Tapes #13 and 14

#13 - 512 to end of Side 1 and all of Side 2
#14 - All of Side 1 and 1 to 135 of Side 2

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

May 17, 1968

A G E N D A

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THEFT AND RELATED OFFENSES (Article 14)
Preliminary Draft No. 1; April 1968

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Fourth Meeting, May 17, 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
Miss Kathleen Beaufait, Deputy Legislative Counsel
Justice Gordon Sloan, Chairman, Oregon State Bar Committee on Criminal Law and Procedure

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

Approval of Minutes of Meeting of April 6, 1968

Representative Elder moved that the reading of the minutes of the meeting of April 6, 1968, be dispensed with and that they be approved as submitted. Mr. Spaulding seconded and the motion carried unanimously.

Theft; Preliminary Draft No. 4

Chairman Burns commented that the Commission at its meeting on April 27, 1968, had tentatively adopted and approved for circulation Preliminary Draft No. 4 of the theft articles with a few minor amendments. Mr. Paillette advised that the draft was being prepared for distribution with the revisions approved by the Commission and with some expansion of the commentary.

Theft of Services; Preliminary Draft No. 1

Chairman Burns asked Mr. Paillette if "services" was defined in ORS and received a negative reply. Mr. Paillette called attention to page 3 of Preliminary Draft No. 1 setting forth a list of Oregon statutes dealing with theft of services and illegal interference of utilities and noted that there was no current "theft of services" statute, as such. He explained that the theft of services section was designed to cover all the types of conduct listed in the ORS sections on page 3 in conjunction with a related section on criminal tampering designed to take care of the interference type of conduct not covered under theft of services.

Mr. Paillette called attention to the format employed in the drafts prepared for this meeting where a commentary followed each section of the draft rather than preceding it. Each commentary was divided into three sections: Summary, Derivation and Relationship to Existing Law. He then read the theft of services draft together with the commentary.

Subsection (1) (a). Chairman Burns pointed out that Model Penal Code section 223.7 said "obtains services which he knows are available only for compensation" and asked why "he knows" had been omitted from the proposed draft. Mr. Paillette explained that it would not be difficult to prove that services were available only for compensation and such proof would certainly raise an inference of knowledge on the actor's part. He expressed the view that the actual knowledge was difficult to prove and inclusion of "he knows" in the statute would not be a valuable addition. Mr. Spaulding was of the opinion that the knowledge element was implicit in the section as drafted.

Chairman Burns asked if "purposely" or "wilfully" should be included in subsection (1) (a). Mr. Paillette replied that he had purposely avoided the use of such words because he did not know how they would be defined in the general articles or even if they would be defined. He was of the opinion that it would be a strained interpretation of the language in the draft to say that it did not encompass wilfulness or purpose and added that when the basic general articles were drafted, it was unlikely that they would contain a provision making it criminal to commit any type of theft negligently. He remarked that after the general articles were drafted, changes might need to be made in all the drafts to make them consistent with the views of the Commission with respect to words of intent or wilfulness or purpose.

Representative Elder contended that intent should be included in the statute because a person could walk out of a restaurant and simply forget to pay his bill, having no intent to defraud. Mr. Paillette commented that "intentionally" could be inserted in subsection (1) (a), but the district attorney could have a prima facie case even with "intentionally" in the section.

Justice Sloan objected to the phrase "or other means." After a discussion, Mr. Spaulding moved that ", with intent to defraud" be inserted after "if" in subsection (1) so that the intent to defraud would modify "other means" and thus require theft by other fraudulent means. The motion carried, but was later withdrawn.

Mr. Paillette pointed out that "with intent to defraud" was not consistent with "by force." Inasmuch as the intent to defraud was intended to modify "other means" only and not to modify "force, threat, deception", Mr. Spaulding withdrew his previous motion and moved adoption of the following:

"(1) A person commits theft if:

"(a) He obtains services which are available by force, threat or deception or by other means with intent to avoid payment for the services; or"

The motion carried, but it too was later withdrawn.

Miss Beaufait urged, and Mr. Paillette agreed, that intent should modify all the words in the phrase "by force, threat, deception or other means" and not just "other means." The committee agreed and after further discussion decided that the subsection should read:

"(1) A person commits theft if:

"(a) With intent to avoid payment therefor, he obtains services which are available only for compensation, by force, threat, deception, or other means; or",

Subsection (1) (b). Mr. Paillette explained that subsection (1) (b) was taken from section 165.15 of the New York Penal Law and was used rather than the Model Penal Code provision because it enumerated labor, equipment and facilities instead of just calling them "services." He said an example of the type of situation the subsection was designed to cover was where a foreman diverted his paving crew to lay a driveway at his own home. It was, he said, an area that had been covered not only by the Model Penal Code but by all of the states conducting a criminal code revision to get at a problem which wouldn't be covered by a comprehensive theft statute unless it contained a definition of property that included services.

Mr. Spaulding questioned whether the draft would extend to someone who was not in the employ of another person; the employe might be working for a foreman but would not actually be in his employ. Chairman Burns noted that the Model Penal Code solved that problem by saying "having control over the disposition of services of others." Miss Beaufait suggested that "in the employ" be deleted and after further discussion, Mr. Spaulding so moved. The motion carried unanimously.

Chairman Burns inquired if the term "labor" as used in subsection (b) would exclude the professional person. Mr. Paillette advised that "services" was defined in subsection (2) but the term was not used in subsection (b). He read the commentary from the New York code which indicated that the subsection was designed to get at a specific type of problem and was not intended to cover professional services:

"This offense is included for the purpose of plugging an apparent gap in the present law pointed up by the decision in People v. Ashworth, 1927, 220 App. Div. 498, 222 N.Y.S. 24.

> The defendants therein, a mill superintendent and his brother, were convicted of grand larceny as a result of having made unauthorized and personally profitable use of the mill's machinery, facilities and labor to spin a substantial quantity of wool for a certain company. The judgment was reversed on the ground that the corrupt use of the mill's facilities and labor did not constitute a theft of 'property' and, hence, could not be the subject of larceny."

Justice Sloan asked if there was any possible way that theft could by definition be made to include the type of situation discussed in the New York commentary, thereby avoiding the hazards of a generalized use of the term "services." He said that it had become an accepted way of life for persons who were employed as purchasing agents, for example, to purchase items at a discount for themselves or their friends and such a practice was not necessarily frowned upon by employers. Mr. Paillette commented that he had intended that the subsection would apply to flagrant abuses only and added that more specific language might be desirable. There was a lengthy discussion of subsection (b) and the committee decided to adopt it tentatively with the one amendment and to discuss the subject further at the next meeting.

Subsection (2). Chairman Burns suggested the definition section be moved to either the beginning or end of the section and the committee agreed.

The Chairman then asked if subsection (2) would cover toll bridges and the committee agreed to insert "toll facilities" after "transportation."

Mr. Spaulding inquired if "telephone" was included in "commodities of a public utility nature" and suggested that "telephone" could be eliminated. Mr. Paillette said he questioned whether telephone services would fall into the category of a public utility and the committee decided not to delete "telephone." Representative Elder suggested "telephone" should be expanded to include telegraph and any other types of telecommunications services. After some discussion, the committee agreed to insert "or other communications" after "telephone."

Miss Beaufait questioned whether an accommodation was the only thing received at a restaurant. She contended that a person not only received service but also a commodity in the form of food. Mr. Paillette expressed the view that accommodation in a restaurant would be broad enough to cover food. After further discussion, Representative Elder moved that "food, lodging or other" be inserted after "the supplying of" in the third line of subsection (2). The motion carried.

The phrase "hotels, restaurants or elsewhere" was discussed and the committee agreed that the phrase would include parks, picnic grounds, campgrounds, etc. and was satisfactory as drafted.

Miss Beaufait questioned the value of "for use" in line 4 of subsection (2) and asked why anyone would procure equipment except to use it. Mr. Paillette explained that the words were included to differentiate between "for use" and "for keeps;" in other words, the equipment was to be used and returned. The most common use of the section, he said, would be in the supplying of vehicles. The equipment would be returned but the actor might not pay for the service of using it. There was a lengthy discussion of this subject and the committee decided not to alter the draft with respect to the phrase "supplying of equipment for use."

Mr. Spaulding moved that subsection 2 be adopted to read:

"(2) As used in _____, "services" includes, but is not limited to, labor, professional services, toll facilities, transportation, telephone or other communications service, the supplying of food, lodging or other accommodations in hotels, restaurants or elsewhere, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water."

The motion carried.

Following the discussion of subsection (3), Mr. Spaulding asked if inclusion of "food" in subsection (2) would apply to a person who didn't pay his grocery bill or left the grocery store without paying for the food he had taken. Mr. Paillette replied that such an act would be ordinary theft because the actor would be obtaining property thereby.

Mr. Spaulding commented that "services" was defined to include property when "food" was used in the definition. Mr. Paillette suggested that the service was the supplying of the food; not the food itself.

Chairman Burns observed that "or elsewhere" in subsection (2) was too broad and Mr. Spaulding pointed out that if it were eliminated, picnic grounds, campgrounds, etc. would not be covered. Chairman Burns suggested that lodgings be enumerated as in subsection (1) of ORS 165.230 but if that approach were taken, stables, kennels and hospitals would not be included, he said. Mr. Paillette pointed out that enumeration would result in a more limited statute. After further discussion, the committee agreed to limit subsection (2) to the language contained in ORS 165.230 (1) by delineating specific types of accommodations to be covered.

Subsection (3). Miss Beaufait suggested "receiving" be used in place of "rendering" on line 2 of subsection (3). After a brief discussion, the committee agreed to this revision.

The committee discussed the meaning of "absconding" and Mr. Paillette indicated that it meant more than not paying for a service; it also included a running away. He noted that ORS 165.630 (d) stated that one instance of prima facie evidence of fraudulent intent was when a "person absconded without paying or offering to pay for such food, lodging or other accommodation" and added that the prima facie provisions in the proposed draft were not as broad as those contained in the present Oregon law. He pointed out that subsection (3) of the draft did not go as far as either the New York or Model Penal Code sections where refusal to pay was prima facie evidence of deception, whereas the proposed draft would make it prima facie fraudulent only if the actor absconded without payment or offer to pay. Mr. Paillette explained that subsection (3) was intended to be limited to the type of service received in a hotel or restaurant where service was ordinarily paid for immediately upon the rendering of it. It was not intended to apply to the man who absconded without paying his gas or electric bill because that type of service was ordinarily paid for on a monthly basis, and that type of act would not raise a prima facie case.

Miss Beaufait noted that if a person openly walked out the front door without paying his bill, he would not be absconding, but if he left by way of the back window, his act would come under subsection (3). She asked if one reason for using this type of language was to protect from civil liability the proprietor who ran out and seized the man who had not paid his bill, just as protection from liability was built into the shoplifting statute for the proprietor who stopped someone from leaving his premises with merchandise he had not paid for. Mr. Paillette replied that he did not believe this was the principle reason other states had adopted similar language but it would nevertheless protect the proprietor by providing probable cause to arrest.

Chairman Burns suggested that one of the reasons the committee was having so much difficulty with subsection (3) was because so many things were lumped together under the definition of services. He expressed approval of the language in subsection (2) of ORS 165.230 and proposed that it be followed, where applicable, in place of subsection (3).

Mr. Paillette remarked that the prima facie provision could be completely eliminated if the committee so desired and noted that it had been included to assist in enforceability. This comment was offered as an alternative, he said, but he did not advocate removal of the prima facie provision. Chairman Burns agreed that its deletion would not improve the section.

The committee discussed whether subsection (3) could possibly be applied to a man who absconded without paying his gas bill. Justice Sloan suggested that the addition of "immediately" after "ordinarily" in the first line of subsection (3) might make it clearer. Chairman Burns so moved and the motion carried.

The committee next considered using language other than "absconding" and Chairman Burns pointed out that "absconding" would require an overt act. Representative Elder expressed approval of using the list of overt acts as set forth in ORS 165.230.

Justice Sloan pointed out that section 165.15 of the New York Penal Law was more specific with respect to the type of services intended to be covered and suggested the New York approach might be more satisfactory than the generalized approach in the proposed draft.

Chairman Burns asked Mr. Paillette to redraft subsection (3) along the lines discussed by the committee employing the phrase "services ordinarily paid immediately upon the receiving of them" as adopted by the committee and endeavor to limit the subsection to hotels, restaurants, taxicabs and the like by employing some of the criteria in ORS 165.230. He suggested that the draft be distributed to subcommittee members as soon as possible. The members could then return their comments to Mr. Paillette and he could redraft the sections in accordance with those suggestionsprior to the next meeting. He also suggested that Mr. Paillette prepare an alternative draft patterned after the New York code in line with Justice Sloan's comment.

Criminal Tampering; Preliminary Draft No. 1

Mr. Paillette read the section dealing with criminal tampering and his commentary thereto. He explained that the section would not replace tampering with an automobile, which was covered under the unauthorized use of a vehicle section, but would cover the type of conduct that might not result in a person stealing any type of service or might not result in any damage to the utility or the property but was still interfering with the property in some manner. He said that the section was an attempt to include every protection that existed in the present statutes with respect to interfering with a utility or property without actually obtaining anything.

Chairman Burns called attention to ORS 164.900 dealing with malicious destruction of personal property and suggested that a similar section be drafted in two parts, one part pertaining to malicious destruction and the other dealing with criminal tampering. He said that all of the sections listed on page 8 of the commentary involved injury or destruction whereas the proposed draft talked in terms of inconvenience.

Mr. Paillette was asked for a specific instance in which this section would apply and he referred to ORS 166.640, Tampering with railroad property. Chairman Burns expressed the view that the protection of railroad property would be later covered by a general trespass statute. Representative Elder pointed out that trespass statutes could be enforced in the railroad yard but the public could not be barred from crossings outside the yard and a section such as this might be useful in that respect. Mr. Spaulding indicated that it would be better to have a statute which would apply to everybody rather than just the railroads.

Justice Sloan asked if there would eventually be a section in the criminal code on vandalism and Mr. Paillette replied that the Model Penal Code had a section called "Criminal mischief" which dealt with instances where some damage had occurred.

Several examples were given of the type of conduct to which the proposed section might apply: Tampering with railroad ties or switches, tampering with a bicycle so the brakes wouldn't work and removing cattle guards so the cattle were turned loose. Chairman Burns recalled an incident where someone removed the locks from the snow gates on Lark Mountain and some young people had subsequently entered the area, become snowbound and one of them had died as a result.

Chairman Burns expressed concern at the vagueness of the definition of "tamper." Mr. Spaulding suggested "unwarranted" might be better than "improper" in subsection (2) (a).

Mr. Paillette pointed out that the commentary to the New York code said, "'Tamper' implies the idea of meddling or interfering with or displacing property." The Michigan commentary said that the draft condensed several sections into two degrees of criminal tampering and he pointed out that many of the sections set forth there were similar to sections in ORS.

Miss Beaufait was concerned over the vagueness of "something" in the tamper definition and Justice Sloan replied that "property" might be a better word. Chairman Burns suggested subsection (2) (a) read:

> "'Tamper' means unwarranted interference with the property of another or making unwarranted alterations in its existing condition."

Justice Sloan contended that subsection (1) (a) was both the crime and the definition, and expressed the view that it might be possible to eliminate the definition of "tamper."

After further discussion, Mr. Spaulding suggested the following language to replace the criminal tampering section:

"A person commits criminal tampering if he tampers or interferes with property of another with intent to cause substantial inconvenience to the owner or to another person and without having any right to do so or any reasonable ground to believe that he has such right."

Mr. Spaulding explained that his proposal would make the utility provisions apply to everyone and Mr. Paillette expressed reservations about a statute which did not contain specific reference to utilities. He felt it was wise to include language in the statute which would give an inkling of legislative intent.

After further discussion, Mr. Spaulding moved adoption of his suggested language as set forth above and the motion carried. Chairman Burns directed that for the purpose of Preliminary Draft No. 2 the criminal tampering section should be prepared in accordance with the motion and when the committee considered a malicious destruction or malicious mischief section, they would give some thought to combining the two.

Misapplication of Property; Preliminary Draft No. 1

Mr. Spaulding noted that subsection (1) said that a man was guilty of misapplication of property if he created a risk, and subsection (2) said it was a complete defense if it was only a risk and no damage occurred. Mr. Paillette agreed that the actor could have created a risk but if the property was returned to the defendant and he suffered no loss whatsoever, the prosecution would not lie. Justice Sloan commented that if subsection (1) was good law, subsection (2) was unnecessary; in other words, the wrong had been committed when the actor turned the property over to someone without authority, and the fact that it was finally returned undamaged did not right the wrong. Chairman Burns commented that the resolution of such a problem should be a civil matter.

Several situations were posed where this section would apply. In reply to a question by Chairman Burns, Mr. Paillette said that the Model Penal Code did not contain a section on misapplication of property, the New York code did have one and present Oregon law did not.

Mr. Spaulding contended that the section covered situations similar to larceny by bailee where the actor did not act in accordance with the nature of the trust. Chairman Burns commented that the Supreme Court had held that larceny by bailee required evidence of proof of intent and the proposed section did not contain this requirement. The Chairman asked Mr. Paillette to read the section from the theft article which was intended to cover the larceny by bailee situation.

Mr. Paillette read section 2 of Preliminary Draft No. 4 of the theft draft through subsection (1) together with the definitions of "deprive" and "appropriate" and expressed the view that this material would cover larceny by bailee. Mr. Spaulding said he did not think it would take care of the "nature of his trust" situation in the present larceny by bailee statute.

Representative Elder was not totally convinced that the misapplication of property section was unnecessary and suggested that it be referred to someone such as the chief of the fraud detail in the Portland Police Department for comment. He thought there might be many instances where the section would be needed. Mr. Paillette said he had included the section because he felt there was a good chance that there would be a wrongful disposition of property made that would not amount to "depriving" or "appropriating" and that kind of circumstance should be protected.

Representative Elder suggested that the section be deleted from the draft but held in readiness so that if a loophole were later discovered in the code, it could be restored. The committee agreed.

Next Meeting

A date for the next meeting of the subcommittee was discussed. It was agreed that Mr. Paillette would check with each member and attempt to find a date that would be acceptable to everyone.

The meeting was adjourned at 2:30 p.m.

Respectfully submitted,

Mildred E. Carpenter

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission