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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

March 23, 1968

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Second Meeting, March 23, 1968

Minutes

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

Absent: Mr. Robert Chandler

Also present: Mr. Donald L. Paillette, Project Director
Professor Courtney Arthur, Reporter
Miss Kathleen Beaufait, Deputy Legislative Counsel

Agenda: Larceny; Preliminary Draft No. 2; March 1968
Larceny; defenses; Preliminary Draft No. 2; March 1968

The meeting was called to order by Chairman John D. Burns at 9:30 a.m. in Room 309 of the Capitol Building, Salem, Oregon.

Approval of Minutes of Meeting of February 24, 1968

There being no additions or corrections to the minutes of the first meeting of Subcommittee No. 1 held on February 24, 1968, the minutes were approved as prepared.

Preliminary Draft No. 2; Larceny

Chairman Burns asked how Preliminary Draft No. 2 differed from the first Preliminary Draft of the larceny statutes and Miss Beaufait explained that the draft had been rewritten to conform to legislative form and style and there was no intention to change the substance of the first draft. She noted, however, that she had inadvertently excised the provision that would have made the mere act of writing a bad check a crime.

Section 1. Definitions. Miss Beaufait pointed out that the definition of "property" had been omitted unintentionally from section 1 and called attention to the general definition of "property" in ORS 161.010 where "property" was defined to include both real and personal property.

Chairman Burns noted that the first Preliminary Draft said:

"'Property' means any article, substance or thing of value, including money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or contract."

The subcommittee agreed that the above definition should be included as subsection (1) of section 1.

The committee next discussed the advisability of inserting "including, but not limited to," in the property definition and it was generally agreed that the definition should be as broad as possible and should therefore read " . . . thing of value, including, but not limited to, money, tangible and intangible . . . ." In reply to a question by Chairman Burns, Mr. Paillette explained that "tangible and intangible personal property" had been included in the definition to avoid the problem that appeared in the Tauscher case where an agent who drew a check on her principal's account was guilty of neither larceny nor embezzlement.

Chairman Burns asked if the definition of "appropriate" or "appropriate property of another to oneself or a third person" was in conflict with case law and was told by Mr. Paillette that he had been unable to find any cases in conflict with the definition and this was also true with respect to "deprive," "obtain" and "owner." Chairman Burns suggested this might be an area where research by law students would be helpful and Mr. Paillette indicated that the law students were beginning other assignments and he was of the opinion that it was sufficient for the draft to be checked by the draftsman initially and then double checked for conflicts by Legislative Counsel.

Chairman Burns noted that subsection (1) (a) stated "exercise control over property of another" rather than "exercise control over it" as set forth in the first Preliminary Draft. Miss Beaufait explained that she did not like to rely on pronouns where there was a possible doubt as to clarity, particularly in criminal law, and the committee agreed this was a desirable change.

Professor Arthur suggested that "deprive" might be a better word than "appropriate." Mr. Paillette indicated that the definitions of "appropriate" and "deprive" were taken from the New York penal code and Chairman Burns remarked that the terms were not redundant; one complimented the other and both were necessary to insure a broad larceny statute. There was further discussion on this point and Mr. Paillette indicated that the effect of the draft was to expand the definition of "deprive" in the Model Penal Code by adding a definition of "appropriate."

Chairman Burns pointed out that ORS 164.310, the classical definition of larceny, used "taking" and asked if "taking" should be defined. Mr. Paillette replied that the other definitions covered "taking" and by omitting a definition of it, the code would stay away from the traditional concept of larceny that there had to be a "taking" to constitute larceny. The committee agreed this concept was desirable.

Miss Beaufait indicated that it would later be necessary to make a decision as to whether "person" should be defined to include states, counties, etc. It was presently defined, she said, in ORS 161.010. Mr. Paillette pointed out that the subsection defining "person" had

been set out under "History and Background of Present Law" in connection with the first Preliminary Draft to make the committee aware of that definition but he had purposely omitted it from the larceny draft. It would, he said, need to be defined in the criminal code but not specifically in the section on larceny.

In reply to a question by Chairman Burns, Mr. Paillette said that the definitions in section 1 were designed to cover larceny, embezzlement and false pretense but not burglary. They might need to be expanded later, he said, but at this juncture included the basic requisites.

Representative Elder moved section 1 be adopted with the inclusion of the amended definition of "property" as set forth above. Mr. Spaulding seconded and the motion carried unanimously.

Section 2. Larceny. Miss Beaufait advised that section 2 separated the act of larceny into classifications (a) through (g) and when one of the types of conduct needed clarification, the section number containing a description of that conduct in greater detail was inserted. She thought section 2 might serve as a kind of index and might be one way to make the code easier to use. The section had been included, she said, to give the committee an opportunity to decide whether they approved of this format.

Chairman Burns commented that the Supreme Court had said that an indictment had to be framed in the language of the statute and asked if this type of format would cause any pleading problems. Mr. Paillette advised that to overcome this problem a section on pleading and proof could be added to the draft as had been done in the New York penal code. He said he had purposely left such a provision out of the initial draft because it was a fundamental policy decision to be made by the committee. He noted that the way section 2 had been drafted by Miss Beaufait, the specific sections were incorporated by reference and even without a provision with respect to pleading, he said he did not see why it would be any problem from the standpoint of the district attorney to draft an indictment charging commission of a crime in the manner specified in one of the subsections in section 2.

Professor Arthur pointed out that section 2 used "intent" whereas the MPC used "purpose." He explained that the MPC approach abolished many of the common law distinctions involving complicated homicide questions concerning the mental element of a murder. Ultimately, he said, this would affect a large portion of the criminal code and it would probably be necessary to reconsider the mental element later. Mr. Paillette agreed that the draft would need to be reevaluated in the light of decisions yet to be made on the over-all principles.

Chairman Burns pointed out that subsection (1) used "take" in the definition of larceny. Since "take" implied asportation and asportation was being abolished in this draft, he asked again if it was necessary to define "take." The members agreed that such a definition was unnecessary.

Chairman Burns next asked if subsection (2) was redundant of (1) and also whether "but is not limited to" should be added after "includes" in subsection (2). After a discussion, the committee agreed the two subsections should be combined to read:

"(1) A person commits larceny 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 one of the following ways:"

Chairman Burns asked why subsection (2) (a) was included and was told by Mr. Paillette that the purpose of the subsection was to spell out that these elements, heretofore considered separate statutory crimes, would not be larceny.

Professor Arthur commented that he was worried about the use of "embezzlement." He explained that there was no crime of embezzlement under the common law and historically it was a purely statutory crime. Mr. Paillette stated that the rationale of the comments in the Model Penal Code and the New York code on this question was fundamentally the same, the purpose of both being to eliminate the technical distinctions between the crimes and to eliminate holes which enabled the defendant to "wiggle off the hook" on a technicality.

Professor Arthur indicated that the wording of subsection (2) (a) would automatically reenact every former statute covering these subjects with all of their limitations.

A brief recess was taken at this time. Following the recess Chairman Burns directed the staff to draft a restatement of subsections (1) and (2) in accordance with the committee's discussion and attempt a solution to the problems raised with respect to subsection (2) (a).

Mr. Paillette explained that subsection (2) (b) eliminated the distinction between lost and mislaid property which was an artificial distinction under the common law. Professor Arthur referred with approval to the subsection and explained how it eliminated many highly technical and historical aspects of common law which were totally unnecessary in his opinion. Mr. Spaulding questioned whether the subsection was broad enough to include any unauthorized exercise of control and gave as an example a situation where a company mailed a valuable article on trial which had not been ordered by the recipient. He asked whether it should be larceny for the recipient to take and use that article. Mr. Paillette stated that it would not be larceny under section 3 and expressed the view that it should not be.

<u>Section 3. Larceny of lost, mislaid property</u>. Chairman Burns asked whether section 3 should read "A person who comes into control of property of another that he knows <u>or reasonably should have known</u> . . ." Miss Beaufait replied that inclusion of the additional phrase would depend on whether "knowing" was included in the general definitions.

At Mr. Spaulding's suggestion, the committee agreed to insert "or has good reason to know" after "knows" on line 2 of section 3 with the understanding that if the committee later decided to include "knowing" in the definitions, this phrase could then be eliminated.

Chairman Burns asked if anyone was concerned about "fails to take reasonable measures to restore the property to the owner." Professor Arthur expressed approval of the language and the committee unanimously agreed to approve section 3 with the amendment set forth above.

<u>Sections 4 and 5, Bad checks; section 7, Larceny by false promise; Theft by deception.</u> Representative Elder cited cases where people made exorbitant demands of insurance companies for payment on lost articles and asked at what point such a demand ceased to be a civil matter and became criminal. Professor Arthur commented that there was a problem as to whether false statements of value were false pretenses in such circumstances.

In this connection Mr. Paillette called attention to section 223.3 of the Model Penal Code, Theft by Deception. He advised that section 7 of the draft under discussion covered larceny by false promise and suggested that it might be better to have a broader provision, such as theft by deception. Mr. Paillette also suggested sections 4 and 5 relating to bad checks be deleted to be replaced by the section on theft by deception which inferentially could cover a bad check offense without spelling it out in so many words. The bad check provisions as such would then be deferred until consideration was given to statutes on fraudulent types of crimes, such as forgery, not covered in this draft. That section might also cover the type of crime Representative Elder had discussed.

Chairman Burns remarked that as he looked at the theft by deception statute, he was more convinced that the draft be labeled "theft" rather than "larceny" in accordance with the discussion at the committee's previous meeting. He also expressed concern over the absence of any necessity for corroborating evidence in the Model Penal Code's theft by deception section. Mr. Paillette replied that under the basic larceny section, even though the technical distinction between taking and obtaining was eliminated, he did not think it would erase the necessity for a prosecutor to prove a false token. Chairman Burns noted that the false token now was required for OMFP but not for larceny by trick and indicated that he favored a requirement for corroborative evidence on theft by deception. Mr. Paillette commented that there was some case law on this subject in other jurisdictions under the revised theft codes.

After further discussion, Chairman Burns directed Mr. Paillette to redraft section 7 to make it broad enough to cover theft by deception and to incorporate in that section a requirement for a false token under the larceny by obtaining statute. In addition, the committee agreed to eliminate sections 4 and 5 and reserve the bad

check problem until consideration was given to the sections dealing with fraud. Chairman Burns specified that the new section would also need to be reconciled with subsection (2) (a) of section 2 and a study made as to whether a false token should be required for larceny by trick.

Section 6. Chairman Burns asked why the MPC definition of larceny by extortion was not used in the draft. Mr. Paillette replied that the initial draft followed the New York approach because it contained a clearer distinction between larceny by extortion and robbery. He explained that the MPC did not use future physical injury to the person threatened as a criterion, and, without that requirement, the act could be robbery. If no property was obtained by the threat, he said, some other crime might be committed but there would be no larceny.

Mr. Paillette indicated that if the crime of larceny by extortion was adopted, the committee should consider whether they wanted to continue to have a provision in the code making it a crime to threaten. If so, that provision could be included under inchoate crimes. The committee agreed that the thrust of ORS 163.480, Threatening injury or accusation of crime; intent to extort, should be inserted later, probably in a general attempt provision.

Chairman Burns asked why "in the future" was not included in subsection (2) as well as in subsection (1) and was told by Miss Beaufait that the verb "will" implied the future. Mr. Paillette explained that "in the future" was intended to mean a future time as opposed to the immediate present -- something the person was afraid would happen on some other occasion rather than pulling the trigger on the gun right now. After further discussion, the committee agreed to add "in the future" after "will" in the last line of the opening paragraph and to delete "in the future" from subsection (1).

Miss Beaufait expressed the view that subsection (3) was very broad language and Mr. Paillette pointed out that the other recent code revisions included similar language -- "commit any criminal offense" in the Illinois code; "or other criminal conduct" in the MPC. After further discussion, the committee agreed that no change was necessary in subsection (3).

Subsection (4) was approved as written.

With respect to subsection (5) Miss Beaufait noted that there was a similar provision in ORS 163.470 which proscribed statements against former convicts. It was a true fact that the person had been a convict, she said, but it was unlawful to publicize the fact. The committee approved the subsection after a brief discussion.

Chairman Burns asked if the exception in subsection (6) might more logically appear in the sections dealing with defenses but the majority of the committee recommended that the subsection remain unchanged.

Miss Beaufait pointed out that the phrase "such a threat" was used incorrectly because there was no reference to threat in the previous clause. The committee agreed that "such a threat" should be revised to read "such conduct."

Representative Elder asked who had the right to act on behalf of a union. Mr. Spaulding posed a situation where an employer discharged an employe and the other employes threatened to go out on strike if the employe was not rehired. Representative Elder pointed out that they would not be asking for property by such an action and Mr. Spaulding suggested that "property" might not be the correct word to use. Mr. Paillette read the following excerpt from Tentative Draft No. 2 of the Model Penal Code, p. 78:

> "Subsection (9) reaches the threat of collective unofficial sanctions where an official of a trade association or union, for example, is lining his own pocket by employing coercive power which he is supposed to wield on behalf of his organization. Where the demand is on behalf of the organization, the section does not apply even though the demand may go beyond any honest claim of right. This is because it would be unwise to subject these bargaining processes to serious risk of criminal sanctions, where guilt may turn on nice questions of what is a 'lawful objective' of a strike."

Mr. Paillette explained that the section meant that no matter how outrageous the demand, if it was being made on behalf of the group, it was not criminal. After further discussion, the committee agreed to approve the section with the one amendment set forth above.

Subsection (7) was approved as submitted.

Mr. Spaulding questioned the use of "adversely" in subsection (8). Professor Arthur read the comparable MPC section, 223.4:

> "(d) take or withhold action as an official, or cause an official to take or withhold action;"

The committee agreed that subsection (8) was superior to the MPC language and since it was aimed at the public official only, "adversely" was a satisfactory term.

Chairman Burns read subsection (g) of section 223.4 of the MPC and suggested it be substituted for subsection (9) of the draft:

> "Inflict any other harm which would not benefit the actor."

Other members concurred in this revision.

Representative Elder moved section 6 as amended be approved and the motion carried unanimously.

Section 9. Larceny of services. Mr. Paillette explained that section 9 was derived from section 223.7 of the Model Penal Code. Chairman Burns remarked that the draft was running headlong into larceny by extortion when it talked about deception or threat and running into false promises when it talked about theft by deception. Mr. Spaulding commented that Oregon law did not presently include a section on larceny of services. Mr. Paillette said the section was included in the draft because "property" was not defined to include larceny of services.

Mr. Spaulding suggested the section might be more palatable if a false token were required. Chairman Burns agreed and suggested such conduct be covered in the section on fraud and forgery because it was concerned with fraudulent conduct rather than a larcenous taking. Mr. Paillette recommended that larceny of services be covered somewhere in the criminal code, although not necessarily in the larceny sections. The committee agreed to delete section 9 and reserve consideration of larceny of services until the fraud sections were drafted.

Section 8. Receiving stolen property. Chairman Burns noted that section 8 contained a definition of "receiving" and asked if it might more properly be in section 1. Miss Beaufait replied that the only place the word was used was in this one crime of receiving stolen property. She also commented that a definition of "knowing" might also eliminate "probably" from subsection (2); i.e., if he knew or had good reason to know.

Chairman Burns pointed out that ORS 165.045 referred to "receiving or concealing" and asked why "concealing" had been eliminated. Mr. Paillette explained that "concealing" would be covered by a wrongful withholding and noted that subsection (2) said "receives, retains or disposes." He expressed the view that the damage was done by retaining the property, whether or not it was concealed.

The committee discussed the advisability of placing a definition of "receiving" in section 1. It was agreed that section 8 should be rereferred to the staff with the instruction to broaden the definition of "receiving" to include concealing and place it in section 1.

A recess was taken at this point.

Section 10. Right of possession. Miss Beaufait explained that the definition of "right of possession" in the preliminary draft of larceny definitions had been moved to section 10 in this draft. Mr. Paillette explained that section 10 represented the New York approach to right of possession and did not change the present Oregon law that a joint or common owner could not steal from another joint or common owner. He said he anticipated that this might be a controversial section and the committee might want to adopt the opposing position that a partner could steal from a partner. Ramifications of section 10 were discussed after which Mr. Spaulding moved that section 10 be adopted and the motion carried unanimously.

Section 11. Value of stolen property. Chairman Burns pointed out that section 223.1 (c) of the MPC used "the highest value by any reasonable standard" as a criterion whereas section 11 used "market value of the property at the time and place of the crime." He questioned whether it might be better to say "reasonable market value." Professor Arthur commented that "market value" had a well established meaning that didn't need to be defined, and Mr. Paillette agreed that market value under larceny cases was an accepted method of establishing the value of stolen property.

Chairman Burns asked why "ordinarily" was used in subsection (2) (a). Miss Beaufait indicated there might be other considerations involved and gave as an example a promissory note for $10 signed by Abraham Lincoln which would be worth more than $10 because of its historical value. Chairman Burns suggested subsection (2) (a) be revised to read: "The value of an instrument constituting an evidence of debt, including, but not limited to, a check, draft or promissory note . . . " The committee concurred. Mr. Spaulding was of the opinion that the last clause of the subsection was unnecessary and weakened the balance of the subsection. He moved that a period be inserted after "thereby" and the balance of the sentence be deleted. Motion carried.

Mr. Paillette explained that subsection (2) (b) was intended to cover such instruments as deeds and, in response to a question by Chairman Burns, said there was no corresponding section in existing Oregon law. The subsection was approved.

Mr. Spaulding questioned the use of "satisfactorily" in both subsections (1) and (3). Mr. Paillette proposed that "reasonably" be substituted inasmuch as it had been defined by the courts and the committee agreed.

Chairman Burns asked whether subsection (3) referred to a disputable presumption and Mr. Paillette replied that the question would not arise because the section referred to a defendant's presumption.

Mr. Spaulding moved that section 11 be approved as amended and the motion carried unanimously.

Section 12. Petty larceny. Section 12 was discussed briefly and the committee questioned whether "steal" should be defined in section 1. A number of problems were raised in connection with the use of "steal" and the members discussed the wisdom of placing petty larceny at the end of the larceny sections with a statement to the effect that anything that was not grand larceny would be petty larceny. Inasmuch as it was too early in the revision process to determine a grading system for crimes, the committee deferred action on sections 12 through 15 until the other larceny sections had been completed.

Larceny; Defenses -- Preliminary Draft

Subsection (1). The committee concurred that "or service" should be deleted in both subsections (a) and (b).

Mr. Spaulding suggested insertion of "reasonably" before "believes" in subsection (b). After discussion, the committee decided subsection (b) should read:

> "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."

Mr. Paillette commented that subsection (1) was derived from the Michigan code and was in accord with the case law in Oregon. It would require the defendant to do more than just plead the claim of right and would spell out that the burden of proof was not shifted to him.

Subsection (2). Mr. Paillette indicated that subsection (2) was taken from the New York code. He also pointed out that MPC section 223.1 (3) and (4) dealt with affirmative defenses and, also, that section 223.4 included an affirmative defense to prosecution under subsections (b), (c) or (d). Chairman Burns asked if subsection (2) more properly belonged in the extortion section. Mr. Paillette replied that he was of the opinion that all the defenses should be together in one section and Mr. Spaulding concurred. Subsection (2) was approved.

Subsection (3). Mr. Spaulding noted that subsection (3) provided that a man could not steal from his wife and asked if this was inconsistent with the Married Women's Statutes. Professor Arthur commented that decisions throughout the country had been to the effect that in spite of the Married Women's Statutes, a man and his wife could not steal from each other. Mr. Paillette indicated there was no Oregon authority on this point. Professor Arthur observed that the MPC reporters had discussed this subject at great length and had proposed many different solutions to the problem but had finally settled on the approach set forth in the draft under consideration which changed the law slightly in the direction of allowing theft from a spouse to be larceny. Mr. Spaulding objected to making the couple go to the divorce court in order to enforce their rights. Mr. Paillette advised that subsection (3) was taken from the Illinois code and did not require the couple to be divorced but did require them to be living apart. He expressed the view that it was a middle-of-the-road approach to the problem in that it provided protection for a spouse where needed, but it would not put the district attorney in an impossible situation.

Mr. Spaulding maintained that subsection (3) should be omitted from the draft and Chairman Burns concurred while Representative Elder favored retention of the provision. After further discussion, the committee decided, by a vote of two to one, to delete the subsection. The result would be that the common law would control in this situation and theft would not be expanded to include theft from spouses. They agreed, however, that the full Commission should be

given an opportunity to discuss the problem and when the draft was presented to the Commission, subsection (3) should be included in brackets with a notation that the subcommittee recommended its deletion by a vote of two to one.

Next Meeting

A date for the next meeting of the committee was discussed and they decided to meet in Mr. Spaulding's office in Portland on April 6, 1968, subject to Mr. Chandler's being able to attend.

Subjects to be considered at the next meeting included a review of the redraft of the material covered at today's meeting with the additional section on theft by deception plus the preliminary draft on unauthorized use of motor vehicles. The bad check sections would be deferred until the sections on fraud were drafted and it was also agreed that grading of the larceny offenses would be deferred until the last of the committee's assignments were completed in order to make the grades coincide with all the proposed statutes.

Procedure

Chairman Burns asked that future drafts be numbered on the outside of the folder for ease in referring to a specific draft. With this in mind, drafts previously distributed should be numbered as follows:

I. Larceny; definitions and Larceny -- Preliminary Drafts
II. Preliminary Draft No. 2 -- Larceny
III. Preliminary Draft -- Larceny; defenses
IV. Preliminary Draft -- Taking or using vehicle without authority

The Chairman also asked that future drafts be prepared with citations to the present Oregon code set forth in the right hand margin for each section.

The meeting was adjourned at 2:50 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission