

CRIMINAL LAW REVISION COMMISSION

By: Donald L. Paillette, Project Director Subcommittee: No. 1

Date: March 14, 1968

Action: _____

Date: _____

Proposed Code Revision

Subject: Larceny; defenses

History and Background of Present Law:

Claim of Right. Under existing case law a defendant is not guilty of larceny if he takes the property of another under a bona fide claim of right or under a mistaken belief that he has the authority to deal with the property. 52 C.J.S., Larceny, s. 25.

Such a state of mind is held to be incompatible with an intent to deprive the owner permanently of his property, although the belief may be based on a mistake of fact or a misconception of law. Ibid.

Comment of Model Penal Code (Tentative Draft No. 2, p. 98 (1954)) relating to the defense of claim of right states:

"To be guilty of theft the actor must be aware that he is appropriating property and that it is the property of another. He is not a thief if he mistakenly supposes that the owner has consented or that the law gives him the right to take without the consent of the owner. * * * It is clear under present law that the actor does not commit theft if he believes, however unreasonably, that no one owns the property, or that he is the owner or entitled to possession of the specific property taken."

The Oregon cases are in harmony with the statements quoted above. State v. Teller, 45 Or 571 (1904); State v. Meldrum, 41 Or 380 (1902); State v. Minnick, 54 Or 86 (1909); State v. Sally, 41 Or 366 (1902).

The proposed draft of defenses to theft are, in effect, a restatement of the common law principles, and would apply to appropriation of lost property, theft of services, as well as the other types of larcenous conduct.

Evidence to support the defense of "claim of right" must be introduced by the defendant. In State v. Christensen, 150 Or 11 (1935) the court held that an instruction that, if shortly after the theft the stolen property was found in defendant's possession, and he failed to explain such possession, such failure might be considered as a circumstance tending to show his guilt and given such weight as the jury deemed proper, was not an invasion of the province of the jury, nor as shifting the burden of proof.

History and Background of Present Law:

As the Committee Commentary to Section 3240 of the Michigan Revised Criminal Code points out, the burden of producing evidence must be placed on the defendant if the theft statutes are to be enforceable, for the state cannot discharge a burden of proving in every case the lack of a subjective belief of authority to act, a burden which would be cast upon it if all the defendant must do is to plead a claim of right.

The language of the Michigan Draft, which is adopted in the proposed draft, "burden of injecting the issue" is intended to require the defendant to do more than plead claim of right. The limitation that "this does not shift the burden of proof" is intended to continue the burden on the state to prove intent beyond a reasonable doubt and to preclude any interpretation that the burden shifts to the defendant to prove his claim of right "by a preponderance."

Property of Spouse. At common law a husband or wife could not commit larceny with respect to the chattels of the other spouse because of the legal fiction of unity of the two; but there is a conflict of authority on this question under the Married Women's Property Acts. 52 C.J.S., Larceny, s. 40; 55 A.L.R. 558.

The common law immunity has been abolished or narrowed in a majority of states on the ground that the Married Women's Property Acts and the changed position of women in society today call for treating her in property matters as a separate person independent of her husband. (See Model Penal Code Tentative Draft No. 22, pp 103-5, (1954)).

There are no Oregon cases on this point, but Oregon has had married women's property statutes (ORS chapter 108) since 1880. The lack of cases probably can be attributed to the understandable reluctance of prosecutors to become involved in family property disputes.

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Comment on Proposed Revision:

Subsection (1) is derived from the New York Revised Penal Law and the Michigan Revised Criminal Code (final draft). It restates existing case law and a defendant who establishes either (a) or (b) would negate the requisite larcenous intent; however, its inclusion makes the draft more definitive and comprehensive. The Model Penal Code contains a similar statement of affirmative defenses to theft.

Subsection (2) is borrowed from the New York Revised Penal Law and is designed to exclude from criminal liability the victim of a larceny or other crime causing financial loss, who threatens the actor with criminal prosecution based upon the act unless he makes restitution. The Model Penal Code includes a comparable provision. It seems very

Comment on Proposed Revision:

unlikely that an extortion prosecution based on such a situation would result in conviction, even without such a statutory provision; however, a clear statement relating thereto seems desirable.

Subsection (3) abrogates the common law rule that because of the legal unity of husband and wife one could not commit larceny with respect to the property of the other. It is substantially the same as the provision contained in the Illinois Criminal Code of 1961. The Illinois Committee Comments state that the committee felt that unless the husband and wife have separated and are living in separate abodes when the theft occurs, the criminal law should not intrude into what usually is a civil dispute wherein the true ownership of the property involved is uncertain at best. If, however, the parties have separated and are living apart and theft occurs, there seems to be no good reason why such conduct should not be punishable in the criminal courts.

It is submitted that such an approach is a reasonable one which would leave most property fights between spouses to the divorce courts, but at the same time would provide criminal sanctions in those situations where the separate property rights of a spouse require protection. The Model Penal Code also rejects the rule of absolute immunity, and the Michigan draft adopts a comparable position. The New York Code does not contain a provision covering spouse theft.

Text of Proposed Revision:

PRELIMINARY DRAFT

Section _____. Larceny; defenses

(1) A person does not commit larceny if he acts under an honest claim of right, in that:

(a) He is unaware that the property [or service] is that of another; or

(b) He ^{reasonably} believes that he is entitled to the property [or service] involved or ~~that~~ he has a right to acquire or dispose of it as he does.

The burden of injecting the issue of claim of right is on the defendant, but this does not shift the burden of proof.

(2) In any prosecution for larceny by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge.

(3) It is an affirmative defense that the property involved is that of the defendant's spouse unless the parties were not living together as man and wife and were living in separate abodes at the time of the alleged theft.