 194 Pac. 401 (1920); *Commonwealth v. Coleman*, 60 Pa. Super. 512 (1915); *Commonwealth v. Leisy*, 1 Pa. County Ct. 50 (1884); *People v. Smith*, 5 Park. Crim. (N.Y.) 490 (1863).

¹³ *State v. Williams*, 68 W. Va. 86, 69 S.E. 474 (1910); *Commonwealth v. McDuffy*, 126 Mass. 467 (1879); *Rex v. Williams*, 7 C. & P. (Eng.) 354 (1836).

Where the payment of a debt is achieved by means of a false representation concerning some matter other than the use of property, the creditor cannot be convicted. No injury can be shown since the victim knew he was paying the debt and therefore neither suffered a pecuniary loss nor received something qualitatively or quantitatively different from his expectations. Consult *Commonwealth v. Thompson*, 2 Clark (Pa.) 33 (1843) (A gave B, a constable, authority to collect A's debt. By false assertions of his authority B induced the debtor to believe that he would be arrested and taken before a magistrate if he did not pay or secure his debt to A. Fearing arrest the debtor paid. Subsequently, B was prosecuted for obtaining property under false pretenses, but was acquitted because no injury could be shown); *Sanson v. Commonwealth*, 313 Ky. 631, 233 S.W. 2d 258 (1950); *Clawson v. State*, 129 Wis. 650, 109 N.W. 578 (1906); *In re Cameron*, 44 Kan. 64, 24 Pac. 90 (1890); *Commonwealth v. Harkins*, 128 Mass. 79 (1880); *People v. Getchell*, 6 Mich. 496 (1859); *People v. Thomas*, 3 Hill (N.Y.) 169 (1842).

There are a few cases where the debtor knew that he was paying the debt, but gave the creditor more than the amount of the debt. Compare *State v. Hurst*, 11 W. Va. 54 (1877) (prosecution allowed only for the difference between the money received and the money owed) with *Pruitt v. State*, 11 S.W. 822 (Ark., 1889), and *Regina v. Leonard*, 1 Den. C.C. (Eng.) 304 (1848) (both courts held that the difference could not be subtracted and the defendant was therefore guilty of obtaining the complete sum under false pretenses). However, in the *Pruitt* case the court does not indicate whether the defendant knew he was paying the debt. Further, compare *Regina v. Parkinson*, 41 U.C.Q.B. 545 (Ont., 1877). In this case the victim (*Murray*) knew all the money was to be applied to the debt, and yet the defendant was convicted. However, *Murray* thought he was paying the money to his creditor, *Puterbaugh*, not to *Parkinson*, the defendant. Since *Puterbaugh* may have owed the money to *Parkinson* the court held it could not find the defendant guilty of defrauding *Puterbaugh*, whereas he was found guilty of defrauding *Murray*.

There are many civil cases in which rescission or a similar remedy is sought because payment of a debt was fraudulently induced. Where the debtor knew he was paying the debt, all the courts deny rescission. E.g., *In re Forsythe Shoe Corp.*, 3 F. Supp. 328 (S.D. N.Y., 1933); *China Fire Ins. Co. v. Davis*, 50 F. 2d 389 (C.A. 2d, 1931); *Plews v. Burrage*, 19 F. 2d 412 (D. Mass., 1927). In these cases neither pecuniary injury nor quantitative-qualitative "damage" is present. In the only rescission case found where the plaintiff did not know

The courts have not been explicit in their reason for adopting either the pecuniary loss or the quantitative-qualitative theory as the basis for a finding of an actual defrauding or injury. Insofar as they face the problem at all, those courts which refuse to find a crime argue that although the defendant has undoubtedly committed a moral wrong he has not committed a legal one—in the debt situation because he has only induced the victim to do that which he was obliged to do,¹⁴ and in the security situation because the victim, despite the misrepresentation, is adequately protected by his collateral.¹⁵ In the absence of a tangible injury those courts which believe that the criminal law's function is fundamentally punitive are likely to feel that the state has no interest in punishing the wrongdoer. As the West Virginia Supreme Court has said:

The law does not, in many instances, attempt the enforcement of good morals, and the question is, whether the use of false pretenses to obtain a claim justly due, is within the true meaning of the criminal statute, a fraud. To so construe th[e] statute, would, in my judgment, consign to the penitentiary as thieves many persons who cannot be classed with common thieves without breaking down all our ideas of distinctions in degrees of immorality.¹⁶

he was repaying the debt the court allowed the remedy because the property was fraudulently obtained by means of the defendant's deception. *Blake v. Blackley*, 109 N.C. 187, 13 S.E. 785 (1891). In another case the court would not allow the plaintiff to convert the goods of his debtor for repayment of the debt where the debtor would not have been aware of the conversion: this would be a dangerous and demoralizing way of collecting debts. *Turner Lumber & Inv. Co. v. Chicago, R.I. & P. Ry. Co.*, 225 Mo. App. 1002, 34 S.W. 2d 1009 (1931).

It is believed, however, that the latter two cases were wrongly decided. The general principle in these cases is that "a person who has performed a duty owed to another, enforceable at law or in equity, is not entitled to restitution from the other for such performance, although the performance was induced by the mistake or fraud of the other." *Rest., Restitution* § 60 (1937). Rescission should not be allowed because "this essentially equitable remedy is limited by the familiar principle that the chancellor will not decree relief which can be of no practicable benefit to the complainant." *McCleary, Damage as Requisite to Rescission for Misrepresentation*, 36 Mich. L. Rev. 227, 251 (1937). Because of the desirability of minimizing litigation, a civil remedy for false representations connected with the repayment of a debt is questionable, regardless of whether or not the debtor knew he was paying off the debt.

¹⁴ *State v. Williams*, 68 W.Va. 86, 88-89, 69 S.E. 474, 475 (1910): "While we do not wish to be understood as approving defendant's method of collection, or of justifying his conduct, from a moral point of view, still, viewing his case from a purely legal standpoint, he has not committed a crime for which the law would punish him."

¹⁵ *State v. Palmer*, 50 Kan. 318, 324, 32 Pac. 29, 30 (1893): "It may be said that he [the lender] would not have let the defendant have the \$200 . . . without the \$3,000 note as additional security. That may be true, but if true, and if the \$3,000 note is worthless, yet, if the collateral already in his possession was sufficient to save him from loss on the \$200, he was not defrauded; and, if not defrauded, the defendant could not be guilty of a crime in connection therewith."

¹⁶ *State v. Hurst*, 11 W.Va. 54, 73 (1877). Consult also *Daniel v. State*, 63 Ga. App. 12, 17, 10 S.E. 2d 80, 83 (1940) wherein it was said: "To hold the defendant guilty of cheating

In contrast, those courts which find a crime in the debt and security situations emphasize the protective as well as the punitive function of the criminal law. The argument made is that persons who are willing to collect their debts by frauds, or who are so desperate to gain a loan as to misrepresent the value of the proffered collateral are as punishable as those who tangibly injure their victims. Thus:

[T]he proper consideration is, is it safe to allow every man to be a judge in his own cause, and, in officiating in that capacity, to allow him to resort to false pretenses to accomplish his purpose?¹⁷

This right [of obtaining the payment of debts by false pretenses] would be inconsistent with the peace and good order of society, which it is one of the principal purposes of the law to encourage and support.¹⁸

If, however, the rationale for the requirement of actual defrauding or injury is, as was suggested, to diminish the scope of the crime of obtaining property under false pretenses, this qualitative-quantitative approach seems at least partially inconsistent with that rationale. It may be doubted, in addition, that clarity in the criminal law is served by the *Nelson* court's approach.

and swindling . . . [in overvaluing her security] would be in effect to imprison her for a debt. The State of Georgia was founded as a haven for those imprisoned for debt and it has been the policy of this state, from its inception to the present day, to oppose and discourage any action that savours of punishment for debt."

¹⁷ *People v. Smith*, 5 Park. Crim. (N.Y.) 490, 515 (1863).

¹⁸ *Ibid.*, at 513. In *Commonwealth v. Coleman*, 60 Pa. Super. 512, 519 (1915) the court stated: "When he did the acts which the statute declares constitute that misdemeanor, he committed an offense against the sovereignty of the Commonwealth and could be properly indicted and punished therefor without regard to the state of the accounts between two private firms or corporations." See also the dissenting opinion in *Commonwealth v. Harkins*, 128 Mass. 79, 84 (1880).

CONFLICT-OF-LAWS PROBLEMS IN WORKMEN'S COMPENSATION: *CARROLL V. LANZA*

Speedy recoveries sought by the enactment of state workmen's compensation statutes have sometimes been impeded by problems arising from the workman's connection with more than one state. Often it is doubtful whether the state in which he first seeks recovery can grant either a compensation award or a common-law remedy. When the employee proceeds for workmen's compensation, determination by the tribunal that the compensation law of another state is applicable will frequently prevent compensation recovery in the forum since that state will usually have no administrative procedure for applying the foreign compensation statute.¹ If the worker should attempt to

¹ "Since there is usually no claim to be enforced unless the designated procedure has been followed, the right of workmen's compensation can generally be enforced only before the