ANTHONY YTURRI, CHAIRMAN
89 SW 3RD. ONTARIO 97914
DALE M. HARLAN, VICE CHAIRMAN
11717 LINWOOD AVE., MILWAUKIE 97222

STAFF:
DONALD L. PAILLETTE
EXECUTIVE SECRETARY
MILDRED E. CARPENTER
CLERK

TELEPHONE 364-2171
EXT. 1791

STATE OF OREGON
CRIMINAL LAW REVISION COMMISSION
309 STATE CAPITOL BUILDING
SALEM 97310

April 18, 1968

INTRODUCTION: Theft, Preliminary Draft No. 4

The following preliminary draft of the consolidated theft articles constitutes the major portion of the new provisions relating to crimes against property that have been approved by Subcommittee No. 1 of the Criminal Law Revision Commission. The members of the subcommittee are: John D. Burns, Chairman; Robert Chandler; Edward W. Elder; and Bruce Spaulding.

In addition to the aforementioned draft, the subcommittee also has approved a section dealing with "Unauthorized use of a vehicle;" however, it is not included herein but will be a part of "related offenses."

Earlier drafts included sections covering grading of theft crimes; however, the subcommittee decided to withhold any action thereon until after the general articles relating to classes of crimes are drafted in order to make the penalty provisions for theft internally consistent with the rest of the proposed revision.

A brief commentary follows each section of the draft to provide a summary of its purpose, derivation and relationship to existing law.

The theft articles will be the main order of business of a meeting of the Commission on Saturday, April 27, 1968, at 9:30 a.m. in Room 309 Capitol Building, Salem. Interested persons are invited to attend. Comments or suggestions concerning this draft are solicited and should be sent to the above address.

Donald L. Paillette
Project Director

DLP mc

See: Minutes of Commission
4/27/68, p. 3, v. VIII, Tapes #12 & 13

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

Preliminary Draft No. 4

Article 14.

THEFT

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

(Existing law
(ORS 161.010, 164.310

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

(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.

(a) 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 it from him by larcenous means.

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

(c) 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 therein, even if legal title lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

(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 of contract.

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

COMMENTARY

This section contains definitions of terms used in several succeeding sections of the Theft draft, thereby providing for a shorter and clearer definition of the crime and ensuring a uniformity of meaning throughout the sections. The definitions employed are patterned generally after the New York Revised Penal Law Section 155.00.

Subsections (1) and (2) define "appropriate" and "deprive," both fundamental to a definition of the requisite intent (See Section 2) on the part of the thief to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof. These definitions retain the traditional distinction between larceny and some other offenses which, though similar, do not reach the stature of larceny because of a lesser intent to obtain temporary possession or use of the property or to cause temporary loss to the owner. CJS Larceny, SS 27, 28; State v. Teller, 45 Or 571 (1904); State v. Ducher, 8 Or 394 (1880).

The definition of "obtain" in subsection (3) extends the concept of a taking to include the constructive acquisition of property, and is consistent with the ensuing definition of "property," which includes real property.

Subsection (4), in defining the terms "owner of property taken, obtained or withheld" and "owner," articulates the relationship that must exist between a person and the property involved in order for him to be the victim of a larceny if the property is wrongfully taken from him. The word is not found in our existing larceny statute; however, the phrase "the property of another" that appears in ORS 164.310, as well as in the common law definition of larceny, means "ownership." State v. Broom, 135 Or 641 (1939); State v. Poyntz, 168 Or 69 (1942).

For larceny purposes, it is uniformly held that "ownership" of property means "possession" of it and that having a legally recognizable interest in property gives a person possession of it. State v. Luckey, 150 Or 566 (1935); State v. Swayzer, 11 Or 357 (1884).

It is sufficient if such interest is superior to that of the taker, and it is generally recognized that even a person who has himself acquired property unlawfully has a right of possession superior to that of a third person who wrongfully takes it from him. (52 CJS S. 19, pp 813-814).

Subsection (4) (b) defines the rights of joint or common owners, such as partners, and is a restatement of the generally accepted principle that one cannot "steal" from the other if the taker has a right to possession at the time of the taking. The situation involving security agreements also is covered by subsection (4) (c). This definition gives a person in lawful possession of property a right of possession superior to one having only a security interest therein.

Subsection (5), "property," is defined broadly enough to avoid a limitation to the enumerated kinds and to encompass the subjects of larceny now covered in ORS 164.310, including real property. By specifically including intangible property within its scope, the definition remedies the type of problem that occurred in State v. Tauscher, 227 Or 1 (1961), wherein it was held that only property that is tangible and capable of being possessed may be the subject of larceny or embezzlement under the existing statutes and an agent who, without authority and for her own purposes, drew a check on her principal's account was guilty of neither crime.

Subsection (6), "receiving," is taken directly from Model Penal Code Section 223.6 (1). The commentary thereto (Tentative Draft No. 2, pp. 94-95) stresses that the essential idea to be expressed in statutes prohibiting receiving stolen property is that of acquisition of control whether in the sense of physical dominion or of legal power to dispose. The definition is broad enough to cover "constructive possession" and the activities of those who buy stolen property, as well as persons who acquire title thereto otherwise than by purchase, and who make loans and advances on such 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:

Existing law
ORS 164.310

(1) Takes, appropriates, obtains or withholds such property from an owner thereof.

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

(3) Commits theft by extortion as provided in section 4 of this Act.

(4) Commits theft by deception as provided in section 5 of this Act.

(5) Commits theft by receiving as provided in section 6 of this Act.

COMMENTARY

A. Summary

The primary purpose in drafting this section is to eliminate the traditionally distinct crimes of larceny, larceny by trick, embezzlement, obtaining property by false pretenses, receiving stolen property and extortion and to consolidate them into one crime called "theft." Consolidation is accomplished by the language of subsection (1), aided by the definitions contained in the previous section.

The secondary purpose of broadening the scope of existing law is effected by subsections (2) through (5).

Subsection (2) designates as a form of theft the acquisition of property lost, mislaid or delivered by mistake.

Subsection (3) provides that theft may be committed by "extortion."

Subsection (4) designates "deception" as theft.

Subsection (5) continues the expanded concept of the crime to include theft by "receiving."

The penalty provisions will not be incorporated into the Theft draft until the preliminary articles covering classes of crimes have been drafted; however, this draft is intended to lay the groundwork for a more rational and logical classification of offenders in the property crimes area to reduce the disparity in punishment provisions that now exists.

B. Derivation

The basic definition of theft is similar to New York Penal Law Section 155.05, although, contrary to that code, the enumeration of the old crimes of larceny, larceny by trick, embezzlement and obtaining by false pretenses as ways of committing theft has been purposely avoided. The subcommittee hoped thereby to preclude the implication that the artificial technicalities of these crimes were being retained in the theft articles.

Following the example of the Model Penal Code and several other states, we have attempted to abolish completely the labels and highly technical distinctions between the various larceny-type offenses and propose to codify them into one comprehensive theft statute.

C. Relationship to Existing Law

ORS 164.310 is the basic larceny statute, but it is merely one of numerous statutes relating to the stealing of property. Our present statutes contain three general types of provisions proscribing the criminal taking of property and draw technical distinctions between the traditionally separate crimes of larceny, embezzlement and obtaining property by false pretense. In addition many of the existing statutes found in ORS chapter 164 describe specific criminal acts that are covered by the basic larceny section but are distinguished from it by the subject matter of the theft or its locus. These other statutes cover separately, and often prescribe different penalties for, the crimes of stealing from the person, stealing minerals, trees or plants, livestock, railroad property, animals and motor vehicles, to mention a few.

It is apparent that this multiplicity of statutory provisions with its confusing diversity of penalties for similar crimes, gradually developed over the years as the result of piecemeal legislation.

The embezzlement laws themselves are further refined into a perplexing series of distinct statutory crimes, each with its own special penalty provision. Often, the vastly different penalties between one type of embezzlement and another appear to rest on no logical or reasonable foundation.

Fraudulent criminal conduct which results in the defendant obtaining property from the victim is dealt with as separate crimes in ORS chapter 165.

A substantial body of case law exists in which the Oregon Supreme Court has grappled with the distressing problems created by our archaic theft statutes and related provisions.

The structure of the Oregon statutes, inherited as it was from the old common law, retains today distinctions that are not only meaningless in a modern society, but are, also, unnecessary handicaps to effective administration of the laws.

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.

COMMENTARY

A. Summary

This section is concerned with theft of three types of property: (1) Lost; (2) Mislaid; or (3) Delivered by mistake.

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 by 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.

A person who merely learns of the whereabouts of lost property but does not assume control over it would not commit theft. A finder who casually handles a lost article would not be considered to have "come into control" of it. The chances of restoration to the owner might often be increased rather than lessened by non-interference of casual finders.

Even though a finder may take possession with intent to keep the property from the owner, he does not commit theft if he then proceeds to take reasonable measures to restore the property to its owner. As the drafters of the Model Penal Code suggest, "the realistic objective in this area is not to prevent the initial appropriation but to compel subsequent acts to restore to the owner." (Tentative Draft No. 2, p. 84).

The section deals with property that is lost, mislaid or delivered by mistake. The latter category covers the kind of situation wherein one accepts a $10 bill knowing

that the other person thinks he is handing over a $1 bill. In such a case the receiver acquires the property without trespass or false pretense and the traditional concept of larceny fails to reach such conduct. However, it is not proposed to make criminal certain types of tolerated sharp trading such as the purchase of another's property at a bargain price on a mere showing that the buyer was aware that the seller was mistaken regarding the value of the property sold.

B. Derivation

The section is a blending of Model Penal Code Section 223.5; New York Penal Law Section 155.05 1 (b); and Illinois Criminal Code Section 16-2.

C. Relationship to Existing Law

At common law, "lost property" is property not intentionally deposited by the owner in a place where it was found. Jackson v. Steinberg, 186 Or 129 (1949). "Mislaid property" is that which the owner has voluntarily and intentionally laid down in a place where he can again resort to it and then has forgotten where he laid it. Ibid.

ORS sections 98.010 - 98.040 presently impose certain affirmative duties on the finders of lost goods; however, none of the criminal statutes deal with the question.

Under existing case law one who receives money from another to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to defraud, is guilty of larceny. State v. Ducher, 8 Or 394 (1880).

Section 4. Theft by extortion. A person commits theft 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 or continue a strike, boycott or other collective 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.

COMMENTARY

A. Summary

This section continues the comprehensive definition of theft and deals with situations where coercion is employed to obtain property of another. The crime would consist of the wrongful acquisition of property by intimidation or threat.

Although the penalty provisions have not been drafted, the subcommittee anticipates that theft committed by extortion, along with theft from the person, would be considered as more serious than theft accomplished by conventional larcenous methods.

Subsections (1) through (9) list the kinds and varieties of threats or intimidating conduct that would amount to theft by extortion.

B. Derivation

The draft follows the lead of Model Penal Code Section 223.4 and is a blend of that section and New York Penal Law Section 155.05 (e). The New York statute proscribes larceny of property by threat to cause physical injury to some person in the future. The Model Penal Code punishes obtaining of property by a threat to inflict bodily injury on anyone. It is submitted that the New York provision is preferable because it more clearly distinguishes between this type of theft and robbery, which is the threatening of immediate use of physical force upon another.

C. Relationship to Existing Law

ORS 163.480, Oregon's present "extortion" law, provides that any person who threatens any injury to the person or property of another or threatens to accuse another of any crime with the intent to extort any "pecuniary advantage or property" from him or to compel him to do any act against his will shall be punished. It can be observed that the crime is committed by making the threat, and obtaining property thereby is not an element.

The proposed draft would go beyond the existing statute by providing that the actor would commit theft if he actually obtained property from another as a result of the threat.

It should be noted, however, that the subcommittee does not propose thereby to eliminate the proscription against the conduct now covered by ORS 163.480. It will be dealt with when the articles relating to crimes against persons are drafted. Too, it seems logical to assume that such conduct would, in any event, amount to "attempted theft by extortion" under the draft.

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

(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.

COMMENTARY

A. Summary

Section 5 defines the crime of theft by deception. The 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.

Subsection (1) (a) retains the traditional false pretenses concept of creating a false impression, and broadens the scope to include the act of confirming

another's false impression which the actor does not believe to be true. If the actor confirms the false impression for the purpose of inducing consent and obtains property thereby, he will commit theft. The false impression may relate to law, value, intention or other state of mind of the victim. The traditional restriction to "existing fact" is rejected.

If the actor fails to correct a false impression which he previously created or confirmed and obtains property thereby, he would commit theft under (1) (b).

A person who prevents another from acquiring information pertinent to the disposition of the property would commit theft if he does so with fraudulent intent and obtains property of another as the result. (Subsection (1) (c)).

If with like intent and with like result the actor sells, transfers or otherwise encumbers property and fails to disclose a lien or other legal impediment to the enjoyment of the property, he would be guilty of theft under the provisions of (1) (d).

Subsection (1) (e) covers theft committed by "false promise" and represents a significant departure from the familiar limitation to misrepresentation of fact and includes promises of future performance which the actor does not intend to perform or knows will not be performed. However, mere nonperformance alone would not be sufficient to establish that the actor intended or believed that a promise would not be performed. (See subsection (3)).

The exception contained in subsection (2) is designed to deal with the problem of mass advertising and "commendation of wares" that would be considered unlikely to deceive ordinary persons, and to situations wherein a misrepresentation may be made during the "bargaining" but the person deceived nonetheless gets everything he bargained for. For example, a salesman who misrepresents his political or lodge affiliations to make a sale.

B. Derivation

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 the word "impression" is taken from Model Penal Code Section 223.3. This language seems desirable because it clearly indicates the intent to eliminate needless distinctions based on "fact" as contrasted with "opinion" or "present or past fact" as opposed to "future events."

The exception contained in subsection (2) is taken from Model Penal Code Section 223.3; however, the term "representations" has been substituted for the phrase "puffing by statements" used therein.

Subsection (3) is a restatement of language from New York Penal Law Section 155.05, and is similar to provisions contained in Model Penal Code Section 223.3 (a).

C. Relationship to Existing Law

The section brings what is now the crime of obtaining property by false pretenses (ORS 165.205) within the ambit of theft and greatly broadens the scope of the offense to include conduct not now covered. Deception would include, also, the type of fraudulent activity which presently would be prosecuted as "larceny by trick." Eliminated is the tricky question of whether "title" as opposed to "possession" passes. Obtaining property by means of a bad check also could be prosecuted as theft by deception.

Section 6. Theft by receiving. A person commits theft by receiving if he receives, retains, conceals or disposes of property of another knowing or having good reason to know that the property is the subject of theft.

Existing law
ORS 165.045

COMMENTARY

A. Summary

The draft follows the lead of the Model Penal Code by incorporating the traditionally distinct crime of receiving stolen property as part of the comprehensive "theft" offense.

Consolidation of receiving with other forms of theft provides the same advantages as other aspects of the unification of the theft concept. It reduces the opportunity for technical defenses based upon legal distinctions between the similar activities of stealing and receiving the fruits of the theft.

It will be noted, however, that consolidation would make it impossible to convict of two offenses based on the same transaction. A person found in possession of recently stolen property may be either the thief or the receiver; but

if the prosecution can prove the requisite thieving state of mind, it makes little difference whether the jury infers that the defendant took directly from the owner or acquired from the thief. (See section 9 for defense.)

B. Derivation

Section 6 and the definition of "receiving" found in section 1 are based upon Model Penal Code Section 223.6. The subcommittee rejected the Model Penal Code approach that creates a presumption of guilty knowledge in "dealers" under certain circumstances feeling that such presumptions might raise constitutional questions.

C. Relationship to Existing Law

The terms "receives" and "conceals" are retained from ORS 165.045 although the concept of "receiving" has been greatly expanded by the definition of that term in section 1 and would continue to include "buying."

The knowledge or belief of the actor that the property is stolen is stated in substantially the same manner as in the present statute, "knowing or having good reason to know." This is more severe than the Model Penal Code which demands actual awareness by the defendant, with the requisite state of mind required to be "knowing that it has been stolen, or believing that it has probably been stolen." (MPC Section 223.6). Nevertheless, under the Model Penal Code version, proof of reason to believe would authorize a jury to draw an inference of actual knowledge, so the difference between the two drafts is largely academic.

Section 7. 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.

COMMENTARY

A. Summary

This section spells out the right of possession of property. Subsection (1) is consistent with the definition of "owner" contained in section 1 (4) by providing that one who obtained possession of property by theft or other illegal means has a right of possession superior to that of one who takes, obtains or withholds it from him by larcenous means. This is a codification of a generally accepted principle in the larceny area. (52 CJS, S. 13, p. 811).

Subsection (2) provides that a joint or common owner of property is not deemed to have a right of possession superior to that of any other joint or common owner. Such a case is left to the civil law.

Subsection (3) deals with the difficult cases in which there is some sort of security agreement between the parties, and provides that in the absence of a specific agreement to the contrary, a person in lawful possession of property has a right of possession superior to one having only a security interest therein. The gist of the subsection is to protect lawful possession.

B. Derivation

Section 7 is taken directly from New York Penal Law Section 155.00.

C. Relationship to Existing Law

The section represents basically a codification of existing common law principles.

Section 8. 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.

COMMENTARY

A. Summary

This section sets forth three criteria to establish value.

B. Derivation

The section is derived substantially from New York Penal Law Section 155.20 and appears to be a more appropriate system of determining value than the Model Penal Code which establishes value merely as "the highest value by reasonable standard of the property or services."

C. Relationship to Existing Law

Value of stolen property for purposes of determining the degree of larceny is its market value at the inception of the taking thereof. State v. Albert, 117 Or 179 (1926).

Section 9. 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 a 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.

(4) In any prosecution for theft by receiving, it is a defense that the defendant received, retained, concealed or disposed of the property with the intent of restoring it to the owner.

[(5) It is a 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.]

NOTE: Subsection (5), abrogating the common law rule that a husband or wife cannot commit larceny with respect to the property of the other, was disapproved by the subcommittee 2 to 1. The members decided, however, that the provision

should be left in the draft for consideration by the entire Commission, in view of the important policy question involved.

The language is substantially the same as that used in Illinois Criminal Code Section 16-4 (b). The Model Penal Code also rejects the rule of absolute immunity between spouses (see Tentative Draft No. 2, pp. 103-5); and the Michigan Revised Criminal Code Section 3240 adopts a similar position.

COMMENTARY

A. Summary

Subsection (1) restates existing case law and provides that a person does not commit theft if he acts under an honest claim of right in that he is unaware that the property is that of another, or reasonably believes he is entitled to deal with the property as he does.

Subsection (2) requires the defendant to produce evidence to support the claim of right, but specifies that this does not shift the burden of proof. This is in accord with Oregon case law.

Subsection (3) excludes from criminal liability the victim of a theft or other crime causing financial loss, who threatens the thief with criminal prosecution based upon his conduct unless he makes good the loss.

Subsection (4) sets forth a defense to the crime of theft by receiving.

B. Derivation

Subsections (1) and (2) are borrowed from Michigan Revised Criminal Code (Final Draft 1967) Section 3240.

Subsection (3) is adapted from New York Penal Law Section 155.15.

Subsection (4) is a modified version of language taken from Model Penal Code Section 223.6.

C. Relationship to Existing Law

(1) Common law larceny required that the defendant have the intent to deprive the owner permanently of his property. A person 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 authority to deal with the property. 52 CJS Larceny S. 25; 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). Subsection (1) is, in effect, a restatement of common law principles, in language broad enough to cover all conduct designated as "theft" by the draft.

(2) The defendant must develop evidence on the issue of claim of right, a mere assertion of the possibility of a claim of right being insufficient. The state is not now required to prove the lack of a subjective belief of authority to act by the defendant. If the theft statute is to be enforceable, the state could not be expected to discharge such a burden. What the defendant does by his evidence is to "raise a reasonable doubt" about the mens rea element of the crime, and the draft makes it clear that the burden continues on the state to prove every element of the crime charged beyond a reasonable doubt. Unquestionably, a jury would be so instructed in the absence of such a provision in the draft, but it seems preferable to make the code as comprehensive as possible by spelling it out.

(3) The defense to prosecution for theft by extortion committed by a threat to charge another person of a crime is analagous to the "claim of right" defense, but more limited in its application.

(4) This subsection is directed at cases such as that of an insurance company receiving property on behalf of the owner. The subcommittee believed it was better to insert this provision in the section relating to defenses rather than as an exception in the substantive statement of the crime to avoid any possible interpretation that it was an element to be negatived by the prosecution.

o - o