Tapes #5 and 10

#5 - Both sides
#10 - 1 to 418 of Side 1

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

February 24, 1968

Larceny; definitions (Article 14)

Basic larceny statute (Article 14)

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

First Meeting, February 24, 1968

Minutes

Members present: Senator John D. Burns, Chairman
Representative Edward W. Elder
Mr. Bruce Spaulding

Senator Anthony Yturri, Commission Chairman
Mr. Donald L. Paillette, Project Director

Absent: Mr. Robert Chandler

Reporters: Professor Courtney Arthur, Willamette University
Professor George M. Platt, University of Oregon

Bar: Justice Gordon Sloan, Chairman, Oregon State Bar Committee on Criminal Law and Procedure

Preliminary Drafts on Larceny Definitions and Basic Larceny Statute

The meeting was called to order by Subcommittee Chairman Burns at 9:30 a.m. in Room 309 of the Capitol Building. At the Chairman's invitation, Senator Yturri made a brief opening statement and the meeting was then turned over to Mr. Paillette for his comments.

Mr. Paillette explained that this meeting had been called to discuss the preliminary draft of statutes relating to larceny and definitions of larceny. He advised that time had not permitted him to distribute the drafts prior to the meeting but he was hopeful that subsequent drafts could be sent to members before the meetings to give them an opportunity to examine the material before they were called upon to discuss it.

He indicated he was hopeful that two things could be accomplished at today's meeting: (1) Determine whether the preliminary drafts followed the general direction the Commission wanted to take insofar as the comprehensive larceny statute was concerned; and (2) Determine whether or not this was the correct organizational method to follow throughout the code revision.

Mr. Paillette explained that the preliminary draft was divided into two sections: Larceny definitions and the basic larceny sections. The drafts were taken to a large extent from the revised New York Penal Law and would accomplish the recommendation of the 1961 Interim Committee on Criminal Law to consolidate crimes against property under one larceny statute. The cases cited in connection with the drafts,

he said, did not constitute a complete record of Oregon cases but were intended to be representative. He noted that certain aspects of the draft were not completed; nothing had been included with respect to affirmative defenses for prosecution of larceny cases nor was there anything comparable to the "taking and using" statutes but he recommended that something of this nature be added. The proposed draft, he said, followed the approach advocated in the Model Penal Code and other recent code revisions which was to get away from archaic technical distinctions and call larcenous conduct of any kind "stealing."

Senator Yturri asked if there was anything unique in Oregon's historical background to require the definition of "property" to be different from the definitions in the Model Penal Code or the New York code. Mr. Paillette replied that State v. Tauscher held that only property which was tangible and capable of being possessed could be the subject of either larceny or embezzlement. The proposed definition of "property," therefore, included "tangible and intangible personal property" and he believed the rest of the definition was broad enough to cover what had been traditionally considered as property under the larceny statute.

Chairman Burns asked Mr. Paillette if he was endeavoring to bypass the requirement for evidence of a false token by including "intangible" in the definition and received a negative reply. Mr. Paillette explained that the proposed draft would do away with the requirement for a false token. This was not accomplished in the property definition but rather in the basic larceny draft where the type of conduct that would constitute larceny would include the type of conduct heretofore called "obtaining by false pretense."

Justice Sloan suggested that an all-inclusive definition of property be considered that would not give specific examples thus avoiding the problem of interpretation by the courts where, because one specific was named in the statute, the question arose as to whether other specifics had been excluded. His suggested wording was: "'Property' includes anything that has value to the person from whom it is taken." He proposed this subject be noted for later discussion.

Professor Arthur remarked that several of the revised penal codes, notably Michigan, contained a section on Rules of Construction and suggested that a statement in that section could take care of the problem Justice Sloan had raised.

Professor Platt expressed approval of the use of "including" rather than "including, but not limited to," as used in many codes. He observed that the latter phrase was probably used unnecessarily by drafters as a matter of cowardice because they were afraid to give up language that had been in use for so long.

Mr. Paillette read the larceny definitions together with his comments. He then turned to the larceny draft and pointed out that it used the term "bad check" as defined on page 2 d. New York, he said, had traditionally had a crime of issuing a bad check and the crime was incorporated within their revised larceny statute but the term would be new to Oregon law. He noted that by including this provision he was not suggesting that the crime of drawing an NSF check be repealed.

Mr. Paillette advised that the crime of extortion as defined in the proposed draft was also a radical departure from present law. If this proposal were incorporated into the larceny statute, it would constitute an aggravated form of larceny and there would have to be a giving up of property by the owner as the result of a threat to come within the statute. Extortion as defined in the present statute could be placed under the general category of "attempted crimes." Both the New York code and the Model Penal Code included extortion as defined in the draft while the Illinois code called the crime "threat" and also made it a crime of larceny.

Subsection (e) on page 2 a, Mr. Paillette said, described a "false promise" and would do away with the requirement for a representation of a past or existing fact.

The draft next described how value would be determined and retained the traditional distinction between petty larceny and grand larceny although grand larceny was broken into first, second and third degree larceny. He commented that under present law there was no division between larceny of $76 or $76,000 and expressed the view that there was a logical reason to differentiate between the value of stolen property.

Mr. Paillette referred to page 2 g containing a section entitled "larceny of services" which, he said, was set forth separately because services were not normally thought of as property. This section would cover such statutes in the present code as defrauding an innkeeper, taxicab fraud, interference with public services such as telephones, etc. The section was taken directly from the Model Penal Code.

Chairman Burns called for general observations with respect to the approach outlined by the preliminary drafts.

Representative Elder expressed the view that the general approach in the condensation of the statutes was very good but he said he could foresee some problems, specifically:

(1) The $75 limitation on bad checks had always been a nagging police problem and increasing the amount to $100 would, he believed, be a further aggravation.

(2) Under the present shoplifting statute the store owner and the police had some immunity from a false arrest suit and this feature had not been perpetuated in the proposed draft.

Chairman Burns noted that the present law placed no value upon the object taken from a store but the penalty was predicated on the property being taken from the sacred environs of a store or from a person whereas the proposed draft would classify the crime by dollar amount.

Mr. Paillette pointed out that the distinction of making the crime more aggravated by taking from a person was retained in the draft. The aggravated stealing from an auto or a store was not retained but could be added quite simply by placing this type of stealing under, for instance, larceny in the third degree, thereby retaining the traditional distinction that the crime was more serious because of the locus of the crime.

In reply to a question by Chairman Burns Mr. Paillette explained that for the purposes of this preliminary draft numbering of the sections had not been considered and the statutory form would be observed at the time the drafts were put into bill form.

Professor Platt asked Mr. Paillette why he had chosen to label the statutes "larceny" rather than "theft" and was told that "larceny" was the word traditionally used in Oregon to designate stealing, the lawyers in the state were comfortable with the term and the proposal attempted to expand the concept of larceny. Professor Platt expressed the view that if the revised code was to make a break with the past and the old common law distinctions, it would be more appropriate to make a break with the common law word "larceny" which, he said, had certain common law overtones whereas "theft" did not carry with it the old attachments and was more inclusive. Justice Sloan expressed approval of Professor Platt's observation.

Representative Elder raised the question of the manner in which the opinions of interested groups should be solicited. It was the general concensus that the draft should be made acceptable to the subcommittee before it was distributed to organizations and that testimony of interested groups should be presented to the full Commission.

Justice Sloan suggested that Mr. Paillette discuss specific questions with persons knowledgeable in the particular field under consideration and others agreed.

Senator Yturri pointed out the advantages inherent in using the Model Penal Code since all aspects of the problems involved had been considered by the ALI in formulating it.

Professor Arthur suggested that tentative drafts of the Model Penal Code, together with the comments, be made available to the subcommittee. Mr. Paillette agreed to investigate the possibility of securing copies of the tentative drafts for the members.

Mr. Paillette pointed out the handwritten changes in the MPC text on page 3, et seq, of the larceny draft which showed the changes in the draft made by the ALI at their final meeting and he noted particularly the deletion in the first sentence of section 223.1. He contended the New York definition was better because it more fully defined the type of conduct that would be larcenous and he had, therefore, used the New York definition in the proposed draft.

Chairman Burns referred to subsection (b) on page 2 of the larceny draft which said "if . . . he fails to take reasonable measures . . . " and asked if "reasonable measures" was defined. Mr. Paillette replied that it was not defined but the revised codes used this phrase.

Professor Arthur expressed approval of the language and pointed out that the section made a marked change in the criminal law of finders as opposed to the civil law of finders and obviated many distinctions in the present law.

Professor Platt noted that "reasonable" raised the question of whether the act was reasonable in the eyes of the actor, the objective test, or reasonable in the detached view of the subjective man test and observed that this question would probably be raised many times in the course of the revision. He was of the opinion that the drafters of the MPC preferred the subjective test.

Professor Platt next discussed subsections (a) and (b) on page 2 b of the larceny draft as these provisions would apply to a stolen credit card. He asked how the value of a credit card would be determined. In a sense, he said, it had no economic value if the owner gave immediate notice to the issuing company that the card had been lost or stolen whereas some cases held that the owner was liable for any amount the thief might charge to it.

Chairman Burns suggested a specific section relating to credit cards be included in the statute. He asked if unauthorized possession of a stolen credit card should constitute a felony when the card had not been used.

Mr. Spaulding remarked that a credit card had no value of itself but did lend itself to obtaining money or other things of value by false pretense. He proposed that it be made a crime to possess a stolen credit card with intent to use it, even though the card had not been used.

Representative Elder believed the subcommittee should hear testimony from those directly concerned with this problem and Senator Yturri pointed out that case law covered a number of credit card questions, particularly with respect to civil liability concerning gasoline and telephone credit cards.

Justice Sloan stated that there would be a difference between stealing a credit card and finding it. He was of the opinion that the dual question of the degree of the crime and the value actually related to how much punishment would be meted out to an offender. The crime could be aggravated by the amount of force used in stealing a purse or a credit card and would then include an assault. The main impact of the degree of the crime would be the amount of punishment.

Mr. Paillette remarked that as the Commission grappled with the problem of what type of conduct would be criminal, it would also have to face the decision of the type of conduct that would be the highest kind of felony, the lowest kind of felony, and on down through the misdemeanor structure. When those decisions were made, it would then be possible to fit the various crimes into one of the degrees defined in the statute.

Chairman Burns expressed the view that the problem might be compounded by breaking crimes into degrees of felonies and degrees of misdemeanors and thought the best approach was the simplest approach.

Senator Yturri commented that there was probably good reason to provide for distinctions in the penalty structure. One of the reasons, he said, for the imposition of degrees of crime was to try to do justice as much as possible, giving the defendant the benefit of the doubt, and at the same time relieve the court dockets and enable the courts to dispose of criminal proceedings in a realistic manner. He said he suspected there were elements of both justice and expediency that had prompted revisors to set forth degrees of crime plus the fact that those interested in correction, reform and rehabilitation were probably placed in a better position if the degrees were included in the statute.

Chairman Burns asked Mr. Paillette if he had considered the theory of the Kansas check abatement statute in drafting his proposal. Mr. Paillette replied that it had been necessary for him to make certain basic decisions in preparing the draft and one was that he could not possibly examine every state's statutes and still get a draft completed in the time allotted. He had accordingly decided to confine his study to the Illinois, New York and Model Penal Codes as being representative of the best of the recent revisions.

Chairman Burns asked if all statutes listed on Exhibit "A" of the larceny draft would be repealed by enactment of the proposed draft. Mr. Paillette replied that if the draft were enacted in its present

form, it would probably repeal 98% of the statutes listed on the exhibit but he had not meant to imply that they would all be repealed. The exhibit was intended to set forth the statutes dealing with larcenous conduct in the present law and to show the wide variety of statutory crimes together with the wide variety of penalties. With respect to Exhibits "A," "B" and "C" Mr. Paillette said he contemplated that by the time the Commission finished its restatement of crimes against property, all of the statutes listed would be repealed and would be covered somewhere in the comprehensive chapter dealing with that subject.

Justice Sloan referred to section (1), page 2 of the larceny draft, and noted that the section was intended to be all-inclusive. He asked if it was then necessary to proceed to section (2) and state the crimes more definitively. He also asked if the definition in section (1) could stand by itself in the statute and let the committee report express the intent of the Commission rather than saying specifically "Larceny includes . . . "

Senator Yturri replied that the court sometimes referred to committee minutes but he was not sure how much weight was given to them. He felt the Commission would be safer to make its intent clear in the statute rather than relying on an expression of intent through reports of Commission meetings.

Professor Platt said Justice Sloan raised a difficult point as to how brief a statute could be without transcending constitutional limits. He said he would tend to agree with Senator Yturri that there should be more than just subsection (1) in the statute itself.

Professor Arthur observed that to the extent the Commission could agree on Model Penal Code provisions or on using the wording of some of the other revised codes, he would recommend they do so in order to take advantage of case law in other states based on uniform language.

Chairman Burns asked Mr. Paillette to distribute a list of ORS sections which would be repealed by the enactment of the proposed drafts. Professor Platt pointed out, and Mr. Paillette agreed, that this was an area where the expertise of Legislative Counsel could be most helpful.

Chairman Burns next suggested that a section be added to the draft relating to stolen credit cards in addition to the sections Mr. Paillette had referred to earlier dealing with taking and using an automobile without authority and affirmative defenses.

Senator Yturri proposed that there be another meeting of the subcommittee in the near future after the members had been given an opportunity to dwell upon the preliminary draft and in the meantime Mr. Paillette would have time to gather more information and to draft the additional sections.

Mr. Paillette indicated he would appreciate receiving comments and suggestions from the members with respect to any proposed changes and improvements they might care to make in the preliminary draft after they had studied it more carefully.

Justice Sloan referred to an article he had read recently dealing with the growing trend of the public to use stores as banks. The article, he said, indicated that Safeway Stores handled more money in cashing checks than they did in selling merchandise. He suggested that Mr. Paillette contact an attorney from Safeway to discuss this problem or any other problem where the Commission might be of assistance.

Representative Elder expressed approval of Justice Sloan's suggestion and urged that the subcommittee seek expert opinion wherever necessary and that the views of interested groups be given careful consideration to avoid their opposition when the revised code reached the legislature.

Senator Yturri commented that other states undoubtedly had faced the same problems Oregon was confronting, yet they had come forth with a statute similar to the one the committee was now contemplating. There was, therefore, precedent in the language in the proposed statutes in the experience of other states. He said that if it appeared necessary or advisable, Mr. Paillette could go to one of the other states, after a group of specific problems had been collected, to explore their solutions personally and to see how the statutes were working out in actual practice.

During a discussion of the weight that should be given to the views of special interest groups, Professor Platt cautioned that with the public and special interest groups, vengeance was a popular reaction to criminal conduct and was something that the Commission would have to resist time and time again as they proceeded with the revision.

Mr. Paillette advised that it was his intention to provide the subcommittee with more background information after he had heard the initial reaction to the preliminary draft. He noted that a great deal more time could be spent researching Oregon cases but he had tried in this preliminary draft to give the subcommittee a cross-section of cases to show that the proposal would do no great violence to the traditional fundamental concepts of the law.

The matter of research assistance through the law schools was discussed. Professor Arthur pointed out that law students were faced with an acute problem so far as their time for this type of extra-curricular activity was concerned and commented that he was less enthusiastic about the total effectiveness of student research than he had been at one time.

Professor Platt also expressed caution with regard to the amount of student help the Commission could expect and explained that his students would not be able to begin on criminal law revision until March 25, the end of the spring term, and he would not be able to tell for several weeks thereafter whether their assistance would be effective.

Mr. Paillette commented that other states had more financial resources than Oregon for their code revisions and in Michigan the state Bar had paid to relieve the two reporters of their teaching duties whereas Professors Arthur and Platt were donating their services. He also noted that student research on a voluntary basis might not be feasible and the Commission could find that they would have to pay at least a student research fee to obtain enough assistance.

A date for the next meeting of the subcommittee was discussed. Mr. Paillette said before the next meeting he would like to have time to prepare the additional sections previously discussed together with comments to accompany them and to be given an opportunity to collect some additional background information on some of the commentary at today's meeting. He suggested that sufficient time be allowed to circulate the material among the members of the subcommittee before the meeting.

Senator Yturri asked if Legislative Counsel would assign one staff member to sit in on subcommittee meetings and to assist the Commission and Mr. Paillette explained that Katherine Beaufait had been assigned to work with him but was unable to be present today because her mother was ill.

Subcommittee members decided the most convenient meeting day would be Saturday and the matter of holding meetings in Portland rather than Salem was discussed. Chairman Burns said he would inform the members of the time and place of the next meeting as soon as Mr. Paillette notified him that the necessary material had been prepared.

Mr. Paillette observed that while it was very valuable to have Professors Arthur and Platt present at all subcommittee meetings, they were reporters for specific areas of the code and as such had been assigned to other subcommittees. As they began to work in these other areas, it would probably be asking too much to expect them to attend all of the subcommittee meetings.

The meeting was adjourned at 1:35 p.m.

Respectfully submitted,

Mildred E. Carpenter

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission