

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

Date: April 2, 1968 Action: _____

Date: _____

Proposed Code Revision

Subject: Section 5. Theft by deception (Article 14)

Comment on Proposed Revision:

Subsection (1) is derived from Illinois Criminal Code Section 15-4 and Michigan Criminal Code (Final Draft) Section 3201. In paragraph (a) the prepositional phrase "of law, value, intention or other state of mind" which modifies "impression" is taken from Model Penal Code Section 223.3 (P.O.D.). This language seems desirable because it clearly indicates the intent of the section to eliminate needless distinctions based on "fact" as contrasted with "opinion" or "present or past fact" as opposed to "future events."

The rationale of all of the modern codes in dealing with theft by deception is the issue of the impression which the actor's total conduct has on the victim. As the New York Penal Law commentators point out in connection with that code's section on "False Promise," many flagrant swindles are perpetrated by patently fraudulent promises -- and with careful avoidance of any misrepresentation of fact -- many an expert confidence man has gone scot-free for want of such a provision.

The exception contained in subsection (2) of the proposed section is taken from Section 223.3 of the Model Penal Code; however, the term "representation" has been substituted for the phrase "puffing by statements" to avoid limiting it to oral or written "statements." This exception is intended to deal with the problem of mass advertising and "commendation of wares." The non-pecuniary deception would not be criminal, either. (See MPC, Tentative Draft No. 2, pp. 71-73 for comments.)

Subsection (3) is a restatement of language found in New York Penal Law Section 155.05, and is similar to provisions contained in the Model Penal Code and provides that mere nonperformance alone shall not be sufficient to establish an intent not to perform a promise.

The entire section is restricted to include only those instances wherein there exists an intent to defraud and to exclude cases essentially civil in nature and amounting to little more than breaches of contract. Accidental or careless creation of a false misimpression is not covered.

CRIMINAL LAW REVISION COMMISSION

PRELIMINARY DRAFT NO. 3

Article 14.

Theft

Section 1. Definitions. As used in _____, (Existing
except as the context may require otherwise: (law

(1) "Appropriate property of another to oneself or a (ORS
third person" or "appropriate" means to: (161.010,
(164.310

(a) Exercise control over property of another, or to
aid a third person to exercise control over property of another,
permanently or for so extended a period or under such circumstances as
to acquire the major portion of the economic value or benefit of such
property; or

(b) Dispose of the property of another for the benefit of
oneself or a third person.

(2) "Deprive another of property" or "deprive" means to:

(a) Withhold property of another or cause property of another to
be withheld from him permanently or for so extended a period or under
such circumstances that the major portion of its economic value or
benefit is lost to him; or

(b) Dispose of the property in such manner or under such
circumstances as to render it unlikely that an owner will recover such
property.

(3) "Obtain" includes, but is not limited to, the bringing about
of a transfer or purported transfer of property or of a legal interest
therein, whether to the obtainer or another.

(4) "Owner of property taken, obtained or withheld" or "owner"
means any person who has a right to possession thereof superior to
that of the taker, obtainer or withholder.

(5) "Property" means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or contract.

(6) "Receiving stolen property" means acquiring possession, control or title, or lending on the security of the property.

Section 2. Theft. A person commits theft when, with intent to deprive another of property or to appropriate property to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof in any of the following ways:

(Existing
(law
(ORS
(164.310

(1) By conduct known prior to the effective date of this Act as common law larceny by trespassory taking, common law larceny by trick or embezzlement.

(2) By acquiring property lost, mislaid or delivered by mistake as provided in section 3 of this Act.

(3) By extortion as provided in section 4 of this Act.

(4) By deception as provided in section 5 of this Act.

(5) By obtaining property by false pretenses as provided in section 6 of this Act.

(6) By receiving stolen property as provided in section 7 of this Act.

Section 3. Theft of lost, mislaid property. A person who comes into control of property of another that he knows or has good reason to know to have been lost, mislaid or delivered under a mistake as to

the nature or amount of the property or the identity of the recipient commits theft if, with intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to the owner.

Section 4. Theft by extortion. A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will in the future:

(Existing
(law
(ORS
(163.480

- (1) Cause physical injury to some person; or
- (2) Cause damage to property; or
- (3) Engage in other conduct constituting a crime; or
- (4) Accuse some person of a crime or cause criminal charges to be instituted against him; or
- (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (6) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such conduct shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
- (7) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (8) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or

refusing to perform an official duty, in such manner as to affect some person adversely; or

(9) Inflict any other harm which would not benefit the actor.

Section 5. Theft by deception. (1) A person commits theft if he obtains property of another by deception. Deception occurs when, with intent to defraud, a person:

(a) Creates or confirms another's false impression of law, value, intention or other state of mind which the actor does not believe to be true; or

(b) Fails to correct a false impression which he previously created or confirmed; or

(c) Prevents another from acquiring information pertinent to the disposition of the property involved; or

(d) Sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; or

(e) Promises performance which he does not intend to perform or knows will not be performed.

(2) "Deception" does not include falsity as to matters having no pecuniary significance, or representations unlikely to deceive ordinary persons in the group addressed.

(3) In any prosecution for theft by deception the actor's intention or belief that a promise would not be performed shall not be established by or inferred from the fact alone that such promise was not performed.

Section 6. Obtaining property by false pretenses.

A person obtains property by false pretenses when, with intent to defraud, he obtains property of another by means of any false token, pretense or device.

(Existing
(law
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(165.205
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Section 7. Receiving stolen property. A person

commits theft by receiving stolen property if he receives, retains, conceals or disposes of property of another knowing or having good reason to know that the property is stolen, unless the property is received, retained, concealed or disposed of with the intent of restoring it to the owner.

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(ORS
(165.045
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Section 8. Right of possession. Right of possession of property is as follows:

(1) A person who has obtained possession of property by theft or other illegal means shall be deemed to have a right of possession superior to that of a person who takes, obtains or withholds the property from him by larcenous means.

(2) A joint or common owner of property shall not be deemed to have a right of possession of the property superior to that of any other joint or common owner of the property.

(3) In the absence of a specific agreement to the contrary, a person in lawful possession of property shall be deemed to have a right of possession superior to that of a person having only a security interest in the property, even if legal title to the property lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

Section 9. Value of stolen property. For the purposes of this _____, the value of property shall be ascertained as follows:

(1) Except as otherwise specified in this section, value means the market value of the property at the time and place of the crime, or if such cannot reasonably be ascertained, the cost of replacement of the property within a reasonable time after the crime.

(2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value, shall be evaluated as follows:

(a) The value of an instrument constituting an evidence of debt, including, but not limited to, a check, draft or promissory note, shall be deemed the amount due or collectible thereon or thereby.

(b) The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be deemed the greatest amount of economic loss which the owner might reasonably suffer because of the loss of the instrument.

(3) When the value of property cannot reasonably be ascertained, it shall be presumed to be an amount less than one hundred dollars.

Section 10. Theft; defenses. (1) A person does not commit theft if he acts under an honest claim of right, in that:

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

(b) He reasonably believes that he is entitled to the property involved or has a right to acquire or dispose of it as he does.

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

(3) In any prosecution for theft 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.

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ORS	Section In Preliminary Draft #4	Comment
- 164.480A or R	2	Trespass and carrying away product.
164.520	2	Operating handcar on railroad.
164.540	Larceny of Services	Unlawful riding on train
- 164.560A	2	Larceny of railroad stock; includes damage.
164.570		Disinterment of body.
" 580 - 164.610		Removing property in cemetery
164.620	Theft of Services	Utilities
164.635	Theft of Services	Telephone
164.650, 164.660, 164.670	Unauthorized use of motor vehicle	
164.680		Damage to boats.
164.700		Killing animal.
- 164.730R	2	Taking animal
164.740	2	Detaining animal
- 164.850	2	Mining
- 165.005R	2	Embezzlement
- 165.010R	2	Embezzlement
- 165.012R	2	Failure to return leased property.
- 165.015R	2	Conversion by public official.
- 165.025R	2	Conversion by trustee
- 165.030R	2	Conversion
- 165.035R	2	Embezzlement

ORS Provisions Affected by Draft

On

THEFT

ORS	Section In Preliminary Draft #4	Comment
161.010A*	1	"Property" defined.
163.280A and 163.290A	2	ORS refers to property subject to larceny.
163.330A	2	Stopping train with intent to commit larceny (or robbery)
163.470A	4	Larceny by extortion by re- vealing ex-convict status.
163.480A	4	Larceny by extortion by accusing person of crime.
164.310R	1,2	Larceny generally.
164.320R	2	Place of committing larceny as determining punishment.
164.330R	2	Same
164.340R	2	Larceny from person as deter- mining punishment.
164.350R	2	Theft of grain
164.360R	1,2	Larceny by severance not necessary when "property" broadly defined.
164.370A or R	2	Skinning carcass without per- mission as larceny.
164.380R	2	Larceny of livestock.
164.390R	2	Shoplifting
164.420A or R	2	Cutting trees, etc. Includes trespass
164.430A or R	2	Trespass with intent of larceny

*"A" means the ORS section would be amended;
"R" means the ORS section would be repealed.

ORS	Section In Preliminary Draft #4	Comment
-165.040R	2	Embezzlement
-165.045R	6	Receiving
-165.205R	5	False pretenses
-165.210R	5	Common law fraud
-165.215R	5	Impersonation
-165.220	5	Falsely representing ownership
-165.230	5	Defrauding innkeeper
-165.260	2	Larceny of royalties
-165.270	Theft of Services	Defrauding taxi
-165.280	2	Toll bridge
-165.295	2,5	Larceny of and by credit card
-165.300		Use of expired credit card
165.405	2	Alteration of brand with intention to convert
165.410		Tampering with brand
165.415	5	False pedigree
165.425	2	Bailee of livestock
165.430R	2	Conversion of livestock
165.435		Buying livestock without owner's consent
165.445	Theft of Services	Defrauding stablekeeper
165.450, 165.455, 165.460	2	Adulteration of gold dust

ORS	Section In Preliminary Draft #4	Comment
165.465	2,5	Misrepresenting metallic content
165.530	Theft of Services	Telephone slugs
165.532	5	Fraud, service
165.615, 165.620	5	False financial statement
- 165.680	5	Fraud