Tape #78

Side 1 only (Play at 1 7/8)

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Seventeenth Meeting, July 7, 1969

Members Present:	Mr. Robert Chandler Mr. Bruce Spaulding
Members Excused:	Chairman John Burns
Members Absent:	Representative Douglas Graham
Staff Present:	Mr. Donald L. Paillette, Project Director Mr. Roger D. Wallingford, Research Counsel
Others Present:	Judge James M. Burns
Agenda:	Business and Commercial Frauds, P.D. #1 (Sections 6 to end) (Article 19)

In the absence of Chairman Burns, Mr. Paillette acted as Chairman and the meeting was called to order at 1:30 p.m. in Room 315, Capitol Building, Salem, Oregon.

The minutes of the meeting of June 13 were approved.

Business and Commercial Frauds

Mr. Paillette noted that at the June 13 meeting, the subcommittee had considered sections 1 through 5 although the definitions in section 5 had not been approved.

Mr. Wallingford pointed out that the plan was to look at sections 6, 7 and 8 and then go back to the definitions in section 5.

Section 6. Sports bribery; Section 7. Sports bribe receiving; Section 8. Tampering with a sports contest.

Mr. Wallingford said that sections 6 and 7 were bribery statutes while section 8 related to tampering -- all three sections pertaining to sports events. He suggested that the language in section 7, subsection (1) "upon an agreement or understanding" be changed to "with the intent" to conform with the preference of the subcommittee in earlier sections of this draft.

Judge Burns asked if "sports participant" would apply to a yell leader.

Mr. Wallingford replied that there had been some discussion about the definition of "sports participant" in section 5, subsection (2), as to what "or any other person directly associated with a player, contestant or team member" would include. At that time he had mentioned an agent as an example. Since then, he said, he had thought it over and the only other person he could think of was a team owner. The question in his mind, he added, was whether it would cover the spouse of a professional athlete in the case of someone trying to bribe her to influence her husband. The question, he concluded, was what "directly associated" meant.

Judge Burns wondered just who was covered by the phrase, "directly associated with a player, contestant or team member."

Mr. Wallingford suggested that section 6 could apply to the agent of a professional baseball player, for instance, who could possibly be bribed to influence the player in some way. Under section 6, he thought it might be possible to get the man who had offered the bribe, but under section 7, it might not be possible to get the agent because of the phrase in subsection (1) "that he will thereby be influenced not to give his best effort in a sports contest." In this case, you would not be bribing the agent "not to give his best efforts." You would be bribing the agent to influence the player.

Mr. Paillette felt that since the participants and the officials were covered, it would pretty well take care of any problem as far as the real effect on the outcome of the contest were concerned. He thought it would be rather tenuous to get into third parties in this situation.

Mr. Chandler recalled that the problem in college sports had been with third party involvement.

Judge Burns pointed out that someone ultimately passed the money along to the player and some player ultimately agreed to accept the bribe. Everyone who presumably helped pass the money along could be tried under the Bribery Section here.

Mr. Wallingford noted that the definition of "sports participant" could be limited by saying after "trainer", "or any other active participant in a sports contest."

Mr. Spaulding thought that the fact that the definition of "sports participant" was broader than was needed would not adversely affect the crime stated in section 7, subsection (1).

Mr. Paillette agreed that there was no damage done in this way.

Mr. Wallingford felt that it even informed a little better because it says, "gives his best effort in a sports contest" and he did not know how one could talk in terms of an agent or an owner giving his best efforts in a sports contest because he would not be a participant.

Mr. Chandler moved that sections 6 and 7 be approved as amended and the motion carried.

Mr. Paillette reported that he and Mr. Wallingford had discussed the tampering concept in section 8 previous to the meeting. Racing, he said, is the area mostly involved in this statute, although it could involve boxing as well. The only statutes we now have in this area are the ones on racing, boxing and wrestling, he added. He felt "tampering" was a pretty hazy term but pointed out that Michigan and New York had both used that term, as well as the MPC.

Mr. Wallingford said that after some thought on this section, he felt the language "tampers with any sports participant, sports official" raised a lot of questions in his mind about what is really meant. He thought it made more sense to tamper with an animal or equipment. For example, a pitcher using a spitball contrary to the rules governing baseball with intent to influence the outcome of the game would be guilty under this statute because he would be tampering with equipment involved in the operation of the sports contest contrary to the rules and usages governing the contest.

Mr. Chandler wondered if that conduct would not normally be handled by the sports officials under the rules of the game.

Mr. Wallingford agreed that it would, but, he wondered, what if an unhappy manager on the other side wanted to sign out a complaint under this statute.

Mr. Spaulding wondered then, exactly what it was we were trying to cover.

Mr. Chandler gave as an example, the situation where someone puts epsom salts in the team's water bucket.

Mr. Paillette said that sort of thing is the only kind that is not covered in our existing statutes. Horse racing is amply covered under Chapter 462 and boxing contests under Chapter 463. The only other things we could be talking about are human participants or the equipment, he thought.

Mr. Wallingford wondered also if the statute would cover something like getting the athlete intoxicated before a game or giving him sleeping pills.

Mr. Paillette asked Mr. Wallingford about the MPC commentary on the subject.

Mr. Wallingford replied that they made virtually no comment on it, but he pointed out that the MPC statute was considerably different from this in that they specify "rigging a publicly exhibited contest" and it is not limited to sports. They were concerned at the time about the T.V. shows that were being rigged, he said.

Judge Burns asked if the phrase "contrary to the rules and usages governing such contest" applied to the whole section. In other words, to be a crime, must you not only have the intent to influence the outcome of the contest, but also must you do so contrary to the rules and usages governing such contest.

Mr. Wallingford replied that this was correct.

Judge Burns continued by asking how then, would this section apply to such things as sleeping pills and epsom salts, because there are no rules of conduct governing a baseball game that says anything about those things.

Mr. Wallingford pointed out that in earlier discussion of this situation, it had occurred to him that even using a drug or alcohol on a participant just prior to a game would be covered under this statute because while the rules governing a baseball game are such that the participant is not supposed to be intoxicated or drugged, that rule applies only to him, not to the third party who got him drunk or drugged.

Mr. Spaulding observed that in that case, it was limited to what was in the rules.

Judge Burns said that it was limited to something that might happen on the field.

Mr. Wallingford reported that Mr. Paillette had suggested using the word "statute", incorporating all the present statutes relating to boxing, racing and wrestling.

Mr. Paillette read his suggestion: "A person commits the crime of tampering with a sports contest if he tampers or interferes with any sports participant, sports official, animal, equipment or thing with the intent to prevent a sports contest from being conducted in accordance with the statutes, rules and usages purporting to govern it." He was not sure that this language would clear the objections to section 8, however. He said that if the subcommittee felt there was an area here that was not presently covered, all that would be needed of Chapters 462 and 463 would be to have them conform with whatever grading provisions are eventually decided upon.

Judge Burns asked if athletes were not given drugs at present.

It was brought out by the subcommittee that it is quite common for athletes to be given pain killers, cortizone shots in their elbows, weight retention pills and amphetamines (as in diet pills) for added energy.

Mr. Paillette asked if the subcommittee thought that this was a necessary section.

Mr. Chandler replied that he felt there should be something on it.

Mr. Paillette then asked Judge Burns what he thought about it.

Judge Burns said the question he had was whether there was an evil in the State of Oregon that is going to be stamped out with this sort of statute.

Mr. Wallingford replied that presently, Oregon has no problem. In researching this area, he said, he found that Oregon has some of the most stringent laws in the United States and perhaps this is the reason why there is no problem.

Judge Burns' opinion was that there was no severe problem or even an identifiable one. His concern was with passing a statute that sounded good and then finding that it covers conduct which was heretofore not criminal, thus making work for the D.A.'s, the courts and the prisons.

Mr. Paillette asked if anyone wanted to make a motion to amend this section or adopt it or reject it.

Mr. Chandler then moved to adopt section 8 as written.

After more discussion, Judge Burns suggested that since there were only two subcommittee members present, it might be well to go along and let them discuss it later. This was agreeable with the other members.

Section 9. Defrauding secured creditors.

Mr. Chandler asked about the term "secured creditor." He wondered if a person had to be a recorded secured creditor in this case.

Mr. Wallingford thought he would have to have filed a financial statement under the Uniform Commercial Code.

Mr. Paillette read the definition of "security interest" from the Uniform Commercial Code which defined it as "an interest in personal property or fixtures which secures payment or performance of an obligation...." It was pointed out that it did not say anything about whether or not the security interest needed to be recorded.

Mr. Wallingford then clarified this for the subcommittee by saying that the definition is not limited to the interest being recorded, but that the recording statutes apply when a person wants to protect his security interest. Some states have much broader statutes, he explained, making it a crime to deal with property subject to security interest for any reason, without a need to show an intent to hinder enforcement of that interest. For example, if you bought a refrigerator which was secured, then needed money and sold it to your neighbor, that would be a crime. But in this section you would have to have the intent to hinder enforcement of that interest, so that if you kept your payments up, it would not make any difference what you did with the refrigerator.

Judge Burns asked if this section did not create a much broader scope of criminal behavior than present Oregon law and was told by Mr. Wallingford that it did.

Mr. Wallingford noted that other than the question of larceny by bailee, the only other statute in point is ORS 29.520 which provides for a civil arrest in an action to recover the possession of personal property when it is being concealed, removed or disposed of with intent to deprive the creditor of the benefit thereof.

Mr. Paillette noted that Michigan commentary points out that the gravamen of the crime is interference with enforcement of a lien and not the deprivation of the property. The MPC draftsmen felt that there was need for some penal law in this area but they thought many of the laws went too far by providing felony penalties for acts such as removing encumbered property from the county or selling the property without consent of the secured creditor.

Mr. Chandler cited a case he had heard of where a person bought a local furniture store. He paid cash for most of his goods for the first three or four months, then ordered much more which he charged. One morning he was gone, along with all the goods. He was last heard from in some small California town where he was operating the same way. Mr. Chandler thought those people who furnished his goods would have an interest in him until he paid them.

Mr. Wallingford agreed and noted that this statute is aimed more at that sort of business fraud than it is at the private consumer situation.

Mr. Spaulding noted that this section would also apply to the person who bought all the goods from the furniture dealer, if he had bought them with intent to hinder the enforcement of the security interest.

Mr. Paillette pointed out that section 9 was a fairly common type of statute, not only in recent revisions, but in most states.

Mr. Wallingford agreed that it was and reminded that as the MPC pointed out, some states have more severe statutes than this one and provide felony penalties without having to show an intent to hinder enforcement. There are situations where a person might remove property subject to security interest from the county in violation of the contract and sell it before it is paid for, not necessarily with the intent to hinder enforcement of it but just because he wanted to sell it. In this case, the seller probably figures he can continue making the payments on it but something might come up which would make that impossible. Of course, the creditor would have no security then, unless he had taken other security. Under the grading this would be a misdemanor.

Mr. Spaulding felt that this section attacks the problem very well.

Mr. Wallingford pointed out that this statute is part and parcel of the two that follow. This one applies to judgment creditors, the next one to unsecured creditors and the third, to fraud and insolvency.

Mr. Paillette noted that the requirement of "to hinder enforcement" limits the scope considerably.

Mr. Wallingford added that this statute is very close to ORS 29.250 which provides for civil arrest for the same situation.

Mr. Chandler asked how one would go about making a civil arrest.

Judge Burns explained how a civil arrest would be handled, but added that it was hardly ever used because it was so complicated. There is a form of it in the judgment creditor proceedings, he said, where a judgment creditor is cited in to give testimony concerning his assets. If he does not show up, you then get an order telling him to come in or be held in contempt. If he fails to show up then, you get a warrant charging contempt. In this case, he added, you are using the coercive power of the court to enforce payment of a bill.

Mr. Spaulding disagreed. He said you were only making him come in to answer questions. He is not being arrested for failing to pay his bill. Of course, he admitted, the reason behind this is to make him pay the bill.

Judge Burns stated that essentially, if a person is getting ready to defraud his creditors, with certain types of judgments, he could be subject to a civil arrest.

Mr. Spaulding wondered if this attacked the same conduct as larceny by bailee.

Mr. Wallingford said the intent requirement was different.

Judge Burns stated that larceny by bailee would be intent not to honor the bailee agreement.

Mr. Spaulding added that it would be intending not to keep the agreement according to the nature of his trust.

Judge Burns thought that in so doing, he would undoubtedly be found to have the intent to hinder enforcement of the security interest. He asked Mr. Paillette if the fraud section retained any of this area, so that the larceny statute was still included.

Mr. Paillette replied that larceny by bailee (165.010) would be covered by theft by deception. However, he was not sure it would cover the intent to hinder enforcement without the "taking" element.

Judge Burns wondered what would happen if he were to drive a mortgaged car to Washington, an act which traditionally has been a crime. This would be a violation of section 9, he thought. He would be removing mortgaged property from the state. Suppose he then missed the next three payments. That would certainly ensure getting the case to the jury because of the intent to hinder enforcement of the security interest, he felt.

Mr. Paillette noted that under embezzlement by bailee, the intent is explained by the words, "one who embezzles or wrongfully converts to his own use...with intent to convert to his own use...or injures, destroys, sells, gives away, or removes from the county where situated ...when obtained without the written consent of the bailor...or fails, neglects, or refuses to deliver, keep, or account for, according to the nature of his trust."

Mr. Spaulding said the thing that bothered him was that under that definition a person would be guilty if he just removed the car from the county where it was mortgaged, regardless of his intent.

Judge Burns observed that it would be pretty hard to find a combination of circumstances where you could prove the intent to hinder the enforcement of security interest and not also prove the broader intent as described in this traditional statute. He said that if a person took a car to Washington and did not make the next three payments, you still would have a jury question of whether or not he intended to convert it to his own use. Otherwise why would he have taken the car out of the state and why would he have neglected to make the regular payments on it.

Mr. Paillette explained that under the Theft Draft, this would not necessarily be theft by deception, but simply theft. Under the definitions of "appropriate property of another" this would amount to an unlawful appropriation of property, he said.

Mr. Wallingford asked if the term "owner" was used in the theft statute.

Mr. Paillette indicated that it was. "Owner of property taken, obtained or withheld, or owner means any person who has the right to possession thereof superior to that of the taker, obtainer or withholder" was the language used.

Mr. Wallingford pointed to that as one of the problems under the definition of "owner." A debtor cannot commit theft against his creditor by disposing of property subject to a security interest, since the creditor's right to possession is not superior to that of the debtor.

Mr. Paillette thought that was a good point. He added that under subsection (3) of section 7 it says "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 the 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 the conditional sale contract or other security agreement."

Mr. Wallingford said that was the reason he felt that a debtor cannot commit theft against his creditor.

Mr. Paillette recalled that when this had been discussed in this subcommittee at the time it was adopted, the feeling was that most of these agreements would be covered by a specific agreement to the contrary in the conditional sale contract.

Mr. Wallingford noted that California has a statute which provides a criminal penalty for a debtor who disposes of his own unencumbered property with intent to defraud, delay or hinder his creditors. The subcommittee agreed this statute was much too broad to be considered here.

Mr. Paillette mentioned that while he was in Michigan for the Code Revision Seminar, one of the discussions had been that since not only the states, but the federal government now have projects to revise their criminal statutes, and particularly since they are all drawing on similar common sources such as the MPC, it is desirable to get as much uniformity as possible. It was suggested, he continued, that a section be examined, adopted if it appears to be desirable, otherwise rejected. In other words, he explained, if there is no good reason to reject it, it is probably desirable to include it.

Judge Burns noted that one of the problems with code revision which ends up being code expansion is that you force a further artificial process into police and district attorney activity. In other words, someone must make the decision of where to place the police and where to put the prosecutors; which crimes to prosecute and which ones not to prosecute. One of the evils of the system, he thought, was the fact that distinction is drawn by law enforcement officers instead of by the legislature. He thought this was a sound policy reason to be careful in adding sections just to be adding sections. He felt it did not do any good to include new statutes if the district attorney was going to ignore them in a majority of the cases.

Mr. Chandler's opinion was that the state does have responsibility whether the district attorney wants to prosecute or not and he thought the state has a real stake in maintaining the validity of the ordinary commercial process, i.e., the sale, the mortgage, the granting of credit, the use of the check as a means of transferring money and the credit card.

Judge Burns wondered, however, if you safeguard or enhance that state by passing laws that are promptly ignored by district attorneys.

Mr. Spaulding voiced the opinion that while the district attorneys did not particularly like those statutes, they were not entirely ignored. He added that he thought it was legally and morally wrong for a person who has given a security interest by agreeing to use that property entrusted to his care for certain things and under certain conditions to violate those agreements with intent to destroy that security interest. He thought that this should be criminal conduct.

Judge Burns questioned though what would happen when a district attorney has all his deputies busy with armed robberies, burglaries and other such so-called major offenses and when the police captain has most of his manpower engaged in similar cases. What, he wondered, is the point of having a statute like this if it is not going to be enforced.

Mr. Chandler said that it seemed to him that this particular statute would not involve a great burden on district attorneys and police officers.

Mr. Paillette observed that the subcommittee faced a problem much as it had with the bad check section. He supposed the criminal code could minimize to some extent the differences of counties. He was sure that it could not be eliminated completely because there will always be some district attorneys who will work better on certain types of crimes. Non-support is a good example. There is a wide variety of enforcement from county to county in this state. It is clearly a felony but some district attorneys do not want to bother with it and yet some make it one of their major projects. So, he concluded, he did not think we should take a position that we will not pass a statute because we do not think the district attorneys will enforce it.

Mr. Spaulding moved that section 9 be adopted and the motion carried without opposition.

Section 10. Defrauding judgment creditors.

Mr. Wallingford pointed out that this section concerned the same type of conduct as section 9 except that it referred to judgment creditors and was new to Oregon law.

Mr. Spaulding said it seemed to him that the judgment creditor has sufficient civil remedies to protect himself if he will use them. He did not think that where the debtor has not given a security interest in property, his conduct should be criminal.

Mr. Chandler asked if it was not presently a crime in Oregon to defraud a judgment creditor.

Mr. Spaulding said it was sometimes hard to know whether a financial institution was solvent. He recalled a civil case in 1932 where a school district had deposited several thousand dollars in a bank in Independence. The next day that bank, along with nearly every bank in Oregon, closed its doors. It was impossible to prove whether the bank was at the time of deposit, insolvent, or if the events of that night and the next day resulted in its insolvency.

Mr. Spaulding wondered where the definition of "insolvent" came from and Mr. Wallingford replied that it came from the Oregon Banking Code.

Mr. Chandler moved that section 11 be approved and the motion carried unanimously.

Section 12. Fraud in insolvency.

Mr. Wallingford explained that this statute protects the unsecured creditor.

Mr. Chandler asked if this was not the federal crime relating to bankruptcy and Mr. Spaulding agreed that it was.

Judge Burns wondered if this would involve a pre-emption problem.

Mr. Wallingford said that 18 USC 152 makes it a crime to fraudulently dispose of unsecured assets in anticipation of a federal bankruptcy proceedings.

Mr. Spaulding thought it would cover other things besides a federal bankruptcy.

Judge Burns asked if there would not be a pre-emption problem with subsection (1) which says "destroys, removes, conceals, encumbers, transfers, conveys...."

Mr. Wallingford really did not know, he said. Apparently Michigan and New York felt there was no problem because their commentary did not touch on that.

It was determined that neither New York, Michigan, nor the MPC had any commentary on this problem of pre-emption. New York indicated that they formerly had a penal law provision on this subject. It said, "the former law in New York was derived from the early revised statutes and has remained essentially unchanged for over 100 years."

Mr. Chandler wondered if this section would apply to those persons under the State Wage Earners Plan. It was agreed that it would.

Mr. Wallingford noted that this draft would not only cover the debtor; it would also cover a third party under subsection (2) which says, "obtains any substantial part of or interest in the debtor's estate."

Mr. Spaulding answered that it is not now a crime, for instance, to transfer your property to your mother-in-law if a judgment is to be instituted against you. It can be shown to the jury at the trial that you did cover up, however, and a creditor would have a right of action to sue to satisfy the transfer.

Judge Burns asked if it could not also become a federal crime in the case of bankruptcy.

Mr. Spaulding thought that it could be but that it would require some intent with reference to the bankruptcy.

Mr. Wallingford noted that under present civil remedies (ORS 95.070) every transfer wtih intent to evade judgment is declared void. Under ORS Chapter 23, there is a procedure to bring the evader before the court, examine him and issue a restraining order to tie up his property. If he does not cooperate, there is a provision for civil arrest.

Judge Burns wondered if this section would affect an insurance policy and if such a policy would be considered "property."

Mr. Paillette read the definition of "property" from the Theft Draft as meaning "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 a contract."

Mr. Wallingford thought that the cash interest in a life insurance policy would be property.

There followed a discussion on the difference between a secured creditor and a judgment creditor and also whether they both should have the same benefits under the statutes.

Mr. Chandler had a question about whether county boundaries should be material as noted in subsection (1).

Mr. Wallingford explained that the reason "county" is specified here is because it takes the county sheriff to levy an execution. It is not necessarily the county in which the judgment is handed down, but it is directed to the county in which the property is located.

Mr. Chandler moved that section 10 be approved. The motion carried with Mr. Spaulding voting no.

Section 11. Receiving deposits in a failing financial institution.

Mr. Wallingford pointed out that "financial institution" is defined in section 1.

Mr. Chandler took this to mean that if he bought something with the intent to defraud Mr. Spaulding, he would be as guilty as the one who sold it.

Mr. Spaulding cited a hypothetical situation where he has supposedly been kind to a fellow who is now in bad shape financially. The man shows his appreciation by telling Mr. Spaulding that he is going to have to go into bankruptcy, but since he does not want to hurt his friend, he will pay him 9¢ on the dollar and then take bankruptcy.

Judge Burns noted that this was presently a voidable preference.

Mr. Spaulding agreed, but it is not now a crime, he said, to receive that payment. This section would make it a crime.

Mr. Wallingford did not think there would be an intent to defraud in a case like that so long as the creditor had a right to the money.

Judge Burns reminded that you would know he was thereby defrauding the other creditors and wondered if that would not be intent to defraud. He pointed out that if another creditor would get 100¢ on the dollar while he (Judge Burns) would get only 50¢, the other creditor would be trying to defraud him. It would be a jury question,he thought.

Mr. Chandler noted that you would have to assume that the person who got paid knew that it would have some effect on the other creditors, which in this case would be so.

Mr. Wallingford replied that this type of conduct is fairly common in cases of bankruptcy. He did not know, however, that taking what is rightfully yours would involve any element of fraud.

Mr. Spaulding pointed out that it was an agreement to defraud the other guy.

Mr. Chandler thought it would be pretty hard to prove that the person taking the payment had an intent to defraud the other creditors.

Judge Burns disagreed. He thought it would certainly get to the jury.

Mr. Spaulding cited another case of where a person goes into a law office and the lawyer makes him pay a substantial fee in advance, knowing that he is going to go into bankruptcy.

Judge Burns questioned whether or not this is the kind of conduct we want to get at under the criminal code. Why not leave it up to the bankruptcy courts, he asked. What is wrong with leaving it as a civil remedy?

Mr. Paillette referred to the commentary which quoted the Commercial Law Journal (1966). "There is a current demand for broad penal legislation in the field of business and commercial bankruptcy frauds. The newest and fastest growing business is the 'planned bankruptcy.' In essence, the planned bankruptcy is a merchandising swindle based on the abuse of credit, either legitimately or fraudulently established." He pointed out that this statute was not aimed so much at the individual — although it would cover such conduct -- as the big-time operators.

Mr. Chandler moved to approve section 12. The motion carried unanimously.

Section 13. Misapplication of entrusted property.

Mr. Chandler voiced the opinion that subsection (3) which includes the language "administrative and judicial rules" was quite broad.

Judge Burns asked how the State Sanitary Authority would be affected by this section.

Mr. Chandler did not see how it would apply under "misapplication of entrusted property."

Mr. Wallingford explained that this section is intended to reach intentional recklessness in the handling of certain kinds of property by those acting in a fiduciary capacity which would include trustees, administrators, executors, and attorneys at law.

Judge Burns asked what type of activity would be affected by this statute. Suppose, he said, that he was the guardian of an estate and had in his possession real property, stocks and bonds. What type of action would be criminal under this section.

Mr. Wallingford replied that it could involve using the funds as an investment in a relative's scheme to make money. Suppose the plan was quite obviously a poor one, whereupon the relative lost his shirt or squandered the money, he said.

Mr. Spaulding pointed out that there were laws and rules about what a trustee or guardian could invest in. If such a person made a substantial investment in which substantial risk of loss was involved, he would be guilty under this section.

Judge Burns asked what would happen if, for instance, he was a skipper of a ship owned by someone else and worked out of Warrenton. Suppose he went out over the bar in violation of the Coast Guard regulations. Would that be a crime, he asked, and should it be. It would be a misapplication of entrusted property, in violation of administrative rules, and it would certainly involve a substantial risk of loss.

Mr. Chandler thought so, if it was done without the permission of the owner.

Mr. Wallingford noted that under our definition of "fiduciary", he would not be acting as a fiduciary.

Mr. Paillette pointed out that under our present statutes, the conversion of trust property requires an intent to defraud.

Mr.Chandler noted that although this section does not say that specifically, it does say that this requires knowledge that the misapplication is unlawful or that it involves substantial risk, whether fraud is intended or not. He said he did not see how you could have intent to defraud in this section if what you are trying to cover is the situation where there is a"substantial risk of loss or detriment."

Mr. Spaulding indicated his agreement and noted that what we are talking about here is "recklessness."

Mr. Chandler was of the opinion that this section is actually making a criminal sanction for bad judgment.

Mr. Paillette said that it seemed to him that with public officers, there is a good public policy argument for holding them to criminal sanctions for reckless use of the property entrusted to them. He did not know, however, whether we should get into the area of private trusts and guardianships where there is no criminal intent.

Judge Burns referred to what he called "the broad definition of misapplication here." He mentioned the fact that the State Treasurer can do certain things with the monies of the State of Oregon. If he gets out of line with those monies, he would get into trouble. But, he said, he does not have a piece of real property and the types of property that guardians normally have and deal with. If they intentionally do something that constitutes a violation of some administrative regulation, this makes it a crime, even though it does not in fact involve actual loss, so long as it involves a substantial risk of loss, or so long as the misapplication is intended. He said he supposed there was a good reason for some of this language but he felt that this could involve some not-too-unusual- transactions that would not normally be thought of as being criminal.

Mr. Chandler observed that there are all kinds of people -- trustees, guardians, executors, administrators and receivers -- some of whom are going to act poorly out of intent to defraud and some of whom are simply going to act out of poor judgment. He said he agrees that it is tough to say we are going to penalize a man for exercising bad judgment, but at the same time, he would hate to deny protection to those who suffer the actual loss because of another's bad judgment.

Mr. Pailette reminded the subcommittee that section 6 of the Bribery Article which covers official misconduct was intended to cover this kind of recklessness with public funds.

Mr. Wallingford agreed, but added that it would have a more severe penalty.

Mr. Paillette pointed out that there are other statutes now such as unlawful use of funds by the State Treasurer making profit out of public funds, disposal by treasurer of money in his custody, making profit out of money in hands of port commissioner or in hands of school clerk, all of which do not require an intent to defraud.

Mr. Wallingford referred to ORS 162.630 which says that "All public officers...having and holding in their possession or custody public funds or money in trust for any person by virtue of their office...shall, as soon as practicable pay the same to the county treasurer...." Failure to comply with this section is a felony punishable upon conviction by 20 years or $50,000 fine, he said.

Mr. Paillette cautioned the subcommitte to leave no loopholes in the law, particularly with respect to public servants. If this section is not approved in the other subcommittee, a provision should be included in this draft. The question remains, however, whether or not we want to reach non-public fiduciaries who engage in reckless conduct with funds or property entrusted to their care by making that conduct criminal.

Mr. Chandler was of the opinion that recklessness was something more than just bad judgment.

Mr. Spaulding pointed out that the statute does not use the word, "reckless."

Mr. Chandler thought that "substantial risk of loss or detriment to the owner or beneficiary" would certainly mean reckless conduct. He added that if we are going to set up these relationships,such as trustees, guardianships, executors, etc., and make the state responsible for the proper execution of them, then reckless conduct in their hands must not be tolerated.

Mr. Spaulding said he supposed the largest percentage of guardianships were shall amounts held in trust for children. There might be a case, he said, where the mother would make an investment which resulted in a substantial loss. If, for instance, she was only trying to increase the amount of money in trust for her child in order to send him to college, should she be prosectued?

Mr. Paillette's opinion was that with respect to the culpability element, if this section is to be retained, it should be made conjunctive, i.e., it should require knowledge that the act is unlawful and that it also involves a substantial risk of loss. He thought both elements should be required rather than either, or and felt that this was the intent of the MPC as well. That way, he noted, if you get into these other regulations, then the burden would be on the state to prove knowledge that the misapplication was done "knowingly" in violation of the law. The Michigan commentary indicated that the state would have to prove both elements by stating:"The culpability element requires (a) knowledge that the actor is misapplying, i.e., acting contrary to legal rules governing the care of the property in question and (b) knowledge that what is done with or to the property involves substantial risk of loss or detriment to the actual owner or beneficiary."

Section 13 was amended by changing "or" to "and" in the third line and a motion was made to approve the section as amended. The motion carried.

Section 14. Issuing a false financial statement.

Mr. Paillette reported that we now have statutes similar to this in Chapter 165, but thought they would be repealed by this section. Mr. Chandler wondered if subsection (2) covers the situation where one is required by the bank to furnish an annual statement of his financial condition, and he just drops them a statement saying there has been no material change in the past 12 months.

Mr. Wallingford pointed out that most of these financial statements are furnished by auditors, bookkeepers and CPA's who affirm one's financial condition knowing it to be false. He assumed that it would reach them as well as the surety situation, he said.

Mr. Chandler moved that section 14 be approved. The motion carried.

Section 15. Obtaining execution of documents by deception.

Mr. Wallingford pointed out that one of the purposes of this statute is to cover certain types of documents which might have some pecuniary significance but are not within the definition of "property" in the Theft Article. He reported that there are numerous statutes covering this type of operation with penalties ranging from 10 days to 30 years. He explained that "benefit" was defined in the Bribery Article as follows: "Benefit means any gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary." He suggested that that definition be added to subsection (2).

Mr. Paillette reported that section 8 of the Forgery and Related Offenses Article would coincide to a certain extent with this section. It refers to fraudulently obtaining a signature and provides that,"A person commits the crime of fraudulently obtaining a signature if with intent to defraud or injure another or to acquire a substantial benefit for himself or another he obtains the signature of a person to a written instrument by means of any misrepresentation of fact which he knows to be false."

Judge Burns suggested that there might be some overlapping here by the language "by deception obtains the execution."

Mr. Wallingford thought there would be. He referred to the summary on this section which mentions "execution of releases, wills, leases, trust agreements, licenses, and election certificates."

Judge Burns wondered if this would apply to insurance adjusters.

Mr. Paillette recalled that section 8 of the Forgery Article was discussed at some length by this subcommittee with respect to insurance adjusters.

Mr. Spaulding said he did not understand the use of the word, "purporting" in subsection (1). He wondered how that would apply.

Mr. Chandler noted that what we are saying here is that if a person obtains the execution of a document which he believes at the time to be good, but which later turns out to be worthless for some reason, he would be guilty under this section.

Judge Burns suggested that the subcommittee might like to take another look at this section in light of the related section in the Forgery Article.

Mr. Chandler's opinion was that the related section in the Forgery Article was referring to the crime of obtaining property by forgery whereas this section was attempting to cover odds and ends such as making false statements to obtain a fishing license.

Mr. Wallingford agreed that this was one of the main differences in the two sections. Some of these instruments do not require anyone's signature, he added.

Mr. Spaulding moved to approve section 15 with the addition of a benefit definition in subsection (2). The motion carried.

Mr. Paillette reported on correspondence he had received via Senator Burns from George Van Hoomissen regarding pyramid sale of distributorships. The correspondence referred to a letter from a man in Nevada to the City Attorney of Portland who sent it to Mayor Schrunk, who then referred it to Mr. Van Hoomissen's office. The purpose of the correspondence was to promote legislation which would prohibit the selling of distributorships in an endless chain scheme. Those who purchase such distributorships pay a considerable portion of their investment for the chance to participate in this scheme. Should they enlist others in the scheme, they will then be rewarded financially.

Mr. Paillette asked if the subcommittee felt there should be a criminal statute similar to California's which states: "Every person who contrives, prepares, sets up, proposes or operates any endless chain is guilty of a misdemeanor. As used in this section 'an endless chain' means any scheme for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons in the participation in this scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant. 'Compensation' as used in this section does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme."

The Portland City Attorney indicated that Portland has a section (Article 16-1121 of the Portland Police Code) which deals with chain letters but that they have nothing dealing with this kind of situation.

Mr. Chandler suggested that Mr. Paillette write to California to find out what results they have had with their statute before drafting anything on the subject.

The meeting adjourned at 5:15 p.m.

Respectfully submitted,

Connie Wood
Criminal Law Revision Commission