

May 7, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 4. Theft by Deception

1. A person is guilty of theft if he obtains or exercises control over property of another by deception and with an intention to deprive him thereof.

2. For purposes of this section, deception occurs when a person intentionally:

A. creates or reinforces an impression which is false and which that person does not believe to be true, including false impressions as to law, value, knowledge, opinion, intention or other state of mind. Provided, however, that an intention not to perform a promise, or knowledge that a promise will not be performed, shall not be inferred from the fact alone that the promise was not performed; or

B. fails to correct a false impression which he previously had created or reinforced, and which he does not believe to be true, or which he knows to be influencing another whose property is involved and to whom he stands in a fiduciary or confidential relationship; or

C. prevents another from acquiring information which is relevant to the disposition of the property involved; or

May 7, 1973

D. fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

3. It is no defense to a prosecution under this section that the deception related to a matter that was of no pecuniary significance, or that the person deceived acted unreasonably in relying on the deception.

May 7, 1973

COMMENT

Source: This section follows Section 637:4 of the New Hampshire Criminal Code, except for subsection 3.

Current Maine Law: Chapter 59 of Title 17, Fraud and False Pretenses, contains 38 separate sections which relate, in part, to the provisions of this draft section. Some of these sections of chapter 59 define crimes which closely parallel the conduct encompassed by this draft, for example, section 1601:

Whoever, designedly and by any false pretense or privy or false token and with intent to defraud, obtains from another any money, goods or other property, the making of a loan or credit, the extension of credit, the discount of an account receivable or what is represented to be an account receivable, or the making, acceptance, discount, sale or indorsement of a bill of exchange, bank check or promissory note, or his signature to any written instrument, the false making of which is forgery, or whoever knowingly, and with intent to defraud, sells, conveys, mortgages or pledges to another personal property on which there is an existing mortgage or to which he has no title, without notice to the purchaser of such mortgage or of such want of title, is guilty of cheating by false pretenses and shall be punished by a fine of not more than \$500 or by imprisonment for not more than 7 years. A promise, if unconditional and made without present intention of performance, will constitute a false pretense within this section.

Under this statute, an unconditional promise made without an intention to perform the promise, is a false pretense. *State v. Austin*, 159 Me. 71 (1963).

Several Maine cases repeat the rule that a false statement of opinion cannot serve as the basis for a conviction under this statute. See e.g., *State v. Deschambault*, 159 Me. 216 (1963), relying on *State v. Paul*, 69 Me. 215 (1879). But if there is a misrepresentation that is within the statute, it is only necessary that the victim have relied on it, *Ellis v. State*, 276 A.2d 438 (Me. 1971), and it makes no difference that he may have been inordinately gullible in doing so. *State v. Mills*, 17 Me. 211 (1840) (otherwise "the weak and imbecile, the usual victims of these pretenses, would be left unprotected", at p. 218); *State v. Deschambault*, supra at 222 (dissenting opinion of Williamson, J.). There is, however, some indication that

May 7, 1973

"puffing" (political puffing in the solicitation of campaign funds) cannot be the basis for a false pretense prosecution. See *State v. Binette*, 159 Me. 231, 233 (1963).

The general rule to which all of the cases seem to cleave, however, is that the "pretense must relate to an existing fact or a past event." *State v. Deschambault*, 159 Me. 223, 226 (1963). The last part of section 1601, relating to false promises, is seen as an exception.

Several of the remaining sections of Chapter 59, Fraud and False Pretenses, are specialized instances of the sort of cheating prohibited by section 1601. For example, section 1608 deals with false pretenses based upon holding one's self out as being deaf, dumb, or otherwise disabled; section 1602 creates the offense of obtaining long distance telephone service by false pretenses; section 1611 deals with disguising horses. Other portions of Chapter 59 are concerned with fraudulent practices which do not necessarily result in a victim being parted from his property, e.g., section 1620 (false advertising); section 1613 (being a party to a fraudulent conveyance).

The Draft: This section does not purport to substitute for all of the offenses in Chapter 59. By dealing comprehensively with obtaining property, as broadly defined in section one of this chapter, it does, however, obviate the need for specialized statutes, such as the present provision relating to telephone service.

The format is followed in this section which describes the underlying conduct as obtaining or exercising control over property of another. The requirement of an intention permanently to deprive is also included.

The means for obtaining the property is defined by the four subsections of section one. These undertake to describe the sort of cheating which goes beyond the limits of what is to be tolerated in a commercial society. Subsection A of section one rests on the premise that when the actor misstates his own state of mind, e.g., that he has an opinion which he does not, in fact, have, there is as much overreaching which ought to be dealt with by the criminal law as where he misrepresents the quantity of goods he holds out for sale. The Maine law concerning false promises is continued, but with the safeguard that a failure to perform the promise cannot, by itself, sustain a conviction.

May 7, 1973

Subsection 3 also continues the Maine rejection of caveat emptor in these circumstances. That subsection also is designed to clarify that if the victim parts with his property on the basis of one of the designated falsities, it makes no difference that the falsity related to, for example, the ability of a product to restore youthful vigor, rather than to any falsity of direct pecuniary significance. In these respects, subsection 3 differs from the New Hampshire code and the Model Penal Code provision on which it is based.

May 7, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 5. Theft by Extortion

1. A person is guilty of theft if he obtains or exercises control over the property of another by extortion and with the intention to deprive him thereof.

2. As used in this section, extortion occurs when a person threatens to:

- A. cause physical harm in the future to the person threatened or to any other person or to property at any time; or
- B. do any other act which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships.

May 7, 1973

Comment

Source: This section is based on the New Hampshire Criminal Code, section 637:5.

Current Maine Law: Chapter 121 of Title 17, entitled Threats and Extortion, contains four sections:

§3701: Threatening communications

Whoever makes, publishes or sends to another any communication, written or oral, containing a threat to injure the person or property of any person shall be punished by a fine of not more than \$500 or by imprisonment for not more than 5 years, or by both. If the communication is written and is anonymous or signed by any other than the true name of the writer, the punishment shall be a fine of not more than \$1,500 or imprisonment for not more than 10 years, or by both. If any such threat is against the person or property or member of the family of any public official, the punishment shall be imprisonment for not more than 15 years.

§3702: Intent to extort

Whoever, verbally or by written or printed communication, maliciously threatens to accuse another of a crime or offense, or to injure his person or property, with intent thereby to extort money or to procure any advantage from him, or to compel him to do any act against his will, when such offense is of a high and aggravated nature, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than \$500 or by imprisonment for not more than 2 years; but when such offense is not of a high and aggravated nature, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than \$100 or by imprisonment for not more than 11 months.

May 7, 1973

§3703: Malicious vexation by persons over 16

Whoever having attained his 16th birthday willfully and wantonly or maliciously vexes, irritates, harasses or torments any person in any way, after having been forbidden to do so by any sheriff, deputy sheriff, constable, police officer or justice of the peace, and whoever without reasonable cause or provocation willfully and wantonly or maliciously vexes, irritates harasses or torments any person by communications to or conversation with such person over or by means of any telephone, when such offense is of a high and aggravated nature, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than \$500 or by imprisonment for not more than 2 years; but when such offense is not of a high and aggravated nature, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than \$100 or by imprisonment for not more than 11 months.

§3704: Annoying telephone calls prohibited

Whoever willfully and wantonly or maliciously uses a telephone facility to transmit to another any comment, request, suggestion or proposal which is obscene, lewd, lascivious or indecent; any threat to injure the person or property of any person; or repeated anonymous telephone calls, whether or not conversation ensues, which disturb the peace, quiet or right of privacy of any person, shall be punished by a fine of not more than \$500 or by imprisonment for not more than 11 months, or by both.

Use of a telephone facility under this section shall include all use made of such a facility between the points of origin and reception. Any offense under this section is a continuing offense and shall be deemed to have been committed at either the place of origin or the place of reception.

Since section 3701 and the latter two sections do not involve any transfer of interest in property, they do not relate to this draft section.

May 7, 1973

Under a predecessor to section 3702, it has been held to be an offense to threaten to interfere with the victim's contract with a third party. *State v. Vallee*, 136 Me. 432 (1940). If the threat proscribed by the statute is made, the offense is complete, without regard to the effect the threat might have had on the mind of the victim. *State v. Bruce* 24 Me. 71 (1844). Similarly, there is no requirement under Maine law that the defendant actually obtain the property which his threat is designed to procure for him. *Id.* In this respect, Maine statutes follow the traditional pattern of American extortion or blackmail statutes. See LaFave and Scott, *Criminal Law* 705 (1972).

The Draft: As part of a consolidated law of theft, this section deals with an offense which requires that the defendant obtain property. It is, of course, also possible for a person to be guilty of an attempt to commit this offense under circumstances satisfying the requirements of the law of attempts and where the property is, in fact, not passed to the defendant. As a consummated offense, this section follows the basic pattern of the other theft offenses by requiring that the defendant obtain or exercise control over the property of another with the intent to deprive.

Since it is required that he obtain or control the property by extortion, there is a causal relation introduced between the defendant's threats and the victim's parting with his property. In this respect Maine law, which makes the victim's state of mind irrelevant, is changed. If, however, the defendant threatens the victim with imminent bodily injury, the conduct would be punishable as Criminal Threatening under section 9 of chapter 22. Other threats, which fall short of an attempt to obtain property or to inflict some other criminal harm, are not covered by the Code.

May 7, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 6. Theft of Lost, Mislaid, or Mistakenly Delivered
Property

A person is guilty of theft if he obtains or exercises control over the property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property, and he both

1. fails to take reasonable measures to return the same to the owner, and

2. has the intention to deprive the owner of such property when he first obtains or exercises control over it, or at any time prior to taking reasonable measures to return the same to the owner.

May 7, 1973

Comment

Source: This section is a slight modification of the New Hampshire Criminal Code, section 637:6, which is, in turn, patterned on the Model Penal Code §223.5.

Current Maine Law: There is one statute which specifically relates to the subject matter of this draft section. Title 17, section 2105 provides:

Whoever falsely personates or represents another and thereby receives anything intended to be delivered to the party personated, with intent to convert the same to his own use, is guilty of larceny and shall be punished accordingly.

The prohibition against "stealing" in section 2101 of Title 17 would cover the cases of lost or mislaid property, since the common law of larceny imposed criminal liability under certain circumstances in these cases. The only statement on the subject which seems to appear in the reported Maine cases is from State v. Furlong, 19 Me. 225, 228 (1841) which cites English authorities for the proposition: "If a man lose goods, and another find them, and not knowing the owner, convert them to his use, this is not larceny. Even although he deny the finding of them, or secrets them. But it is otherwise if he know the owner." What is omitted from this brief statement is that, in order for there to be common law larceny when the finder knows the owner or has ready means for identifying him, the intention to steal the property must exist at the time the property is found. If, at the time of finding, the actor intends to return the goods to the owner, but later forms the intent to steal them, there is no common law larceny. See LaFave and Scott, Criminal Law 628 (1972). The general rule in larceny cases, concerning the need for intent and taking to occur at the same time, has been several times affirmed in Maine. See e.g. State v. Coombs, 55 Me. 477 (1868). To property delivered by mistake, the rule is briefly stated in LaFave and Scott at p. 629: "It is well settled that the recipient of the mistaken delivery who appropriates the property commits a trespass in the taking, and so is guilty of larceny if, realizing the mistake at the moment he takes delivery, he then forms an intent to steal the property."

May 7, 1973

The Draft: This section uses the format of the theft chapter obtaining or exercising control over property with the intention to deprive - to continue the common law on the subject, with one major exception. Under this section, the offense may be committed even if the intention to deprive does not coincide with the obtaining of the property. Since there appears to be no sound reason for exculpating a person who starts off as a good samaritan, but later becomes a thief, subsection 2 permits the offense to be defined so as to include the later-formed intent.

May 7, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 7. Theft of Services

1. A person is guilty of theft if he obtains services which he knows are available only for compensation by deception, threat, force, or any other means designed to avoid the due payment therefor. As used in this section, "deception" has the same meaning as in section 4, and "threat" is deemed to occur under the circumstances described in subsection 2 of section 5.

2. A person is guilty of theft if, having control over the disposition of services of another, to which he knows he is not entitled, he diverts such services to his own benefit, or to the benefit of some other person who he knows is not entitled thereto.

3. As used in this section, "services" includes, but is not necessarily limited to, labor, professional service, public utility and transportation service, restaurant, hotel, motel, tourist cabin, rooming house and like accommodations, the supplying of equipment, tools, vehicles, or trailers for temporary use, telephone, telegraph or computer service, gas, electricity, water or steam, admission to entertainment, exhibitions, sporting events or other events for which a charge is made.

Sub B 42

May 7, 1973

4. Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels, restaurants and garages, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception.

May 7, 1973

Comment

Source: The first three subsections of this section are patterned on the New Hampshire Criminal Code, section 582:8. The last subsection is taken from the Pennsylvania Crimes Code of 1970, section 3926 (s) (3).

Current Maine Law: A few specialized statutes, dealing with destruction, as well as theft, are concerned with the theft of services. Title 17, section 2352, for example, deals with tapping the pipes of a water company, while section 2353 relates to interference with gas or electric meters. Section 1602 punishes unlawful obtaining of long-distance telephone service. Section 1617 deals with tampering with fare boxes on a public vehicle. Not all of the relevant statutes are in Title 17, however, In Title 30, for example, there is section 2701 which punishes obtaining food, lodging or other accommodations with intent to defraud. Section 2702 of Title 30 identifies prima facie proof in the latter sorts of cases:

Evidence that lodging, food or other accommodations were obtained by false pretense, or by false or fictitious show or pretense of baggage or other property, or that the person refused or neglected to pay for such food, lodging or other accommodation on demand, or that he gave in payment for such food, lodging or other accommodation negotiable paper on which payment was refused, or that he absconded without paying or offering to pay for such food, lodging or other accommodation, or that he surreptitiously removed or attempted to remove his baggage, shall be prima facie proof of the fraudulent intent mentioned in section 2701. This section and section 2701 shall not apply where there has been an agreement in writing for delay in payment for a period exceeding 10 days.

The Draft: The aim of this section is to provide comprehensive protection to "services". At common law, these things could not be the subject of theft.

Subsection one sets out the means by which services can be unlawfully obtained. The definitions of deception and threat are incorporated from the sections of this chapter which deal with obtaining tangible property by such means.

Subsection two brings within the coverage of this section a common form of misuse of services, i.e., the diversion of services to an unauthorized use.

Sub B 44

May 7, 1973

The presumption defined in subsection four is valuable where direct evidence of deception may be difficult to obtain, but where the burden should properly be on the person who obtained the service and then takes off without making payment. The policy is similar to that contained in Title 30, section 2702, quoted above.

May 7, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 8. Theft by Misapplication of Property

1. A person is guilty of theft if he obtains property from anyone or personal services from an employee upon agreement, or subject to a known legal obligation, to make a specified payment or other disposition to a third person, whether from that property or its proceeds or from his own property to be reserved in an equivalent or agreed amount, if he intentionally or recklessly fails to make the required payment or disposition and deals with the property obtained or withheld as his own.

2. Liability under section one is not affected by the fact that it may be impossible to identify particular property as belonging to the victim at the time of the failure to make the required payment or disposition.

3. An officer or employee of the government or of a financial institution is presumed:

A. to know of any legal obligation relevant to his liability under this section, and

B. to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of his accounts.

May 7, 1973

4. As used in this section,

A. "financial institution" means a bank, insurance company, credit union, safety deposit company, savings and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment; and

B. "government" means the United States, any state or any county, municipality or other political unit within territory belonging to the United States, or any department, agency, or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government or formed pursuant to interstate compact or international treaty.

May 7, 1973

Comment

Source: This section is taken from the New Hampshire Criminal Code, section 582:10. Similar provisions are in many other codes. See e.g., Pennsylvania Crimes Code of 1970, section 3927.

Current Maine Law: There are specialized statutes on this subject relating to the duty of tax collectors to pay over the proceeds collected to the appropriate treasurer, subject to a civil forfeiture for failure to comply with the statutory duty. See e.g. Title 36, section 759. In addition, Title 17, section 2107 includes provisions for punishment of "a public officer, collector of taxes, or an agent, clerk or servant of a public officer or tax collector [who] embezzles or fraudulently converts to his own use, or loans or permits any person to have or use for his own benefit without authority of law, any money in his possession or under his control by virtue of his office or employment by such officer". This statute has been held to create the offense of larceny without a trespass. State v. Rowe, 238 A.2d 217 (1968). The offense under this statute is, however, one against the property of another. State v. Shuman, 101 Me. 158, 160 (1906).

The Draft: The aim of this section is to reach cases where the wrongdoing does not proceed so much against the identifiable property of someone other than the accused, as it involves a culpable failure to carry out a legal duty. In this sense, it lies close to the border between criminality and mere civil failure to perform a contractual obligation. The section dealing with private conduct relates to cases such as where an employer withholds a certain amount from the wages of his employees, upon his undertaking to pay an amount equal to the withholding into a certain fund. Since, if the employee had received his full wages, and then returned a portion to the employer for transit to the fund, there would be a clear case of embezzlement when the employer treats the returned money as his own, this statute provides for the same result in the case where the amount in question does not change hands.

The duty laid on officers and employees of government and financial institutions is commensurate with public expectations of fiduciary conduct. The presumptions in subsection 3 are in recognition of the awareness such persons usually have of the rules governing their handling of property placed in their control.

May 7, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 9. Receiving Stolen Property

1. A person is guilty of theft, if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it has probably been stolen, with the intention to deprive the owner thereof.

2. The knowledge or belief required for subsection 1 is presumed in the case of a dealer who

A. is found in possession or control of property stolen from two or more persons on separate occasions; or

B. has received other stolen property within the year preceding the receiving charged; or

B. has received other stolen property within the year preceding the receiving charged; or

C. being a dealer in property of the sort received, retained or disposed, acquires it for a consideration which he knows is substantially below its reasonable value.

3. As used in this section, "receives" means acquiring possession, control or title, or lending on the security of the property; "dealer" means a person in the business of buying or selling goods.

May 7, 1973

Comment

Source: This section is based on the New Hampshire Criminal Code, section 637:7. Similar provisions are common. See e.g. Proposed Alaska Criminal Code, section 11.21.150.

Current Maine Law: The basic statute is in Title 17, section 3551:

Whoever buys, receives or aids in concealing stolen property, knowing it to be stolen, shall be punished:

1. Value does not exceed \$100. If the value thereof does not exceed \$100, by a fine of not more than \$100 or by imprisonment for not more than 6 months.

2. Value exceeds \$100. If the value thereof exceeds \$100, by a fine of not more than \$500 or by imprisonment for not more than 5 years.

The conviction of the person who stole the property need not be averred or proved. If the stealing was simple larceny and the person restores or makes satisfaction to the party injured for the full value of such property, he shall not be sentenced to the State Prison. If, after conviction, he is again convicted of a like offense, or if he is convicted of 3 such distinct offenses at the same term of court, the imprisonment shall not be for less than one year nor more than 10 years.

The Supreme Judicial Court has recently determined that in order for a person to be convicted under this statute, he must be found to have himself believed that the goods in question were stolen; it is not sufficient for the jury merely to find that a reasonable man would have had this belief. State v. Beale, 299 A.2d 921 (1973). It is also the rule in Maine that a person may be guilty of this offense regardless of whether the goods were stolen outside of the state. State v. Stimpson, 45 Me. 608 (1858).

The Draft: This section retains the core of the traditional receiving crime. It is expanded in two ways, however. One is via the definition of "receives" in subsection 3 which would include the lender as a receiver; the second is via the assumptions in subsection two which seeks to identify the cases where the requisite knowledge is highly likely to exist.

May 7, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 10. Unauthorized Use of Property

1. A person is guilty of theft if

A. knowing that he does not have the consent of the owner, he takes, operates, or exercises control over a vehicle, or, knowing that a vehicle has been so wrongfully obtained, he rides in such vehicle; or

B. having custody of a vehicle pursuant to an agreement between himself and the owner thereof whereby the actor or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, he intentionally uses or operates the same, without the consent of the owner, for his own purposes in a manner constituting a gross deviation from the agreed purpose; or

C. having custody of property pursuant to a rental or lease agreement with the owner thereof whereby such property is to be returned to the owner at a specified time and place, he intentionally fails to comply with the agreed terms concerning return of such property without the consent of the owner, for so lengthy a period beyond the specified time for return as to render his retention or possession or other failure to return a gross deviation from the agreement.

May 7, 1973

2. As used in this section "vehicle" means any automobile, airplane, motorcycle, motorboat, snowmobile, any other motor-propelled means of transportation, or any boat or vessel propelled by sail, oar or paddle. "Property" has the meaning set forth in section two, and includes vehicles.

3. It is a defense to a prosecution under this section that the actor reasonably believed that the owner would have consented to his conduct had he known of it.

May 7, 1973

Comment

Source: This section is based on the New Hampshire Criminal Code section 582:9, and the Crimes Code of Pennsylvania, section 3928.

Current Maine Law: There are several statutes relating to this subject. The most recently enacted is Title 17, section 2109-A.

Any person who receives ~~physical~~ possession of goods or things of value under a ~~written~~ contract or written lease for the purpose of leasing or renting the use of the same for a valuable consideration and who fraudulently converts the same to his own use shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than 11 months, or by both. The failure to return to the possession of, or to account for said goods or things with, the person who delivered the goods and things at the time or in the manner described in said written contract or written lease shall be prima facie evidence of intent to fraudulently convert; provided that if such person returns to the possession of, or accounts for said goods or things with, the person who delivered the same prior to the expiration of 10 days after a written demand for the return of said goods or things has been mailed by certified or registered United States mail, return receipt requested, addressed to the person who was so entrusted at his address which is last known to the person who delivered the said goods and things, such person who was so entrusted shall not be prosecuted under this section; and no prosecution shall be instituted or commenced until after the expiration of said period of 10 days. The word "person" as used in this section shall include a body corporate.

In addition, Title 29, section 900 deals specifically with using a motor vehicle without authority.

Whoever uses a motor vehicle, or farm or construction machinery, upon any way, or in any other place, without authority from its owner, express or implied, shall be punished by a fine of not more than \$200 or by imprisonment for not more than 9 months, or by both; and if any person is convicted the 2nd time for a violation of this section, he shall be punished by a fine of not less than \$200 nor more than \$500, or by imprisonment for not more than 11 months, or by both.

May 7, 1973

The Draft: This section combines coverage of the common "joyriding" problem with circumstances of criminal misuse of bailed or rented property.

Subsection 1 A extends the joyriding definition to the driver and those of his passengers who know that the vehicle has been taken without consent.

Subsection 1 B is designed to reach the garage mechanic who uses a vehicle left for repair as his own personal means of transportation. The use must, however, be more than minor, and must constitute a "gross deviation" from the basic reason for the vehicle having been left to him. It is necessary to have some limit of this sort on the criminal liability created by this section, and the "gross deviation" limit serves to create a jury question on the issue so that all of the circumstances can be taken into account.

Subsection 1 C is a similar prohibition against misuse of rented or leased property - commonly an automobile, but may be any sort of machinery or equipment. Here, too, the "gross deviation" requirement is interposed.

The defense created by subsection 3 is taken from the Pennsylvania Code and is included as a further limit on the scope of the liability defined in this section. The purpose of the defense is to exclude honest mistakes from the coverage.

May 7, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 11. Classification of Theft Offenses

1. All violations of the provisions of this chapter shall be classified, for sentencing purposes, according to the provisions of this section. The facts set forth in this section upon which the classification depends shall be proved by the state beyond a reasonable doubt.

2. Theft is a class B crime if

A. the value of the property or services exceeds one thousand dollars; or

B. the property stolen is a firearm or an explosive device; or

C. the actor is armed with a deadly weapon at the time of the offense.

3. Theft is a class C crime if

A. the value of the property or services is more than one hundred dollars but not more than one thousand dollars; or

B. the actor has been twice before convicted of the theft of property or services; or

C. the theft is a violation under subsections 2 A or 2 B of section 5.

Sub B 55

May 7, 1973

4. Theft is a class C crime if

A. it is a violation of section 10, regardless of the value involved; or

B. the value of the property or services does not exceed one hundred dollars.

May 7, 1973

Comment

Source: The substance of the grading criteria is taken from the New Hampshire Criminal Code, section 637:11.

Current Maine Law: The major provisions of the current law pertaining to theft each contains its own separate penalty choice. Larceny, for example, is punishable by five years imprisonment if the value of the property stolen exceeds \$500, and by 11 months or \$1,000 if it does not. Title 17, section 2101. Cheating by false pretense, on the other hand, under section 1601 is punishable by seven years and a fine of \$500, regardless of the value of the property obtained. Embezzlement does not have a separate penalty and although it partakes of fraud, is punishable as larceny, not as cheating. Title 17, section 2107. If, on the other hand, a guest in one's house steals something from his host during the night, he may be punished by 15 years in prison, under Title 17, section 2103. If the theft in a dwelling house occurs during the day, this same statute reduces the penalty to 6 years. The same penalties are applicable to a larceny committed after breaking and entering an "office, bank, shop, store, warehouse, barn, stable, house trailer, mobile home, inhabitable camp trailer, vessel, railroad car of any kind, courthouse, jail, meetinghouse, college, academy or other building for public use or in which valuable things are kept". Rules developed in connection with the crime of burglary appear to be applicable here to determine whether there has been a breaking and entering. See State v. Mower, 275 A.2d 584 (Me. 1971).

The Draft: This section governs the sentencing of any offender convicted under the theft provisions of this entire chapter. Accordingly, a major element in identifying the seriousness of the offense, is the value of the property taken, with a three-fold classification being made in that respect. The cut-off points are: (1) over one thousand dollars - class B; (2) from one thousand to one hundred and one dollars - class C; and (3) one hundred dollars or less - class D. In addition, this section makes relevant for sentencing other factors which bear on the seriousness of the offense, such as the theft of a firearm or explosives, or the fact that the thief may have been armed at the time of the offense, both of which class the offense as a B crime. Persistent thieves are dealt with in subsection 3B, which authorizes a C penalty, regardless of the amount that might be involved. Of course, if on the theft for which he is presently convicted, the persistent thief can be brought within subsection 2, he may be sentenced for a class B crime.

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Sub C 13
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Redraft

TITLE D1 GENERAL PRINCIPLES

Chapter 11 Preliminary

Section 4. Pleading and Proof

1. No person may be convicted of a crime unless each element of the crime is proved beyond a reasonable doubt. "Element of the crime" means: (a) the forbidden conduct; (b) the attendant circumstances specified in the definition of the crime; (c) the required culpability; (d) any required result. The existence of jurisdiction must also be proved beyond a reasonable doubt. Venue may be proved by a preponderance of the evidence. The court shall decide both jurisdiction and venue.

2. Subsection 1 does not require the state to negate any defense, or any exception, exclusion, or authorization which is set out in the statute defining the crime, either

A. by allegation in the indictment or information; or
B. by proof at trial, unless the existence of the defense, exception, exclusion or authorization is in issue as a result of evidence admitted at the trial which is sufficient to raise a reasonable doubt on the issue, in which case the state must disprove its existence beyond a reasonable doubt.

Sub C 14

April 18, 1973

Comment

This section was approved by the Commission on January 18, 1973, with an amendment to subsection one to require proof beyond a reasonable doubt of jurisdiction, and to have the jurisdiction and venue questions decided by the court.

This has now been rewritten so as to provide new rules relating to statutory exceptions, which are quite important in the realm of drug laws, and to pleading and proof problems regarding facts relevant to the sentencing classification of crimes.

The new subsection 2 does not require the state to plead anything about a defense or a statutory exception. There is also no obligation to disprove any defense or the existence of an exception, unless there is evidence which raises a reasonable doubt on the issue. The evidence to raise such a doubt will most often come from the defendant, although it is possible for the state's witnesses to do the same thing, and the burden of disproof beyond a reasonable doubt does not depend on the source of the initial evidence. The only substantive change here is to treat statutory exceptions the same way that the earlier draft dealt with matters of defense.

Sub C 15

April 18, 1973

3. If the sentencing classification of a crime depends on facts expressly declared to be relevant to classification in the statute defining the elements of the crime, such facts shall be deemed elements of the crime provided that proof of the facts authorizes the higher of the possible classifications, and the burden is on the state to

A. allege the fact in the indictment or information;
and

B. prove the fact beyond a reasonable doubt.

4. If the sentencing classification of a crime depends on facts expressly declared to be relevant to classification in the statute defining the elements of the crime, and proof of the facts authorizes only the lower of the classifications, the state is not required to negate such facts by allegations in the indictment or information. The state does, however, have the burden of disproving such facts beyond a reasonable doubt if the facts are in issue as a result of evidence admitted at the trial which is sufficient to raise a reasonable doubt on the issue.

5. Subsection 1 does not apply to any defense which the statute explicitly designates as an "affirmative defense." Defenses so designated must be proved by the defendant by a preponderance of the evidence.

Sub C 16

April 18, 1973

More importantly, subsections three and four provide pleading and proof rules relating to facts which are relevant solely for sentencing. The example most recently considered by the Commission (and giving rise to this redraft) can be found in Chapter 24, section 1, Kidnapping, where the sentencing classification is pegged at a class A crime, subject to reduction to class B if the victim is released unharmed. Subsection 4 would govern such a case. The government would not be required to plead that the victim was not released unharmed, and would be required to prove beyond a reasonable doubt that he was not released unharmed only if there is evidence in the case which raises a reasonable doubt about such a release.

Subsection 3, on the other hand, deals with a crime such as larceny where the sentencing classification may be put at one level if the property stolen is more than a given value, and at a lower level if it is below the specified amount. If the state wants a conviction at the higher level, it must both plead and prove the higher amount.