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SB 546 -

SB 591

6/14

Introduced: 1/19/76
Referred: Resources

1 IN THE SENATE

BY CROFT

2 SENATE BILL NO. 546

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 NINTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the power of eminent domain."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 09.55.430 is amended by adding a new paragraph to read:

9 (7) a statement that the property is taken by necessity
10 for a project located in a manner which is most compatible with the
11 greatest public good and the least private injury.

12 * Sec. 2. AS 09.55.450(a) is amended to read:

13 (a) Upon the filing of the declaration of taking and the deposit
14 of the estimated compensation, the court may, upon motion, fix the
15 time during which and the terms upon which the parties in possession
16 are required to surrender possession to the petitioner. However, the
17 right of entry shall not be granted the plaintiff until after ~~the~~
18 ~~hearing of any objection to the declaration of taking made by the~~
19 ~~defendant, or~~ the running of the time for the defendant to file an ob-

20 *or until after the hearing on any objection to the declaration of taking*
21 *if the objection is made in the time allowed by law.*
22 Where the party in possession

23 withdraws any part of the award and remains in possession, the court
24 may fix a reasonable rental for the premises to be paid by that party
25 to the plaintiff during such possession.

26 * Sec. 3. AS 09.55.460(b) is amended to read:

27 (b) The plaintiff may not be divested of a title ^{or possession} acquired except
28 where the court finds that the property was not taken by necessity for a
29 public use or purpose in a manner compatible with the greatest public
good and the least private injury. In the event of that finding, the
court shall enter the judgment necessary to (1) compensate the persons

1 entitled to it for the period during which the property was in the
2 possession of the plaintiff, [AND] (2) recover for the plaintiff any
3 award paid to any person, and (3) order the plaintiff to restore the
4 property to the condition in which it existed at the time of the filing
5 of the declaration of taking unless such restoration is impossible, in
6 which case the court shall award damages to the proper persons as com-
7 ensation for any diminution in the value of the property caused by the
8 plaintiff's wrongful possession.
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#15B546

Declaration of taking = Quick
Taking

takes about 35 days for a quick
taking today

Current claims there is a public hearing
on roots before any condemnation.
What if we write into bill a presumption
in favor of public necessity and
conviction?

Stewart v Grondal 1974 ?

title vests at the time of the filing
of the condemnation but right to
ent. does not vest until court order
aff'd hearing or default.

SB546

Richard P. Kerns - Highways Sections
Against - Need to show "necessity"
only have to show "purpose"
Uses "Quick Taking"

Consolidated design hearings

Alternative to show necessity by plaintiff

Winning from City of A.N.C.

Section 3 could require review of completed
projects

ARCO PIPELINE COMPANY et al.,
Petitioners,

v.

3.60 ACRES, MORE OR LESS, etc., and
Jackie J. Stewart, et al., Respondents.

No. 2419.

Supreme Court of Alaska.

Aug. 1, 1975.

Proceeding was brought by the owners and constructors of the Trans-Alaska pipeline to condemn 3.60-acre right-of-way and easement. The Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., denied taking, and petitioners appealed. The Supreme Court, Erwin, J., held that in proceeding in eminent domain by way of declaration of taking under power delegated by state, court is without authority to review question of necessity of particular taking absent clear showing of fraud, bad faith, arbitrariness or abuse of discretion in exercise of power of condemnation by condemning authority, that fact that some other available routing might suffice or even be more desirable in some respects was not sufficient to raise proper defense to declaration of taking, and that where no specific allegations of bad faith, fraud, or gross abuse of discretion in locating pipeline raised issue sufficient to permit judicial review of necessity of taking, determination of location of pipeline was required to be left to agency charged with carrying out completion.

Order of superior court vacated and case remanded.

1. Eminent Domain ⇨167(2)

Although recognizing duty to construe statutes covering same subject matter in pari materia, and to adopt where possible reasonable construction of each in order to realize legislative intent and avoid conflict or inconsistency with other, Supreme Court nevertheless found concept of judicial review embodied in general eminent domain

statute to be inconsistent with and inappropriate to declaration of taking proceedings. AS 09.55.270, 09.55.440.

2. Eminent Domain ⇨320

In condemnation proceeding under declaration of taking, title passes immediately upon filing of complaint and deposit to party seeking condemnation at which time property is deemed to be condemned and taken for use of party seeking condemnation. AS 09.55.440.

3. Eminent Domain ⇨320

Under complaint seeking condemnation and order for possession, title does not vest, nor condemnation actually occur until final award has been determined and ordered and judgment of condemnation entered by court.

4. Eminent Domain ⇨166

Almost summary quality of proceeding in condemnation under declaration of taking bespeaks grant of additional substantive power of condemnation which considerably reduces rights of landowner to contest taking in question. AS 09.55.440.

5. Eminent Domain ⇨198(1)

In proceedings in eminent domain by way of declaration of taking, court is without authority to review question of necessity of particular taking absent clear showing of fraud, bad faith, arbitrariness or abuse of discretion in exercise of power of condemnation by condemning authority. AS 09.55.440.

6. Eminent Domain ⇨196

Once authorized public use for taking under declaration of taking is established by condemnor, and statutory and procedural requirements otherwise satisfied, that the particular taking is reasonably requisite to realization of that use shall be presumed. AS 09.55.440.

7. Eminent Domain ⇨171

Where intended use of property sought to be condemned by owners and constructors of the Trans-Alaska pipeline under declaration of taking was public and was statutorily authorized, and unrebuted

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evidence was presented to effect that design and construction criteria for pipeline would be most feasibly satisfied by route across property sought to be condemned, fact that some other available route might suffice or even be more desirable in some respects was not sufficient to raise proper defense to declaration of taking. AS 09-55.440.

8. Eminent Domain \hookrightarrow 68

Where intended use of property sought to be condemned by owners and constructors of the Trans-Alaska pipeline under declaration of taking was public and was statutorily authorized, and property owner made no specific allegations of fraud, bad faith, or gross abuse of discretion on part of owners and constructors in exercise of their condemnation powers or in locating pipeline, determination of location of pipeline was left to agency charged with carrying out completion. AS 09.55-440.

Karl L. Walter, Jr., of Groh, Benkert & Walter, Anchorage, for petitioners.

Jackie J. Stewart, in pro. per.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, and BURKE, JJ.

OPINION

ERWIN, Justice.

Petitioners are the owners and constructors of the Trans-Alaska Pipeline. In order to facilitate the prompt completion of this monumental and historic project, the State of Alaska in AS 38.35.130 authorized a delegation of its power of eminent domain and permitted thereby the use by petitioners of a declaration of taking to condemn real property in the state for right-of-way purposes.¹ Pursuant to this grant,

1. AS 38.35.130 of the Right-of-Way Leasing Act provides in part:

(a) The lessee may, if the commissioner delegates the function to it, condemn, by declaration of taking, under AS 09.55.420-09.55.450, real property and acquire leases

on July 15th, 1974, petitioners filed an eminent domain complaint and a declaration of taking seeking to condemn a 3.6 acre right-of-way and easement—100 feet wide and approximately 1400 feet long—across the 80 acre homestead of respondent Stewart in the area of Delta Junction. The sum of \$700.00 was deposited in the court as estimated compensation for the taking. Respondent Stewart answered and asserted that condemnation of the respondent's property was not necessary since petitioners had public lands available to them which were suitable for the pipeline construction.

A consolidated hearing concerning this as well as other parcels in the same area was conducted on September 20 and November 1, 1974. At the hearing petitioners offered expert testimony on the subjects of route selection and design criteria and the necessity of the taking of respondent's property. The testimony revealed that in the opinion of the pipeline company the route selected was optimal in satisfying design and construction criteria and maintained the straightest line possible, one having the fewest number of angles detrimental to the proper flow of crude oil. The expert testimony further indicated that core drilling of the property had revealed that the soil was suitable for burying the pipeline. Respondent, on the other hand, offered no testimony questioning the efficacy of the route selected, but provided instead evidence that there were state and university lands north of respondent's property over which the pipeline could be constructed.

After hearing the testimony and after additional briefing the trial court denied the taking, concluding that petitioners had failed to demonstrate that they had considered routing the line over public lands and

of or easements or rights-of-way on lands in the state required for right-of-way purposes for a pipeline subject to the lease on behalf of and as agent for the state in which title to or interest in the land shall vest.

thereby avoid private injury. The court ruled that where the option of alternative routing over public land exists petitioners have the burden of submitting convincing evidence that they have at least considered the alternative routing across state land to avoid private injury, and that they must give cogent reasons for their ultimate selection.

Following the decision a petition for review was filed in the Supreme Court and an order granting such review was entered on February 18, 1975.

Before discussing the issues raised in this review, it should be pointed out that the trial court specifically found that petitioners have been given statutory authority by the state of Alaska to take property for the construction of the Trans-Alaska Pipeline; it also apparently found that petitioners had been properly delegated this power and had otherwise complied with the applicable statutes governing the exercise of the

power of condemnation by way of declaration of taking. These conclusions are supported on the record² and have not been contested herein by respondent. They are therefore not at issue in this Petition for Review.

The specific issue presented here for review is whether or not the trial court was correct in its determination that for purposes of the exercise of the power of condemnation by way of a declaration of taking petitioners have the burden of showing consideration of possible alternate pipeline routes and of providing sufficient proof of the necessity of the particular route selected. The resolution of this question necessarily entails an analysis of the statutes governing the use of a declaration of taking by petitioners and, correlatively, an inquiry into the question of the proper scope of judicial review in such proceedings.

AS 09.55.420-09.55.450,³ governing the use of a declaration of taking in this state,

Sec. 09.55.440. *Vesting of title and compensation.* (a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. . . .

Sec. 09.55.450. *Right of entry and possession.* (a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking. . . .

(c) The right to take possession and title in advance of final judgment where a declaration of taking is filed is in addition to any other rights to take possession provided in §§ 240-460 of this chapter.

2. We note that the record reveals that on July 2, 1974, the Commissioner of the Department of Natural Resources executed a Delegation of Authority under the statute and specifically authorized thereby petitioners' use of a declaration of taking to condemn the Stewart property.

3. The pertinent provisions of these statutes read as follows:

Sec. 09.55.420. *Declaration of taking by state or municipality.* (a) Where a proceeding is instituted under §§ 240-460 of this chapter by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. . . .

Sec. 09.55.430. *Contents of declaration of taking.* The declaration of taking shall contain

- (1) a statement of the authority under which the property or an interest in it is taken;
- (2) a statement of the public use for which the property or an interest in it is taken;
- (3) a description of the property sufficient for the identification of it;
- (4) a statement of the estate or interest in the property;
- (5) a map or plat showing the location of the property;
- (6) a statement of the amount of money estimated by the plaintiff to be just compensation for the property or the interest in it,

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4. Note 1 supra

5. 340 P.2d at 1

6. Id. at 153.

7. These section Sec. 09.55.2 to be taken. may be take chapter includ

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constitute the authority for petitioners' taking in this case.⁴ In *Bridges v. Alaska Housing Authority*, 349 P.2d 142 (Alaska 1959), the only case in which this court has engaged in a comprehensive analysis of the general import of these provisions in the context of the exercise of eminent domain in this state, it was observed that

[a] declaration of taking enlarges the rights of the condemning authority and reduces those of the landowner. Upon the filing of the declaration and a deposit of the amount of compensation estimated to be due, title to the real property vests in the condemning agency and "such real property * * * shall be deemed to be condemned and taken for the use of the condemning agency * * *." And then, without the necessity of awaiting the report of the commissioners and assessment of damages, the court is given the power "to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession" to the condemning authority.⁵

The Court further concluded that

[i]t apparently was not intended that the declaration of taking power should merely supplement the procedural aspects of the then existing statutory provisions

on eminent domain. . . . The declaration of taking is a power of eminent domain, and not only a manner of exercising a power otherwise conferred. More than procedure is involved; substantive rights are affected.⁶

We take this opportunity to observe that changes in the language of the declaration of taking provisions since *Bridges* have been—at least for purposes of this review—minor, and we consequently recognize the applicability of the *Bridges* analysis to the case at hand. In *Bridges*, however, we were not called upon to consider the effect of the declaration of taking provisions in light of other statutes which govern eminent domain proceedings in general. It is this interrelationship which is at the crux of this review.

The trial court, in holding that petitioners were obliged to demonstrate in convincing terms the necessity of selecting one route as opposed to other alternatives which might arguably minimize private injury, premised its ruling upon the conclusion that the petitioners' action was governed by the same rules which apply to any governmental exercise of the power of eminent domain. Obviously looking to such statutes as AS 09.55.260 through 09.55.280, and 09.55.300,⁷ the court quite reasonably concluded that it was therefore

tions shall be made in the manner most compatible with the greatest public benefit and least private injury;

Sec. 09.55.270. *Prerequisites.* Before property can be taken, it shall appear that

(2) the taking is necessary to the use;

Sec. 09.55.280. *Entry upon land.* In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of § 300 of this chapter. . . .

4. Note 1 *supra*.

5. 349 P.2d at 153-54 (footnote omitted).

6. *Id.* at 153.

7. These sections provide in pertinent part:
Sec. 09.55.260. *Private property subject to be taken.* The private property which may be taken under §§ 240-460 of this chapter includes

(5) all rights-of-way for any of the purposes mentioned in § 240 of this chapter, and the structures and improvements on the rights-of-way, and the lands held and used in connection with them shall be subject to be connected with, crossed, or intersected by another right-of-way or improvements or structures on them; they shall also be subject to a limited use, in common with the owner, when necessary; but the uses, crossings, intersections, and connec-

the province of the court to require the condemnor to prove to the satisfaction of the court that the selected route is consistent with the greatest public benefit and to the least private injury.

However, a consideration of the clear legislative intent that the prompt completion of the pipeline be facilitated under the Right-of-Way Leasing Act,⁸ our reading and analysis of certain critical provisions governing the effect of the use of a declaration of taking, and the continued recognition and validation of the approach we adopted in *Bridges* lead us to the conclusion that the court erred in concluding that in a proceeding for condemnation by way of a declaration of taking the court is empowered to require the condemnor to prove the necessity of a given taking.

Our declaration of taking statutes were patterned upon the language of 40 U.S.C. §

Sec. 09,55,300. *Powers of court.* (a) The court has power

(1) to regulate and determine the place and manner of making the connections and crossings or of enjoying the common uses mentioned in § 260(5) of this chapter

(2) to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary.

8. AS 38,35,010 *et seq.* See, for example, the October 17, 1973, letter from Governor William A. Egan to Hon. Terry Miller, President of the Senate, which accompanied the bill which (as later modified and adopted) substantially amended the original Right-of-Way Leasing Act of 1972. With respect to the subject of condemnation, the Governor observed that

... a modified form of eminent domain has been restored so that construction of pipelines may proceed promptly.

House Journal and Senate Journal of Alaska, Special Session 1973, at 8.

9. There is, regrettably, a dearth of legislative history available concerning the adoption of our declaration of taking statutes. To the effect that they were originally taken almost word for word from 40 U.S.C. § 258a, however, see 1960 Op. Alaska Att'y Gen., No. 15.

10. See *Russian Orth. Greek Cath. Church of N. America v. Alaska State Housing Auth.*,

258a⁹ which governs "quick take" eminent domain proceedings by the United States. Decisions interpreting this federal statute may consequently be considered persuasive for purposes of construing the analogous provisions of our own statutes.¹⁰

A review of such decision reveals that it has been consistently recognized that the effect of the language of § 258a is that once a declaration of taking is filed title to the property is transferred to the condemning authority subject only to the right of the property owner to challenge the validity of the taking as not being for an authorized public purpose or as having been made capriciously or in bad faith.¹¹ It has, for example, been held that absent bad faith, if the use is a public one the necessity of a given taking is not a question for judicial determination;¹² that once the

408 P.2d 737 (Alaska 1972), where this Court looked to decisions under the federal act for guidance in construing the effect of AS 09,55,420 to 09,55,440. See also *Alaska Transp. Comm'n v. Alaska Airlines, Inc.*, 431 P.2d 510, 512 (Alaska 1967).

11. *Wilson v. United States*, 350 F.2d 901, 906-07 (10th Cir. 1965); *United States v. Threlkeld*, 72 F.2d 464, 465 (10th Cir. 1934); see *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *United States ex rel. T.V.A. v. Welch*, 327 U.S. 516, 60 S.Ct. 715, 90 L.Ed. 843 (1946); *United States v. Carmack*, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 269 (1946); *United States v. New York*, 160 F.2d 479 (2d Cir. 1947); *United States v. 1,278.83 Acres of Land*, 12 F.R.D. 320 (E.D.Va.1952). See also GA J. Sackman, Nichols' *The Law of Eminent Domain* § 27-26, at 27-80 (rev. 3d ed. 1971) where it is stated that

[s]ince the wisdom and expediency of a condemnation are not matters for judicial review, defenses relating to the necessity for acquisition of property, the necessity for resorting to eminent domain to acquire it, the extent or amount of property to be taken, the choice of the tract, the wisdom or feasibility of the project, the kind of property or the nature of the estate to be acquired, are not proper. (footnote omitted)

12. *Wilson v. United States*, 350 F.2d 901, 907 (10th Cir. 1965).

declaration of taking extended to the condemnor, the condemnor is not to question the necessity of the taking and that as the judgment of such condemnation extends to determine whether the taking is actually necessary the court's review is limited to cases where there is an abuse of administrative discretion by the officials making the declaration. If the officials have acted reasonably and the taking is for a public purpose and was without adequate compensation or was unreasoned

Such an approach would appear to be what would appear to be the scope of eminent domain is not to question the necessity of the taking which ought generally to be beyond the question of public purpose and

13. *United States v. 1,278.83 Acres of Land*, 12 F.R.D. 320 (E.D.Va.1952).

14. *United States v. 1,278.83 Acres of Land*, 12 F.R.D. 320 (E.D.Va.1952); *United States v. 2,606.84 Acres of Land*, 445 F.2d 980 (9th Cir. 1970), 91 S.Ct. 1308, 2403 U.S. 912, 9690.

15. The overwhelming weight of authority makes clear beyond doubt that the expediency of a taking lies within the discretion of the government and is not a matter for judicial review. (footnote omitted)

16. GA *id.* § 27,26.

17. See *Ariz. Rev. Stat. Ann. § 4-11*, (1969); 7 Rev. Stat. (1964).

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declaration of taking is filed and the estimated compensation is deposited, neither the condemnee nor the court has the power to question the condemnor's determination of the necessity of a particular taking;¹³ and that as the judicial role in examining such condemnation proceedings does not extend to determining whether the land sought is actually necessary to the project, the court's review power is limited to those cases where there has been some clear abuse of administrative discretion—where the officials making the administrative decisions have acted in bad faith or so capriciously and arbitrarily that their action was without adequate determining principle or was unreasoned.¹⁴

Such an approach is in keeping with what would appear to be the general rule that the scope of review of any taking in eminent domain is extremely limited; that questions of necessity and expediency are largely beyond the reach of the court, which ought generally to limit its inquiry to the question of the existence of a proper public purpose and the absence of any

abuse of the power of condemnation.¹⁵ It is consequently recognized that it is no defense in a condemnation proceeding that some other location for the taking might reasonably have been selected or some other suitable property obtained.¹⁶

[1] As against this proposition, however, Alaska is among the minority of jurisdictions which statutorily call for judicial inquiry into the question of necessity in eminent domain proceedings.¹⁷ AS 09-55.270, for example, specifically requires for a showing that the taking "is necessary to the use" before property can be taken. The resultant conflict between this provision and the concept of judicial review developed under the language of 40 U.S.C. § 258a—which may be presumed to have been intended to apply to our declaration of taking provisions¹⁸—seems clear. Recognizing our duty to construe statutes covering the same subject matter in pari materia,¹⁹ and to adopt where possible a reasonable construction of each which realizes legislative intent and avoids conflict or inconsistency with the other,²⁰ we nev-

13. *United States v. Mischke*, 285 F.2d 628 (5th Cir. 1961); *United States v. 6.74 Acres of Land*, 148 F.2d 618 (5th Cir. 1945).

14. *United States v. Certain Land in Borough of Manhattan*, 233 F.Supp. 809 (S.D. N.Y. 1964), *aff'd*, 336 F.2d 1021 (2 Cir.). See also *United States v. 80.5 Acres of Land*, 418 F.2d 980 (9th Cir. 1971); *United States v. 2,600.8½ Acres of Land*, 432 F.2d 1280 (5th Cir. 1970), *cert. denied*, 402 U.S. 916, 91 S.Ct. 1368, 28 L.Ed.2d 658, *reh. denied*, 403 U.S. 912, 91 S.Ct. 2203, 20 L.Ed.2d 690.

15. The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review. (footnote omitted)

1 J. Sackman, *Nichols' The Law of Eminent Domain* § 4.11, at 4-138 (rev. 3d ed. 1974).

16. *GA id.* § 27.26, at 27-80.

17. See *Ariz.Rev.Stat.* § 12-1112 (1956); *Smith-Hurd Ill.Ann.Stat.* ch. 47, § 2.2(c) (1969); 7 *Rev.Codes Mont.* 1947, § 93-9905 (1964)

We note that though we could find no explicit legislative recognition of this fact, the editors of our own Alaska Statutes 1962 have indicated in their annotations to AS 09.55.270 that this section was derived from an almost identical provision in the Montana Statutes. See 7 *Rev.Codes Mont.* 1947, § 93-9905 (1961). This fact would appear to offer much in the way of explanation for the trial court's reliance upon Montana precedent when it concluded that "when the condemnor fails to consider the question of the least private injury between alternate routes, its action is arbitrary and amounts to an abuse of discretion." *Cling Montana Power Co. v. Bokun*, 153 Mont. 390, 457 P.2d 769, 775 (1960).

18. *Cf. Nicholson v. Sorensen*, 517 P.2d 766, 770 (Alaska 1973); *Gray v. State*, 463 P.2d 897, 902 (Alaska 1970). See also p. 10 & note 10 *supra*.

19. See, e.g., *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974); *Smalley v. Juneau Clinic Bldg. Corp.*, 493 P.2d 1296 (Alaska 1972); *United States v. Harcastle*, 10 Alaska 254 (1942).

20. *Gordon v. Burgess Const. Co.*, 425 P.2d 602 (Alaska 1967).

ertheless find the concept of judicial review embodied in our general eminent domain statutes to be inconsistent with and inappropriate to proceedings under a declaration of taking.

[2,3] The conclusion seems inescapable that there exists a clear functional distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession. Under the former title passes immediately upon filing and deposit—at which time, under AS 09.55.410, the property is deemed to be “condemned and taken for the use of the plaintiff.”²¹ Under the latter no such vesting occurs; title does not vest, nor does “condemnation” actually occur until the final award is determined and an order and judgment of condemnation is entered by the court.

[4] As recognized in *Bridges*, as well as later cases,²² the difference in the nature of these two proceedings is not merely procedural; the almost summary quality of the former bespeaks the grant of an additional substantive power of condemnation which considerably reduces the rights of the landowner to contest the taking.²³ Consequently, reading AS 09.55.420 to 09.55.450 in this light, we are lead to the conclusion that the intent of these provisions was to bring, in summary fashion, statutory finality to the questions of title and right to possession even though litigation continues with respect to the ultimate amount of compensation to be paid. If such finality is to be given any meaningful effect, we conclude that such vesting must be subject only to the rather limited right of the owner to contest the validity of the taking as not being statutorily authorized or as having been capriciously or arbitrarily exercised.²⁴ To permit the owner to

challenge the necessity of the particular taking without an initial showing on his part that it is the result of some clear abuse of discretion is to give the concept of a declaration of taking no more effect than that of a complaint in any condemnation proceeding; such an interpretation would render the language of AS 09.55.410 noted above essentially meaningless.

We would note at this juncture that although the enabling legislation under which petitioners are empowered to use a declaration of taking does not refer to or incorporate it—and we consequently do not find it wholly dispositive of the case at hand—AS 09.55.460(b) provides in part that

[t]he plaintiff may not be divested of a title acquired except where the court finds that the property was not taken for a public use.

We find that this express declaration of legislative intent as to the scope of judicial review in such proceedings lends considerable support for the conclusion we reach today.

Our decision that the question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings is also buttressed by several other factors. There is evidence, for example, that the legislature was at least well aware of the substantive differences in the two types of proceedings when it considered the use of eminent domain powers for pipeline right-of-way acquisition. Prior to the adoption of the present AS 38.35.130 an amendment was offered to the bill which would have authorized for pipeline purposes the exercise of eminent domain powers only under AS 09.55.240-09.55.410, the general eminent domain provisions.²⁵

21. See note 3 *supra*.

22. See *City of Anchorage v. Lot 1 in Block 68 of Orig. Town.*, 400 P.2d 609 (Alaska 1966).

23. See p. 6-7 & note 5 *supra*.

24. Cf. GA J. Sackman, Nichols' *The Law of Eminent Domain* § 27.25, at 27-61 to -62 (rev. 3d ed. 1974).

25. See the amendment offered by Senator Croft to the committee substitute for the original senate bill amending AS 38.35.130 which would have inserted after “condemna” the words “by eminent domain under AS 09.55.240-09.55.410.” House Journal and Senate Journal of Alaska, Special Session

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ARCO PIPELINE CO. v. 3.60 AGRES, MORE OR LESS Alaska 71

Cite as, Alaska, 539 P.2d 61

Such an approach was rejected, however, and the present version allowing the use of a declaration of taking was adopted instead.

It must next be recognized that the Montana case law upon which the trial court apparently founded at least part of its decision²⁶ arises from a statutory scheme which does *not* recognize at all the concept of a declaration of taking or any other such "quick take" proceeding.²⁷ Moreover, there is evidence that the courts of Montana have themselves not been entirely consistent on the subject of judicial review of administrative determinations of necessity. In *State Highway Commission v. Crossen-Nissen Co.*, 145 Mont. 251, 400 P.2d 283, 285 (1965), for example, it was held that although (in a normal eminent domain action) the plaintiff has the initial burden of making some sort of prima facie showing of necessity, it is

incumbent upon the defendant to show fraud, abuse of discretion or arbitrary action in order to defeat the action of the [plaintiff].

The court went on to hold that

even when necessity has been challenged on the ground of arbitrariness or excessiveness of the taking, there is left largely to the discretion of the condemnor the location, route, and area of the land to be taken. There rests upon the shoulders of one seeking to show that the taking has been excessive or arbitrary, a heavy burden of proof in the attempt to persuade the court to substitute its judgment for that of the condemnor. . . . "[Such] proof should be made clear and convincing; otherwise no location could ever be made."

1973, at 99. Although this amendment passed the senate, the failure of both houses to concur on this as well as other amendments to the Right-of-Way Leasing Act resulted in a Free Conference Committee substitute which, as finally approved, provided the present version.

²⁶ See discussion, note 17 *supra*.

Assuming arguendo that such an evidentiary rule is wholly appropriate for proceedings under the same general eminent domain provisions in this state (a question we need not reach in this case), we find it difficult to square this analysis of burdens of proof with the ruling upon which the trial court based its decision—that the condemnor is under a burden of demonstrating ab initio its consideration of alternative routes and of justifying the ultimate route selected. The mandate of a prima facie showing of "necessity," even in Montana, has been held to require only a showing that the particular property taken is "reasonably requisite and proper for the accomplishment of the purpose for which it is sought."²⁸ Notwithstanding the difficulty involved in reconciling these positions, or Montana case law, we are persuaded that no such burden of proof as was imposed by the trial court was ever intended to apply to proceedings under a declaration of taking in this state.

The final touchstone leading us to the conclusion that AS 09.55.420-09.55.450 were clearly intended to authorize a more summary and less judicially dependent exercise of the power of eminent domain is found in the original act under which the declaration of taking proceeding was authorized.

Sections 1 through 8 of chapter 90, SLA 1953, authorized the use of a declaration of taking as a special supplemental proceeding "to provide for obtaining possession of lands taken for public highway purposes by eminent domain." Prior to 1953 no such proceeding was recognized under Alaskan law. Although now no longer limited to public highway purposes, the state being authorized to use the proceeding for any

²⁷ See 7 Rev. Codes Mont.1947, §§ 93-9901 *et seq.* (1961).

²⁸ *State Highway Comm'n v. Crossen-Nissen Co.*, 145 Mont. 251, 400 P.2d 283, 284 (1965); accord, *State Highway Comm'n v. Yost Farm Co.*, 142 Mont. 239, 384 P.2d 277, 279 (1963); *State ex rel. Livingston v. District Court*, 90 Mont. 191, 300 P. 916 (1931).

purpose for which the right of eminent domain may be exercised,²⁹ the original 1953 Act is otherwise in almost every respect identical to the present provisions. The 1953 Act, however, contained a severability clause which specifically provided in addition that

[a]ll laws or portions of laws inconsistent with the policy and provisions of this Act are hereby repealed to the extent of such inconsistency in their application to the declaration of taking procedure authorized by this Act.³⁰

This provision, though not incorporated in the original 1962 codification of the Alaska Code of Civil Procedure,³¹ not only clearly reflects a legislative recognition of the substantive difference between the use of this special power and that of eminent domain in general, but it also evidences in its express repealer language an intent that the exercise of this power should not be restricted by limitations, otherwise applicable to eminent domain, which are inconsistent with the policies of immediate vestiture of title and the limited power of the court to divest such title once acquired (as is reflected in the present AS 09.55.460 noted *supra*). A judicial recognition of these policies appears at least by implication in our opinion in *Bridges*.

[5,6] After consideration of the foregoing, we are of the opinion that in proceedings in eminent domain by way of a declaration of taking under AS 09.55.420-09.55.450, the court is without authority, either by virtue of the express mandate of

AS 09.55.460(b) or by implication from the legislative history and policy evidenced in AS 09.55.440, to review the question of the necessity of a particular taking absent a clear showing of fraud, bad faith, arbitrariness or an abuse of discretion in exercise of the power of condemnation by the condemning authority. Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements are otherwise satisfied,³² that the particular taking is reasonably requisite to the realization of that use shall be presumed. Notwithstanding such provisions as AS 09.55.270(2), judicial inquiry into such necessity or the condemnor's determinations with respect thereto is not appropriate unless and until the condemnee has presented clear and convincing evidence that the condemnor has acted in bad faith or so capriciously and arbitrarily as to indicate the absence of any reasonable determining principle.

[7,8] In this case it is clear that the use intended is public and statutorily authorized. Petitioners have, moreover, presented un rebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of respondent. The fact that some other available routing might suffice or even be more desirable in some respects is not sufficient in this case to raise a proper defense to the declaration of taking. Consequently, it cannot be said that petitioner is under any duty to initially submit evidence that it has considered such alternate routing; nor can

the failure to make the circumstances justrariness or an abuse specific allegations some gross abuse of the pipeline can ra permit judicial rev the taking.³³ No been made herein. the location of the be left to the agenc out its completion.³⁴

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BOOCHEVER, J



Lionel KIM

STATE of N

Supreme C Aug

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29. We note that the historical development of these provisions reflects the adoption of increasingly less restrictive limitations on the use of this power. See § 1, ch. 90, SLA 1953 (use by the Territory for public highway purposes); § 1, ch. 138, SLA 1955 (use by the Territory "for any purpose for which the Territory is authorized the power of eminent domain"); §§ 1-5, ch. 146, SLA 1959 (extending the use of the declaration to the state, public utility and school districts); §§ 13.10-13.23, ch. 101, SLA 1962 (extending the power to first-class cities); § 2, ch. 122, SLA 1966 (adopting the language presently appearing in AS 09.55.420).

30. Section 7, ch. 90, SLA 1953.

31. Sections 13.10-13.23, ch. 101, SLA 1962.

32. It is clear, for example, that the failure of a declaration of taking to satisfy the specific requirements of AS 09.55.430 would constitute a proper defense to the condemnation. See note 3 *supra*. It is also manifest that a taking may properly be challenged on the ground that the condemnor's action is not in compliance with such specific restrictions on the exercise of the power as may appear in the commissioner's delegation of authority or the lease itself.

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the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. Only specific allegations of fraud, bad faith, or some gross abuse of discretion in locating the pipeline can raise issues sufficient to permit judicial review of the necessity of the taking.³³ No such allegations have been made herein. The determination of the location of the pipeline must therefore be left to the agency charged with carrying out its completion.³⁴

The order of the superior court is vacated and the case is remanded for further proceedings in conformity with this opinion.

Vacated and remanded.

BOOCHEVER, J., not participating.



Lionel KIMBLE, Appellant,

v.

STATE of Alaska, Appellee.

No. 2287.

Supreme Court of Alaska.

Aug. 22, 1975.

Defendant was convicted in Superior Court, Fourth Judicial District, Everett W. Hepp, Gerald J. Van Hoomissen, and Warren W. Taylor, JJ., for armed robbery and he appealed. The Supreme Court, Rabinowitz, C. J., held that even though indictment referred to two separate statutory provisions pertaining to robbery and use of firearms during commission of certain crimes, since trial court's instructions presented case to jury as one involving solely an armed robbery prosecution, any

33. No challenge on constitutional grounds has been raised in this case and we do not reach such issue in this review.

539 P.2d—572

error in framing the allegedly duplicitous indictment was harmless; that accidental pretrial confrontations between defendant and robbery victim did not violate due process where evidence indicated that victim's courtroom identification had an independent origin; that there is no right to counsel at photographic displays; and that fact that there were no persons of defendant's race on the venire of jurors did not establish purposeful and systematic exclusion of an identifiable portion of the community.

Affirmed.

1. Indictment and Information ⇨125(1)

The rationale underlying the rule prohibiting duplicitous indictments is to give notice to the defendant of exactly what charges he must defend against and to avoid the consequences of the inability of the jury to indicate which way they are voting on each of the charges.

2. Criminal Law ⇨1167(1)

Where indictment on which defendant was tried referred to two separate statutory provisions pertaining to robbery and use of firearms during the commission of certain crimes, but trial court's instructions presented case to the jury as one involving solely an armed robbery prosecution, any error in framing of allegedly duplicitous indictment was harmless. AS 11.15.240, 11.15.295; Rules of Criminal Procedure, rule 8(a).

3. Indictment and Information ⇨144.1(1)

Proper remedy for duplicitous indictment is not to dismiss it but to compel the State to elect the charges on which it wishes to proceed.

4. Constitutional Law ⇨266(3)

When a pretrial confrontation is purely accidental and is not prearranged by the State, court will not ordinarily inquire into

34. See *Williams v. Transcontinental Gas Pipe Line Corp.*, 89 F.Supp. 485, 488-89 (W.D.S.C.1950).

Introduced: 1/19/76
Referred: Resources

1 IN THE SENATE

BY CROFT

2 SENATE BILL NO. 546

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 NINTH LEGISLATURE - SECOND SESSION

5 A BILL .

6 For an Act entitled: "An Act relating to the power of eminent domain."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 09.55.430 is amended by adding a new paragraph to read:

9 (7) a statement that the property is taken by necessity
10 for a project located in a manner which is most compatible with the
11 greatest public good and the least private injury.

12 * Sec. 2. AS 09.55.450(a) is amended to read:

13 (a) Upon the filing of the declaration of taking and the deposit
14 of the estimated compensation, the court may, upon motion, fix the
15 time during which and the terms upon which the parties in possession
16 are required to surrender possession to the petitioner. However, the
17 right of entry shall not be granted the plaintiff until after the
18 hearing of any objection to the declaration of taking made by the

19 defendant, or the running of the time for the defendant to file an ob-
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21 of taking if the objection is made in the time allowed by law. Where the party in possession
22 withdraws any part of the award and remains in possession, the court

23 may fix a reasonable rental for the premises to be paid by that party
24 to the plaintiff during such possession.

25 * Sec. 3. AS 09.55.460(b) is amended to read:

26 (b) The plaintiff may not be divested of a title or possession acquired except
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LAW OFFICES OF

Groh, Benkert and Walter

SECURITY TITLE AND TRUST BUILDING

711 "H" STREET, SUITE 600

Anchorage, Alaska 99501

TELEPHONES
(907) 272-6474
(907) 277-6433

CLIFFORD J. GROH
RONALD G. BENKERT
KARL L. WALTER, JR.
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March 23, 1976

The Honorable Terry Gardiner
Chairman, House Judiciary Committee
Alaska House of Representatives
Pouch V, State Capital
Juneau, Alaska 99811

RE: Eminent Domain Bill (SB 546)

Dear Mr. Gardiner:

I understand that your committee has before it a bill which was originally introduced by Senator Croft to change the standards of judicial review and what a condemnor must prove in order to exercise a declaration of taking. The bill as I understand it is an outgrowth of a case decided by the Alaska Supreme Court entitled ARCO Pipeline Co., et al. v. 3.60 acres, et al. As the attorney for the condemnor in that case I would like to point out some of the factors which I find would be a great detriment to the condemnor and the people of this State if the bill becomes law.

As a matter of background the present Alaska Declaratory Judgment Act is modeled upon the federal Declaratory Judgment Act. Until the trial court's decision in the ARCO Pipeline case, the federal rule, which was enunciated by the Alaska Supreme Court in that case, had been applied by the Alaska courts. In other words, the Alaska Supreme Court merely followed the federal rule which had been in existence for years and in Alaska since the Declaration of Taking Act was first enacted in 1953. In other words, the Supreme Court merely adopted the generally accepted federal rule which still permitted the court judicial review to determine if proper action had been exercised by the condemning authority but did not allow the court to determine where and how a project should be built, which is not the function of the court.

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March 23, 1976
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In my opinion, if the Croft bill had been law, this state would not have seen a pipeline constructed by 1977 because of the delays and perhaps complete frustration of being unable to find the parcels which a judge deemed suitable for the routing depending upon the judge involved. The bill would have caused additional costs in project design, attorney's fees, trial time, administrative costs and, finally and most important, would probably require the condemning authority to pay more for the property in excess of the just compensation in order to avoid legal entanglements. In short, the bill could be a way of judicial blackmail to achieve more than the just compensation.

The ARCO Pipeline case in itself is illustrative of the delay. The condemnor attempted for almost four years prior to negotiate a settlement, but it ended up with the condemnee requesting the absurd sum of over \$20,000.00 plus other stipulations for a 3.6 acre, 100 ft. (plus temporary construction easement) across the 80 acre homestead, which is not being used by the homesteader for any other use than a personal residence, in an area where the property is selling for a few hundred dollars an acre, and the condemnee asked for \$1,500.00 an acre, but wanted other damages. On July 15, 1974, the condemnor filed its declaration of taking. Hearings were held on September 20 and November 1 on the necessity. A decision was finally entered on December 24, and a petition for review was filed with the Supreme Court. Fortunately, the Supreme Court granted a petition for review because of the public importance of the pipeline and rendered the decision on August 1, 1975, reversing the trial court. The Supreme Court's decision cannot be viewed as an unjust result under the circumstances where the landowner says build the project over the neighbor's property and leave me alone, an attitude which ignores the fact that the neighbor might object.

Since most other projects such as utility right-of-way, highways, buildings and other projects are not so monumental to require a quick action by the courts, it can be seen that a condemnation which took over one year of being expedited through the courts would conceivably be further delayed if an appeal were taken through the normal route. At the present

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time I am involved in several matters on appeal, and one of them has been on appeal since May of 1975 without a record being prepared, and there will probably be an additional period of time of up to one year for the required briefing, oral argument and decision of the Supreme Court. In other words, the delay and frustration of the project could extend for over two years, and you undoubtedly know what a delay in construction costs means to a project. In short, a \$2,000.00 easement which must be obtained in court could hold up a \$1,000,000.00 project and add another 10-20% to that project until the easement is obtained. The condemnor either has to pay a greatly inflated price (judicial blackmail), redesign the project (and go through the same procedure again) or wait to determine what would happen in court. Furthermore, if the condemnor pays one landowner more during negotiations, then word spreads so that all condemnees want more. Because the Croft bill would require the court to make findings, the Supreme Court may be bound by such findings if not clearly "erroneous" and that project site would have to be abandoned because the trial court as judge, jury, planner, designer, engineer and economist so determined that another site might be better.

In the ARCO Pipeline case, the condemnee's basic objection to the pipeline was the routing. The condemnee stated that it should go around his property and drew a couple of pencil lines on a map to show to the court how this routing could be accomplished on someone else's property. In the ARCO Pipeline case the condemnee did not offer any expert testimony or show why the pencil line was better from an economic, soils, terrain, contours, planning, ecology, design, engineering, costs or other matters which a well-planned project would have to take into account. In other words, he made no offer to nor did he show the project was more feasible.

The trial court considered that this mere pencil line was in effect an "alternate route" and stated that the condemnor must offer "convincing evidence...to show that they have at least considered the alternative routing...and give cogent reasons for their alternate selection". In other words, the condemnor had to have prescience to visualize what every

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Page Four

possible condemnee might come up with over the 800 miles of pipeline, and to prove to the court why this imaginary alternate route should not be selected. As an engineer stated in one case, it is possible to build a pipeline up the side of the Empire State Building if one has the money to pay. So, the question in almost every condemnation case is not whether the project can be built at all on the particular parcel, but what is the more feasible route or site, a decision best determined by the agency and not a court. In the ARCO Pipeline case, based on the additional length as shown by the pencil line, the total construction cost of the proposed alternate pencil routing was estimated at \$192,500.00. In other words, if the condemnor had not shown to the court's satisfaction (the court being a planner, designer, engineer, etc.) under the Croft bill that the alternate routing was perhaps not feasible, then the court could deny the taking. You might argue that the court would not do such a ridiculous thing when an easement valued at hundreds of dollars an acre would necessitate a completely new redesign at a tremendous extra cost, but this is exactly what the trial court did in one actual case. You and your committee might ask yourself what would happen to every other project in the State of Alaska, once it is known that the means are at hand to frustrate a legitimate public purpose by adding a test for no reason other than the ruling in the ARCO Pipeline case is not understood.

The only purpose of a declaration of taking is to give immediate title to the property so that the work can proceed. A declaration of taking is premised on the idea that the condemnor has exercised and will exercise its best judgment in selecting the route and performing the necessary design and engineering. If the courts and condemnees are going to select the sites and how a project is to be built, I think the citizens of this state are entitled to a protest.

I should like to emphasize that I do not have any prospects in the future of representing any condemnors, and that my practice will be again limited to that of representing condemnees. I can assure you as an attorney representing condemnees that if the present bill passes which emasculates the Declaration of Taking Act, you can be assured that many condemnees will not

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surrender their property without going through the Supreme Court, unless as you may expect, they receive a considerable premium over and above the fair market value and just compensation for the privilege of the State having to avoid their challenge to the declaration of taking procedure so that the project can be built. Since the State must pay the condemnees actual costs under some circumstances such as when the jury some two years later in these inflationary times finds the property was 10% more (the condemnee asking for 100% or more) than the just compensation the entire cost through appeal could be added to the project cost.

In conclusion, the bill if passed would only frustrate legitimate public projects, would greatly delay the acquisition of property necessary for projects, would require the State and other condemnors to expend a great deal of money in attempting to meet frivolous objections, would probably require from time to time a complete project to be rerouted at considerable cost and would surely add to the land acquisition costs. In short, the bill is merely going to add to the great cost of public works and public utilities. You must ask who is being protected by the bill, the lawyers and their clients, or the general public.

I would request that you review this bill carefully because this bill will mean that a condemnor in effect no longer has a declaration of taking procedure to the detriment of the general public which undoubtedly desires a project being commenced as soon as possible at the least expense.

Yours very truly,


Karl L. Walter, Jr.

KLW/dd

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LAW OFFICES OF

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SECURITY TITLE AND TRUST BUILDING

711 H STREET, SUITE 600

Anchorage, Alaska 99501

TELEPHONES
(907) 272-6474
(907) 277-6433

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March 23, 1976
Page Four

possible condemnee might come up with over the 800 miles of pipeline, and to prove to the court why this imaginary alternate route should not be selected. As an engineer stated in one case, it is possible to build a pipeline up the side of the Empire State Building if one has the money to pay. So, the question in almost every condemnation case is not whether the project can be built at all on the particular parcel, but what is the more feasible route or site, a decision best determined by the agency and not a court. In the ARCO Pipeline case, based on the additional length as shown by the pencil line, the total construction cost of the proposed alternate pencil routing was estimated at \$192,500.00. In other words, if the condemnor had not shown to the court's satisfaction (the court being a planner, designer, engineer, etc.) under the Croft bill that the alternate routing was perhaps not feasible, then the court could deny the taking. You might argue that the court would not do such a ridiculous thing when an easement valued at hundreds of dollars an acre would necessitate a completely new redesign at a tremendous extra cost, but this is exactly what the trial court did in one actual case. You and your committee might ask yourself what would happen to every other project in the State of Alaska, once it is known that the means are at hand to frustrate a legitimate public purpose by adding a test for no reason other than the ruling in the ARCO Pipeline case is not understood.

The only purpose of a declaration of taking is to give immediate title to the property so that the work can proceed. A declaration of taking is premised on the idea that the condemnor has exercised and will exercise its best judgment in selecting the route and performing the necessary design and engineering. If the courts and condemnees are going to select the sites and how a project is to be built, I think the citizens of this state are entitled to a protest.

I should like to emphasize that I do not have any prospects in the future of representing any condemnors, and that my practice will be again limited to that of representing condemnees. I can assure you as an attorney representing condemnees that if the present bill passes which emasculates the Declaration of Taking Act, you can be assured that many condemnees will not


The Honorable Terry Gardiner
March 23, 1976
Page Five

surrender their property without going through the Supreme Court, unless as you may expect, they receive a considerable premium over and above the fair market value and just compensation for the privilege of the State having to avoid their challenge to the declaration of taking procedure so that the project can be built. Since the State must pay the condemnees actual costs under some circumstances such as when the jury some two years later in these inflationary times finds the property was 10% more (the condemnee asking for 100% or more) than the just compensation the entire cost through appeal could be added to the project cost.

In conclusion, the bill if passed would only frustrate legitimate public projects, would greatly delay the acquisition of property necessary for projects, would require the State and other condemnors to expend a great deal of money in attempting to meet frivolous objections, would probably require from time to time a complete project to be rerouted at considerable cost and would surely add to the land acquisition costs. In short, the bill is merely going to add to the great cost of public works and public utilities. You must ask who is being protected by the bill, the lawyers and their clients, or the general public.

I would request that you review this bill carefully because this bill will mean that a condemnor in effect no longer has a declaration of taking procedure to the detriment of the general public which undoubtedly desires a project being commenced as soon as possible at the least expense.

Yours very truly,



Karl L. Walter, Jr.

KLW/dd

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COMMITTEE REPORT

3/15/75

HOUSE

Mr. Speaker:

Date May 12, 1976

The Committee on JUDICIARY has had SB 575 am

under consideration. A Majority of the members of the Committee

recommends it DO PASS

recommends it DO NOT PASS

recommends it DO PASS WITH ATTACHED AMENDMENT(S)

recommends it BE REPLACED WITH CS FOR _____ AND THAT

CS FOR _____ DO PASS

"and" recommends it BE REFERRED TO THE _____

COMMITTEE

reports it back WITHOUT RECOMMENDATION

"other"

Members signing the Majority report:

Tony ... in Pass

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

Tony ... Chairman

STUMP & STUMP
ATTORNEYS-AT-LAW
314-317 COMMERCIAL BUILDING
BOX 2693
KETCHIKAN, ALASKA 99901
PHONE: 225-4131

January 7, 1976

Mr. Robert H. Ziegler, Sr.
Ziegler, Ziegler & Cloudy
P. O. Box 979
Ketchikan, Alaska 99901

Re: Request for Legislative Action

Dear Bob:

By the time you receive this you should be in Juneau attending to legislation for the State of Alaska.

I would appreciate it if you would give consideration to the following request: I note that in Alaska Statute Title 09.40.230 as it relates to injunctions, there appears within the context of these statutes, the following:

"When it appears that (1) the plaintiff is entitled to the relief demanded, and the relief or any part of it includes restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or (2) the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done some act in violation of the plaintiff's rights concerning the subject of the action and tending to render the judgment ineffectual; or (3) the defendant threatens or is about to remove or dispose of his property or a part of it with intent to delay or defraud his creditors, an injunction may be allowed to restrain such act, removal, or disposition."

I certainly believe that the reference to plaintiff and defendant therein should be deleted, as certainly, and I am sure you are quite aware of this, there are instances where the defendant at times moves for injunctive relief and should not be precluded from so doing merely because the statute states that the plaintiff has to be the moving party.

STUMP & STUMP
ATTORNEYS AT LAW

Mr. Robert H. Ziegler, Sr.
January 7, 1976
Page 2.

I would therefore respectfully request that this statute be amended to delete reference to plaintiff and defendant, and interpose the word "party", or such other word as would not directly make reference to the persons as either plaintiff or defendant.

Thank you for your courtesy in this matter, Bob, and may you have a most successful legislative session.

Very truly yours

STUMP & STUMP

By W. Clark Stump
W. Clark Stump

WCS:ju

STUMP & STUMP

ATTORNEYS-AT-LAW

315 NATIONAL BANK OF ALASKA BUILDING

P. O. BOX 2693

KETCHIKAN, ALASKA 99901

PHONE 225-4131

February 4, 1976

Hon. Robert H. Ziegler, Sr.
Senator - Alaska State Legislature
Pouch V
Juneau, Alaska 99811

RE: AS 09.40.230

Dear Bob:

Thanks for your letter of February 4, 1976 relative to my suggestion on the amendment of AS 09.40.230.

In answer to your inquiry, as you no doubt know from your long and valued career as an attorney, any party to a lawsuit has the right to move for injunctive relief; i.e. plaintiff or defendant. The way AS 09.40.230 was worded only the "plaintiff" had the right to secure such relief. Your amendment would allow "both" parties to secure such relief; i.e. plaintiff or defendant.

I find the application of this statute most used in domestic relation type cases; i.e. husband files for divorce, and his wife the defendant, seeks injunctive relief to enjoin the plaintiff from disposing of the family assets pending the final outcome of the case. Of course this is only one example, however, it is illustrative.

Thank you for your consideration on my suggestion.

Very truly yours,

STUMP & STUMP

BY:

W. Clark Stump
W. Clark Stump

WCS:s

SB

592

COMMITTEE REPORT

3/17/76

HOUSE

Mr. Speaker:

Date May 6, 1976

The Committee on JUDICIARY has had 23 502 am

under consideration. A Majority of the members of the Committee

() recommends it DO PASS

() recommends it DO NOT PASS

() recommends it DO PASS WITH ATTACHED AMENDMENT(S)

() recommends it BE REPLACED WITH CS FOR _____ AND THAT
CS FOR _____ DO PASS

() "and" recommends it BE REFERRED TO THE _____
COMMITTEE

() reports it back WITHOUT RECOMMENDATION

() "other"

Members signing the Majority report:

Terry Hardman - Do Pass _____

Members NOT concurring in the Majority report:

_____ recommends:
_____ recommends:
_____ recommends:
_____ recommends:
_____ recommends:

Terry Hardman Chairman



JUNEAU ALASKA

Alaska State Legislature House

March 17, 1976

MEMORANDUM

TO: Representative Terry Gardiner
Chairman, House Judiciary Committee

FROM: Representative Bob Bradley
Chairman, House Commerce Committee

SUBJECT: Senate Bill No. 592

Attached is some backup material on Senate Bill No. 592, relating to the theft of telecommunications which was passed out of the Commerce Committee and referred to Judiciary.

Practice Commentaries

by Arnold D. Hechtman

This section is supplementary to a prior provision rendering one who steals tangible property consisting of "secret scientific material" (defined in § 155.00[6]) guilty of grand larceny in the third degree (§ 155.30[3]). The latter crime applies to one who, for example, steals a document reciting a secret scientific formula. It does not, however, embrace one who with the same larcenous intent photographs or copies such a document, since such conduct does not constitute a *taking* of properties so as to constitute larceny (§ 155.05[1]). The instant section plugs the indicated gap with the crime of "unlawful use of secret scientific material," which, like the larceny offense (§ 155.30), is graded a class E felony.

§ 165.10 Repealed. L.1969, c. 115, § 4, eff. on 120th day after Mar. 25, 1969

Historical Note

Section, which related to theft of services and definitions of terms, was added L.1965, c. 1030; amended L. 1967, c. 791, § 24.

§ 165.15 Theft of services

A person is guilty of theft of services when:

1. He obtains or attempts to obtain a service, or induces or attempts to induce the supplier of a rendered service to agree to payment therefor on a credit basis, by the use of a credit card which he knows to be stolen.
2. With intent to avoid payment for restaurant services rendered, or for services rendered to him as a transient guest at a hotel, motel, inn, tourist cabin, rooming house or comparable establishment, he avoids or attempts to avoid such payment by unjustifiable failure or refusal to pay, by stealth, or by any misrepresentation of fact which he knows to be false. A person who fails or refuses to pay for such services is presumed to have intended to avoid payment therefor; or
3. With intent to obtain railroad, subway, bus, air, taxi or any other public transportation service without payment of the lawful charge therefor, or to avoid payment of the lawful charge for such transportation service which has

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 ent reciting a secret sci-
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 ns or copies such a docu-
 stitute a taking of prop-
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 hich, like the larceny of
 felony.

115, § 4, eff. on 120th day

L.1965, c. 1030; amended L.
c. 791, § 24.

s when:
 obtain a service, or induces
 or of a rendered service to
 credit basis, by the use of
 be stolen.

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 ed to him as a transient
 rist cabin, rooming house
 voids or attempts to avoid
 ilure or refusal to pay, by
 on of fact which he knows
 or refuses to pay for such
 atended to avoid payment

oad, subway, bus, air, taxi
 service without payment
 to avoid payment of the
 station service which has

been rendered to him, he obtains or attempts to obtain such
 service or avoids or attempts to avoid payment therefor
 by force, intimidation, stealth, deception or mechanical
 tampering, or by unjustifiable failure or refusal to pay; or

4. With intent to avoid payment by himself or another
 person of the lawful charge for any telecommunications
 service, he obtains or attempts to obtain such service or
 avoids or attempts to avoid payment therefor by himself
 or another person by means of (a) tampering or making
 connection with the equipment of the supplier, whether by
 mechanical, electrical, acoustical or other means, or (b)
 any misrepresentation of fact which he knows to be false,
 or (c) any other artifice, trick, deception, code or device;
 or

5. With intent to avoid payment by himself or another
 person for a prospective or already rendered service the
 charge or compensation for which is measured by a meter
 or other mechanical device, he tampers with such device
 or with other equipment related thereto, or in any manner
 attempts to prevent the meter or device from performing
 its measuring function, without the consent of the supplier
 of the service. A person who tampers with such a device
 or equipment without the consent of the supplier of the
 service is presumed to do so with intent to avoid, or to
 enable another to avoid, payment for the service involved;
 or

6. With intent to obtain, without the consent of the sup-
 plier thereof, gas, electricity, water, steam or telephone
 service, he tampers with any equipment designed to sup-
 ply or to prevent the supply of such service either to the
 community in general or to particular premises; or

7. Obtaining or having control over labor in the employ
 of another person, or of business, commercial or industrial
 equipment or facilities of another person, knowing that he
 is not entitled to the use thereof, and with intent to de-
 rive a commercial or other substantial benefit for himself
 or a third person, he uses or diverts to the use of himself
 or a third person such labor, equipment or facilities.

Theft of services is a class A misdemeanor.

L.1965, c. 1030; amended L.1967, c. 791, § 25; L.1969, c. 115, § 6.

Historical Note

1969 Amendment. Subd. 1. L.1969, c. 115, § 5, eff. on 120th day after Mar. 25, 1969, added subd. 1. It derived from former subd. 1, repealed L.1969, c. 115, § 5.

1967 Amendment. Subd. 2. L.1967, c. 791, § 25, eff. Sept. 1, 1967, added sentence beginning "A person who falls."

Subd. 5. L.1967, c. 791, § 25, eff. Sept. 1, 1967, omitted "provided by the supplier of the service" following "mechanical device."

Subd. 6. L.1967, c. 791, § 25, eff. Sept. 1, 1967, omitted "of the supplier thereof" following "equipment."

Derivation. Subd. 1. New

Subd. 2. Penal Law 1909, § 925, added L.1923, c. 503, amended L.1939, c. 579; L.1955, c. 469.

Subd. 3. Penal Law 1909, §§ 1990, 1990-b. Section 1990, amended L. 1917, c. 350; L.1957, c. 823, was from

Penal Code 1881, § 426, amended L. 1890, c. 458, § 1. Section 1990-b, added L.1957, c. 824, amended L.1965, c. 108.

Subd. 4. Penal Law 1909, §§ 967, 1293-c. Section 967 added L.1961, c. 548. Section 1293-c, added L.1916, c. 367, amended L.1941, c. 883; L.1955, c. 477.

Subd. 5. Penal Law 1909, §§ 1431, 1431-a, 1432, 1432-a. Section 1431, was from Penal Code 1881, § 651, amended L.1888, c. 219, § 1; L.1892, c. 692, § 1; L.1892, c. 693, § 1; L. 1893, c. 692, § 1; L.1900, c. 589, § 1; L.1906, c. 453, § 1. Section 1431-a added L.1926, c. 842. Section 1432 was from Penal Code 1881, § 651-a, added L.1902, c. 333, § 1. Section 1432-a added L.1933, c. 414.

Subd. 6. Penal Law 1909, §§ 1431, 1432, 1432-a, for history, see subd. 5 note above.

Subd. 7. New.

Practice Commentaries

by Arnold D. Hechtman

In relation to the former Penal Law, this section is entirely new in form and substantially new in substance.

Since "services" are not "property," "theft" of a service does not constitute larceny; and, if any such conduct is to be proscribed, it must be by special statute. The former Penal Law defines few offenses of that nature (see §§ 927, 967, 1431, 1432, 1432-a). It is not necessary, however, to go to the other extreme of equating services with property and of predicating, wherever possible (mainly in the area of deception), "theft of service" offenses equivalent to those involving thefts of property, or larcenies. Legislation of that character would doubtless lead to hosts of "criminal" charges of a basically civil nature. The instant section steers a middle course by defining seven specific offenses, most involving theft or attempted theft of certain kinds of services.

Subdivision 1, dealing with credit card offenses, was amended in 1969, as one phase of an extensive bill enacted for

Historical Note

99. Penal Code 1881, § 426, amended L. 1890, c. 458, § 1; § 426, amended L. 1957, c. 884, amended L. 1965, c. 398.

967. Subd. 4. Penal Law 1909, §§ 967, 1293-c. Section 967 added L. 1967, c. 548. Section 1293-c. added L. 1916, c. 367, amended L. 1911, c. 883; L. 1955, c. 477.

967. Subd. 5. Penal Law 1909, §§ 1431, 1431-a, 1432, 1432-a. Section 1431, was from Penal Code 1881, § 651, amended L. 1888, c. 219, § 1; L. 1892, c. 692, § 1; L. 1892, c. 695, § 1; L. 1893, c. 692, § 1; L. 1909, c. 589, § 1; L. 1946, c. 473, § 1. Section 1431-a added L. 1927, c. 84. Section 1432 was from Penal Code 1881, § 651-a, added L. 1899, c. 333, § 1. Section 1432-a added L. 1903, c. 414.

967. Subd. 6. Penal Law 1909, §§ 1431, 1432, 1432-a. For history, see subd. 5 note above.

967. Subd. 7. New.

Commentaries

D. D. Hechtman

Penal Law, this section is entirely new in substance.

"property," "theft" of a service; and, if any such conduct is to be a special statute. The former Penal Code of that nature (see §§ 927, 967, 967, not necessary, however, to go to the services with property and of predominantly in the area of deception), equivalent to those involving thefts. Legislation of that character would "criminal" charges of a basically section steers a middle course by defining, most involving theft or attempted-services.

with credit card offenses, was the use of an extensive bill enacted for

the purpose of strengthening the Penal Law in its application to conduct involving theft and misuse of credit cards (L. 1969, c. 115; see practice commentary upon § 165.09).

Prior to 1969, the general subject of fraudulently obtaining property or services by means of stolen, false or improperly used credit cards was covered by (1) the crime of larceny (by false pretenses) in cases where property was obtained; (2) the "theft of services" offense at hand (§ 165.15 [1]) in cases where a service was obtained; and (3) a misdemeanor entitled "unauthorized use of credit cards," which appeared not in the Penal Law but in the General Business Law (§ 513). The General Business Law statute, defining in rather complex fashion a very broad offense or offenses embracing acquisition of both property and services, covered approximately the same ground as the appropriate Penal Law statutes.

The 1969 credit card bill (L. 1969, c. 115) did not work any truly significant change of substance in this area but established a new structural format. The rather redundant General Business Law section (§ 513) was repealed. The Penal Law "theft of services" provision (§ 165.15[1]) was narrowed to apply to the acquisition of services by means of "stolen" credit cards only (rather than acquisition by means of almost any kind of defective card, as was formerly the case). And, finally, a new Penal Law section was added (§ 165.17), defining the crime of "unlawful use of credit card," which does not deal with the use of stolen or forged cards but renders guilty of a misdemeanor one who "in the course of obtaining or attempting to obtain" either "property or a service displays a credit card which he knows to be revoked or cancelled".

These offenses together with various others in the larceny and forgery areas have the following overall scope with respect to a person who purchases or attempts to purchase property or a service by means of a credit card which he knows to be in some way defective for the purpose:

(1) Regardless of whether property or a service is the subject of the purchase, and regardless of whether the credit card is stolen or counterfeit, or whether it has merely been canceled or revoked, the culprit is guilty, at the very least, of a class A misdemeanor (§§ 165.25, 165.15[1], 165.17).

(2) If property is the subject of the purchase or attempted purchase, the culprit has committed larceny and, depending upon the value of the property, may or may not also be guilty of a felony (§ 155.30).

(3) If the credit card is a stolen one, the culprit is, undoubtedly, also guilty of criminal possession of stolen property in the second degree, a class E felony (§ 165.45 [2]). In addition, if in making or attempting to make the purchase he signs a voucher, receipt or other paper in the name of the card owner—as he usually would have to do—he is also guilty of forgery in the second degree, a class D felony (§ 170.16[1]).

(4) If the credit card is a forged or counterfeit one, the culprit is, undoubtedly, also guilty of criminal possession of a forged instrument in the second degree, a class D felony (§ 170.25).

Subdivision 2 restates the proscriptions of former Penal Law § 925 but expands the offense to include thefts and payment-avoidance of restaurant services as well as of those provided by hotels, inns and the like.

Subdivision 3 includes certain former Penal Law offenses (§§ 199.1, 2, 199.4) but broadens the general crime to encompass improper acquisition or fee-avoidance of all forms of "public transportation service" rather than of the limited kinds specified in the former statutes.

Subdivision 4 substantially restates former Penal Law § 967 (see, also, § 12.03-c).

Subdivision 5 substantially restates certain phases of three former sections dealing in part with fraudulent tampering with gas, electric, steam and water meters (§§ 1431, 1431-a, 1432). The offense is broadened, however, to include meter tampering and similar larceny relating to any sort of public or private service measured by a meter, whether of the indicated public utility kinds or otherwise.

Subdivision 6 embodies other phases of former Penal Law §§ 1431 and 1432, addressed to the acquisition of gas, electric, steam and water service without the supplier's consent. This offense does not necessarily require intent to avoid payment for the service improperly obtained. It would apply, for example, to one who, having had his gas turned off, succeeds in regaining the service by unauthorized tampering, regardless of whether he intends to pay for the gas thus obtained.

Subdivision 7 is new. The 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 an unprofitable use of the mill's machinery to spin a substantial quantity of yarn. The judgment was reversed on the ground that the use of the mill's facilities and labor was not "property" and, hence, could not be stolen. Subdivision 7 herein renders such a result impossible.

Theft of Services is a one-degree misdemeanor. Obviously, all the ways in which it can be committed are not of equal gravity. It would be reasonable to expect the Legislature to prescribe a number of degrees, prescribing the punishment with the gravity of the prohibition. Above, this section represented a one-degree misdemeanor in New York law which was introduced in 1907. It was originally defined as a misdemeanor. The Legislature has since subclassified it; the expectation that it would impose reasonable subclassification in a subsequent legislative session since about 1910. It was introduced, for example, to extend the definition of services and make it a violation of the law. Such attempts have not been successful because they lacked merit but not because they lacked distinction from "hotel" or "taxi" services. Hopeful that the Legislature will soon be forthcoming.

Cross Reference

Buildings may be entered for examination of work, see Transportation Corporation. Hotels and boarding houses, generally, see Larceny, see section 155.00 (1) (a).

Notes of Decisions

- Historical 1
- Hotel service 2
- Meters or attachments, tampering with 3
- Refusal to pay fare 4
- Stealing rides 5

1. Historical
The first enactment by the Legislature upon the general subject was in 1907.

of a stolen one, the culprit is, criminal possession of stolen property, a class B felony (§ 165.45) making or attempting to make a check, receipt or other paper in his name—as he usually would have done—forgery in the second degree, a class B misdemeanor (§ 165.10).

of a forged or counterfeit one, the culprit is also guilty of criminal possession of a forged instrument in the second degree, a class B misdemeanor (§ 165.10).

descriptions of former Penal Law § 165.10 are amended to include thefts and payments for services as well as of those described in former Penal Law § 165.10.

of a former Penal Law offense broadens the overall crime to include the avoidance of all forms of "tax" rather than of the limited categories of "tax" services.

restates former Penal Law § 165.10.

restates certain phases of former Penal Law § 165.10 in part with fraudulent tampering and water meters (§ 165.10), broadened, however, to include chicanery relating to any sort of service, whether of a utility or otherwise.

of phases of former Penal Law § 165.10, the acquisition of gas, electric, water or steam, without the supplier's consent, and the failure to pay for the same, require intent to avoid payment. It would apply, for example, if a person had his gas turned off, subsequently obtained the gas, and failed to pay for the gas thus obtained.

of an offense is included for the first time in the present law (People v. Ashworth, 1927, 220 N.Y. 100).

The defendants therein, a husband and wife, were convicted of grand larceny in the second degree.

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. Subdivision 7 herein renders such conduct a "theft of services."

Theft of Services is a one-degree crime: a class A misdemeanor. Obviously, all the ways in which this offense can be committed are not of equal seriousness so that it would be reasonable to expect the offense to be defined in a number of degrees, prescribing punishment commensurate with the gravity of the prohibited conduct. As indicated above, this section represented a substantially new concept in New York law when it was incorporated into the revised Penal Law in 1967. Because of its basic novelty as a separately defined crime, no attempt was then made to further subclassify it; the expectation being that, as experience with the impact of the section developed, the Legislature would impose reasonable subclassifications. In almost every legislative session since about 1970, bills have, in fact, been introduced, for example, to extract only the theft of railroad services and make it a violation rather than a class A misdemeanor. Such attempts have thus far been unsuccessful not because they lacked merit but because they created an illogical and unfair distinction between "railroad" and "subway" or "taxi" services. Hopefully, appropriate subclassification will soon be forthcoming.

Cross References

- Buildings may be entered for examination of meters, pipes, fittings, wires and works, see Transportation Corporations Law § 14.
- Hotels and boarding houses, generally, see General Business Law § 200 et seq.
- Larceny, see section 165.00 et seq.

Notes of Decisions

- Historical 1
- Hotel service 2
- Meters or attachments, tampering with 3
- Refusal to pay fare 4
- Stealing rides 5

found in L.1878, c. 261. That statute made it a misdemeanor for any person to get on or off a freight car or engine while in motion, or to ride on any wood or freight car, unless employed by or with permission from the proper officers of such railroad or the person in charge of such car or engine. Subdivision 1 of section 165.15 of the Penal Code was plainly a codification of that enactment. By

1. Historical
The first enactment by the legislature upon the general subject is to be

REPRODUCED FROM THE ORIGINAL SOURCE

Note 1

L.1879, c. 474, it was made a misdemeanor for a minor or other person, hinder, or delay the passage or running of any car lawfully running upon any horse or street railroad. Subdivision 3 of section 426 of the Penal Code was, quite as plainly, a codification of that statute. By L. 1880, c. 370, it was made a misdemeanor for a minor or other person, not a passenger, to climb, stand upon, or in any way to attach himself to, a locomotive or car, unless it is done in compliance with law, or by permission, under the lawful rules and regulations of the railroad. The same chapter also made it a misdemeanor to invite or solicit any such minor or other person to come, or to be, or to consent to his remaining upon, any engine, or any freight or baggage car, unless rightfully there by law, or with permission under the rules and regulations of the corporation. Thus, these three statutes had for their object the prevention of the unauthorized riding, or being, upon cars or engines, and of the obstruction, or delaying, of cars upon surface railroads. In the following year, when the Penal Code was established (L.1881, c. 676), section 426 was enacted as it stands at present with the exception that, by an amendment in 1890 (L.1890, c. 458), subdivision 3 was made to apply to steam railways, as well as to horse and street railways, and the caption "Riding on freight trains" was added. It is reasonable to infer that the Penal Code, in the respect which we are now considering, was intended as a codification of, and to retain within its provisions, existing laws. *East v. Brooklyn Heights R. Co.*, 1909, 195 N.Y. 469, 88 N.E. 751.

2. Hotel service

Evidence that guest left hotel with her baggage, leaving an unpaid balance for room rent and telephone charges, did not sustain conviction of obtaining credit or accommodation at hotel with intent to defraud, in absence of proof that when she registered she did so with intent to de-

fraud, and where, aside from indebtedness involved, she had paid all other charges for over 6 months. *People v. Astor*, 1945, 269 App.Div. 250, 55 N.Y.S.2d 283.

Presumption under this section [Penal Law 1909, § 925] of intent to defraud by obtaining credit or accommodation at hotel arising from guest's leaving hotel with baggage and charges unpaid was overcome, where the leaving was not surreptitious but was requested by hotel proprietor. *Id.*

An apartment hotel comprising kitchenette apartments and accommodating transients only very infrequently did not constitute a "hotel" with respect to plaintiff who occupied a small furnished apartment with his family under a six months' lease within this section [Penal Law 1909, § 925]. *Cooper v. Schirmelster*, 1941, 176 Misc. 474, 26 N.Y.S.2d 668.

The omission of the term "apartment hotel" in this section [Penal Law 1909, § 925] was deliberate in absence of any expression or action by the Legislature which might be deemed a sufficient basis for describing a different intent, and the term "hotel" in this section does not include an "apartment hotel." *Id.*

"A hotelkeeper can require a guest to pay his board in advance. The law gives him a lien upon the guest's baggage and" this section [Penal Law 1909, § 925] "give him a drastic remedy in all cases" actual fraud either in obtaining credit or in any effort to deprive the landlord of his lien upon a guest's baggage. But the mere fact of a guest not being able to pay a hotel bill is not a crime." *People v. Klas*, 1913, 79 Misc. 452, 141 N.Y.S. 212. See also, *People v. Nicholson*, 1898, 25 Misc. 266, 55 N.Y.S. 447.

Where a landlord keeps a board bill and bar bill together and makes no specific application of payments, he cannot claim that the balance due is for board and proceed under this

section [Penal Law 1909, § 925]. *People v. Klas*, 1913, 79 Misc. 452, 141 N.Y.S. 212.

Where a board bill is contracted by a regular boarder at a hotel without misrepresentation and he leaves the hotel openly and takes his baggage openly, he is not guilty of a violation of this section [Penal Law 1909, § 925]. *Id.*

Where there is no evidence that defendant intended to defraud hotel keeper by making false pretenses, surreptitiously removed baggage, he left merely to obtain money to pay bill, he cannot be convicted under this section [Penal Law 1909, § 925]. *People v. Nicholson*, 1898, 25 Misc. 266, 55 N.Y.S. 447.

3. Meters or attachments, tamper with

This section [Penal Law 1909, § 1431-a relating to meters or attachments] was applicable to civil actions or proceedings. *Ed-Ess. Inc. v. New York Edison Co., Inc.*, 1932, 237 App. Div. 315, 261 N.Y.S. 226. See also, *Esposito v. Consolidated Edison Co. of N. Y.*, 1947, 68 N.Y.S.2d 868; *Zacharia v. Consolidated Edison Co. of New York*, 1910, 22 N.Y.S.2d 157; *Parsons Const. Corporation v. City of New York*, 1937, 163 Misc. 922, 29 N.Y.S. 276.

4. Refusal to pay fare

Where leasing corporation, from which defendant was alleged to have engaged a limousine for hire, thereafter unjustifiably failing to pay for services rendered, was engaged in business of providing private hire, she services and reserved to itself right to refuse service to members of public it did not waive to serve, so that it was a private as opposed to common carrier, service provided by corporation did not fall within scope of subd. 3 of this section provided that a person is guilty of "theft of services" when, with intent to obtain railroad, subway, bus, air, taxi or "any other public transportation service" without payment of lawful

LIBRARY

and where, aside from indebtedness involved, she had paid all other charges for over 6 months. *People v. Astor*, 1045, 269 App.Div. 259, N.Y.S.2d 283.

Presumption under this section [Penal Law 1909, § 925] of intent to fraud by obtaining credit or accommodation at hotel arising from guest's leaving hotel with baggage and charges unpaid was overcome where the leaving was not surreptitious but was requested by hotel proprietor. *Id.*

An apartment hotel comprising cheneette apartments and accommodating transients only very infrequently did not constitute a "hotel" with respect to plaintiff who occupied a small furnished apartment with his family under a six months' lease within this section [Penal Law 1909, § 925]. *Cooper v. Schirmesser*, 1941, 176 Misc. 474, 29 N.Y.S.2d

The omission of the term "apartment hotel" in this section [Penal Law 1909, § 925] was deliberate in absence of any expression or action by the Legislature which might be deemed a sufficient basis for ascribing a different intent, and the term "hotel" in this section does not include an "apartment hotel." *Id.*

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4. Refusal to pay fare

Where leasing corporation, from which defendant was alleged to have engaged a limousine for hire, thereafter unjustifiably failing to pay for services rendered, was engaged in business of providing private limousine services and reserved to itself right to refuse service to members of public it did not wish to serve, so that it was a private as opposed to a common carrier, service provided by corporation did not fall within scope of subd. 3 of this section providing that a person is guilty of "theft of services" when, with intent to obtain railroad, subway, bus, air, taxi or "any other public transportation service" without payment of lawful

charge therefor, he obtains or attempts to obtain such service by unjustifiable failure or refusal to pay. *People v. Lee*, 1972, 71 Misc.2d 239, 336 N.Y.S.2d 18.

Defendant railroad passenger's refusal to show his ticket to trainman on request constituted violation of this section [Penal Law 1909, § 1990] proscribing riding on railway car without authority or permission of proper officers or with intention of not paying therefor. *People v. Gins*, 1966, 49 Misc.2d 883, 268 N.Y.2d 644.

Refusal by passenger on railroad train to pay amount of fare demanded of him is prima facie evidence of his intention not to pay for the ride in violation of this section [Penal Law 1909, § 1990] providing that person who rides passenger car with intention of not paying therefor is guilty of an offense. *People v. Painsmith*, 1958, 14 Misc.2d 300, 174 N.Y.S.2d 860.

This section [Penal Law 1909, § 1990] providing that person who rides on passenger car with intention of not paying therefor is guilty of an offense does not apply only to persons who surreptitiously attempt to obtain transportation without paying therefor, but was applicable to passenger who refused to pay to conductor three cents which conductor believed was applicable to fare as federal transportation tax. *Id.*

Once a passenger on railroad train decides to refuse to pay fare demanded, he acts at his own peril, but if passenger tenders an amount equal to correct fare, he does not violate this section [Penal Law 1909, § 1990] providing that person who rides passenger car with intention of not paying therefor is guilty of an offense. *Id.*

Under section 4263 of 26 U.S.C.A. (I.R.C.1954) of Internal Revenue Code providing that 10 per cent excise tax on amount paid for transportation of persons by rail shall not apply to amounts which do not exceed 50

Nbts 4

cents or 10 amounts paid for commutation tickets for one month or less, no tax was due on 20-cent fare for transportation of passenger, who had monthly commutation ticket, to destination not included within ticket, and passenger, who offered to pay the 20 cents, but refused to pay 3 cents which conductor stated was due as transportation tax, did not violate this section [Penal Law 1909, § 1990] providing that a person who rides on passenger car with intention of not paying therefor is guilty of an offense. Id.

freight train was diverted to in reversing a judgment for the plaintiff in a negligence action. Barrett v. New York Cent., etc., R. Co., 1899, 157 N.Y. 663, 52 N.E. 659.

This section [Penal Law 1909, § 1990] rendered one stealing a ride on a freight train guilty of a misdemeanor. Sharp v. Erie R. Co., 1904, 90 App.Div. 502, 85 N.Y.S. 553, reversed on other grounds 184 N.Y. 100, 76 N.E. 923. See, also, People v. Webster, 1894, 75 Hun 278, 26 N.Y.S. 1007.

5. Stealing rides

The prohibition against stealing rides does not extend to cases where permission to ride on an engine is given by the person in charge thereof, as the engineer. Grimsshaw v. Lake Shore, etc., R. Co., 1912, 205 N.Y. 371, 98 N.E. 762.

Where an officer sees a person stealing a ride on a freight train and directs another officer to arrest him, who does so and at the station house charges him with vagrancy, he may be convicted of a violation of this section [Penal Law 1909, § 1990], where, on being taken before a magistrate, the first officer charges him with such violation. People v. Webster, 1894, 75 Hun 278, 26 N.Y.S. 1007.

A violation of this section [Penal Law 1909, § 1990] in riding on a

§ 165.17 Unlawful use of credit card

A person is guilty of unlawful use of credit card, when in the course of obtaining or attempting to obtain property or a service, he uses or displays a credit card which he knows to be revoked or cancelled.

Unlawful use of credit card is a class A misdemeanor. Added L.1969, c. 115, § 6.

Practice Commentaries

by Arnold D. Hechtman

This section was added by one of a series of amendments contained in a 1969 bill designed to strengthen New York's criminal laws in their application to frauds and misconduct committed by the use of stolen, forged or otherwise defective credit cards (L.1969, c. 115, section 6). An explanation of this section is contained in the practice commentary upon § 165.15.

§ 165.20 Fraudulently obtain

A person is guilty of fraudulently with intent to defraud or injure a tial benefit for himself or a third ture of a person to a written in- representation of fact which he kn.

Fraudulently obtaining a signat L.1965, c. 1030.

Historical

Derivation. Penal Law 1909, §§ 932, 934, 935, 937-a. Section 932 was from Penal Code 1881, § 596. Section 934, amended L.1959, c. 363, was

Practice Cases

by Arnold D.

This section replaces a variety sions directed at those who fr- ture of another to a written. 937, 937-a, 938).

Cross Ref

Larceny, see section 155(a) et seq. Signature defined, see General Construc.

Notes of L

- Audit and payment of claims 3
- Church collections and contributions 4
- Credit statement 5
- Elements of crime 1
- Legal papers and documents 6
- Spurious documents 7
- Written instrument, generally 2

1. Elements of crime

To be actionable the pretenses used in obtaining property by false token or writing must be calculated to deceive or be capable of defrauding. People v. Court of Gyer, etc., 1881, 81 N.Y. 436.

The reliance on the pretense by the prosecutor is an essential element of

PENAL LAW

PENAL LAW

§ 165.15

by fraudulent statement or device. People v. Price, 1975, 47 A.D.2d 499, 366 N.Y.S.2d 726.

ARTICLE 165—OTHER OFFENSES RELATING TO THEFT

§ 165.05 Unauthorized use of a vehicle

Practice Commentary Cited People v. Alamo, 1974, 34 N.Y.2d 452, 359 N.Y.S.2d 375, 313 N.E.2d 419.

10. Failure of lessee to return vehicle

A failure by a lessee of a commercially rented vehicle to return it to lessor at time stipulated is not a violation of subd. 3 of this section and, at least in absence of a demand by owner and refusal by lessee to deliver, original renting and retention does not become a crime by lapse of time, but is merely a breach of contract. Banner Car, Co. v. Lazar, 1975, 51 Misc.2d 360, 360 N.Y.S.2d 314.

Supplementary Index to Notes Failure of lessee to return vehicle 10

9. Evidence

Evidence was insufficient to establish defendant's guilt beyond a reasonable doubt of possession of weapons and dangerous instruments and appliances or unauthorized use of a vehicle. People v. Roberts, 1975, 47 A.D.2d 909, 366 N.Y.S.2d 227.

§ 165.15 Theft of services

A person is guilty of theft of services when:

[See main volume for text of 1 to 5]

4. With intent to avoid payment by himself or another person of the lawful charge for any telecommunications service, including, without limitation, cable television service, he obtains or attempts to obtain such service for himself or another person or avoids or attempts to avoid payment therefor by himself or another person by means of (a) tampering or making connection with the equipment of the supplier, whether by mechanical, electrical, acoustical or other means, or (b) any misrepresentation of fact which he knows to be false, or (c) any other artifice, trick, deception, code or device; or

[See main volume for text of 5 to 7]

Theft of services is a class A misdemeanor. As amended L.1975, c. 530, § 2.

1975 Amendment. Subd. 4, L.1975, c. 530, § 2, eff. on the 90th day after July 29, 1975, included cable television service theft for himself or another person.

Supplementary Practice Commentaries

by Arnold D. Hechtman

1975

Subdivision 4 was amended to add "cable television service" (L.1975, c. 530); a phrase which is now defined in subdivision 9 of § 155.00. The amendment was sponsored by the Cable Television Commission which, apparently, considered that the development of cable television use in this State has been inhibited by widespread theft of cable television services. One estimate is that as many as 100,000 people in New York State may be getting cable services without paying for it. Obviously, a serious theft problem exists but that does not mean that the instant amendment is necessary. It assumes—or at least implies—that the theft of cable television services was not heretofore proscribed so that the specific inclusion thereof was necessary.

Subdivision 4, since its initial enactment, has spoken in terms of the theft of "telecommunications services." This phrase, not found in the former Penal Law, was introduced in the 1967 revision as a generic term to encompass just such technical advances as cable television. The former law specifically addressed "telephone" or "telegraph" services (former Penal Law §§ 967, 1200-c) and, if such terms had been

to first degree

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defendant which were dismissed at close of the People's case was legally sufficient to support such counts under a theory of larceny by false pretenses or larceny by false promises. People v. Consolazio, 1975, 47 A.D.2d 823, 366 N.Y.S.2d 190.

55. — Second degree larceny

Evidence showing, inter alia, that welfare assistance recipient fraudulently received public welfare funds of over \$5,000 supported conviction of second-degree grand larceny. People v. Price, 1975, 47 A.D.2d 499, 366 N.Y.S.2d 726.

57. — Petit larceny

Evidence that defendant took art works from dealer by giving false promises to sell the works and return the proceeds, minus a commission, to the dealer, that defendant failed to respond to various correspondence from art dealer requesting payment or return of the works and defendant's admissions that sales had been completed, and that he had engaged in similar transactions demonstrated beyond a reasonable doubt and to a moral certainty that defendant had a fraudulent intent and was guilty of petit larceny. People v. Newman, 1975, 80 Misc.2d 975, 365 N.Y.S.2d 400.

§ 160—ROBBERY

1st degree

773. and demanded money from cash register, that defendant took money from her wallet, that an accomplice of defendant took money from cash register, and that defendant participated in harassment and threats to her following the robbery was sufficient to sustain defendant's convictions for first-degree robbery, second-degree robbery, two counts of third-degree grand larceny, and harassment. People v. Plummer, 1975, 36 N.Y.2d 161, 365 N.Y.S.2d 812, 325 N.E.2d 161.

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§ 165.15

PENAL LAW

continued in the revised law, the instant amendment would be appropriate. But the word "telecommunication" was adopted precisely for the purpose of obviating periodic amendment of this subdivision whenever a new device, such as cable television, is introduced into our culture. As defined, "telecommunications" means: "communication at a distance (as by cable, radio, telegraph, telephone or television)" (Webster's Third New International Dictionary, unabridged). Thus, without further elaboration, the statute clearly included the subject of the instant amendment.

The objection to this amendment is not that it is incorrect but that it is inappropriate. One of the major deficiencies of the former Penal Law was that, by accretion over the years, it became a cumbersome and confusing repository of prohibited conduct directed at very narrow circumstances. The revised Penal Law sought to avoid this undesirable condition by the use of generic or other broadly descriptive terms to encompass the many forms—existing and prospective—that criminal conduct can take. Unfortunately, the instant amendment serves to limit this well laid plan amply.

§ 165.30 Fraudulent accounting

Practice Commentary Cited

People v. Brown, 1974, 81 Misc.2d 149, 365 N.Y.S.2d 115.

Elements of crime 3

1. Constitutionality

This section making it an offense to accost person in public place with intent to defraud him of money or property by means of trick, swindle,

or confidence game was not void for vagueness. People v. Brown, 1974, 81 Misc.2d 149, 365 N.Y.S.2d 115.

3. Elements of crime

Essence of offense of fraudulent accounting is the swindling and defrauding of victim after gaining his confidence. People v. Brown, 1974, 81 Misc.2d 149, 365 N.Y.S.2d 115.

§ 165.50 Criminal possession of stolen property in the first degree

Supplementary Index to Notes

Free goods or gifts 6

Market value 5

Purpose 1/2

1/2. Purpose

Purpose of this section and section 155.20 fixing higher degrees of crime of larceny or criminal possession is not related to regulating economic market but to assessing scale of criminal operations by persons charged with offenses under this section and section 155.20. People v. Colasanti, 1974, 35 N.Y.2d 431, 363 N.Y.S.2d 577, 322 N.E.2d 269.

3. Evidence

Evidence, including evidence that defendant was observed by police officers running from a house in whose adjacent garage a stolen automobile was parked, sustained defendant's conviction for criminally possessing property in the first degree. People v. Hoffman, 1975, 47 A.D.2d 618, 361 N.Y.S.2d 22.

5. Market value

Defendant's request of \$19,500 for stolen experimental lithium pills was

a significant admission of value and a confirmation of a market value for purposes of prosecution for criminal possession of stolen property in first degree, even if that market was an illegitimate market. People v. Colasanti, 1974, 35 N.Y.2d 431, 363 N.Y.S.2d 577, 322 N.E.2d 269.

Where at time experimental lithium pills were possessed as stolen property the experimental pills had been recalled by manufacturers and substitute pills of substantially same chemical composition were being manufactured and marketed, market value of substitute pills was relevant to establish current value of the recalled pills in prosecution for criminal possession of stolen property in first degree, and it was immaterial whether the value of recalled pills was that in legitimate or illegitimate market. Id.

6. Free goods or gifts

The uninvited taker of free goods or gifts is just as much a thief as if the goods were distributed for a price. People v. Colasanti, 1974, 35 N.Y.2d 431, 363 N.Y.S.2d 577, 322 N.E.2d 269.

§ 165.60 Criminal possession of stolen property; no defense

Practice Commentary Cited

People v. Fisher, 1974, 77 Misc.2d 717, 364 N.Y.S.2d 580.

TITLE 2

§ 190.25 C

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§ 195.00 O

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Common law 24

Purpose 1/2

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MIDNIGHT SUN BROADCASTERS, INC.

KENI - KENI TV
ANCHORAGE

KFAR - KFAR TV
FAIRBANKS

KINY - KINY TV
JUNEAU

KTKN
KETCHIKAN

Radio: NBC - ABC

Television: NBC

January 14

Reply to:

KINY AM & TV
231 S. FRANKLIN
JUNEAU, ALASKA
99801

Dear Bob,

Here are the copies of the N.Y. law that I was talking to you about on the phone the other nite. It is pretty simple and has just been inserted into to section on "Theft of Services". This incidentally would give some additional protection to telephone services also and I am sure would be upported by every telephone co in the state.

Anything you could do to get this into the books would be greatly appreciated. At the moment it is supported by Ketchikan Alaska Television and Sitka Alaska Television but will be brought up at the Alaska cable convention to be held here in Juneau March 4-5-6.

Copy of letter for your
Information.

Terry Gardiner

Box 1092, Ketchikan, Alaska 99901 Pouch V, Juneau, Alaska 99811

May 13, 1976

Wally Christiansen
Midnight Sun Broadcasters Inc.
Box 1852
Ketchikan, Alaska

Dear Wally,

For your information the House Judiciary Committee has had SB 592, theft of telecommunication services, under consideration and has passed a House Committee Substitute. The House Committee Substitute was a bill that was introduced originally by Rep. Brown's telecommunication interim committee. The Judiciary Committee felt that the HCS better met the legal requirements that would be needed to prosecute persons guilty of stealing various telecommunication services. Senator Ziegler said that he had no problem with the HCS. I hope the changes we have made are in accordance with your ideas concerning the problem.

I will make certain that the House Rules Committee does schedule SB 592 for action before the legislature adjourns.

Sincerely,

Terry Gardiner

SB 592



MIDNIGHT SUN BROADCASTERS, INC.

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Copy of letter for your information.

R.D. "BUCK" JENSEN
President - General Mgr.

E.W. "WALLY" CHRISTIANSEN
Vice-President - Chief Engineer

KETCHIKAN ALASKA TELEVISION, INC.

K-A-T-V CABLE
CHANNELS 4-5-6 & 2
KETCHIKAN, ALASKA 99901

January 6, 1976

Mr. Robert Merritt
University of Alaska
Fairbanks, Alaska 99701

Dear Mr. Merritt:

I want to thank you for inviting me to the meeting held December 15 in Anchorage on the subject of television in the villages. Since that meeting I have spent some time thinking about the discussions held and also about the economics of the program.

It appears that certain political groups within the state of Alaska are dedicated to the program of eventually furnishing three channels of entertainment television and one channel of educational television to every village of over 25 inhabitants. It is obvious that the technology to provide this service is available and the only limiting factor is the economics. As the number of channels and the number of hours per day as well as methods of transmission and distribution within the village are the large factors in this cost figure I have taken a single channel four hour per day program as a base for a "start soon" project.

During the discussions in Anchorage a great deal of time was spent on the necessity of taping and delaying certain programs to conform to "time zone" specifications. With all due respect it was clear that these speakers had never spent any time in the villages as there is only one time zone and that is "Sun" time. In the summer time there is so much daylight that it is not a factor and in the wintertime there is so little it again loses its importance. In the village whether the news comes on at 4:00 P.M. or at 6:00 P.M. is of very little or no importance. In the initial program I believe the concept of a huge tape recording and delay center can be eliminated.

At the meeting a good deal of time was spent talking about the huge cost of transmission of the programing, the some 175 villages by satellite and that a program of taping and distribution of the material by cassette would be more economical. As an eleven year veteran of recording and bicycling of television programing by use of video tape I have come to the conclusion that my cost is very close to \$25 per hour not including copyright fees. This would lead me to believe that if done by the State of Alaska the cost

would approach \$30 per hour. On a four hour per day and serving 175 villages this would amount to \$21,000 per day. Some savings on this figure would result if tapes were bicycled but I can see political problems that would be hard to resolve. I can also see all kinds of hardware problems that would be difficult to solve in remote areas.


At present RCA Alasom is serving the commercial television users of satellite transmission facilities in Anchorage, Fairbanks and Juneau and has a tariff filing for Nome. At present the charge is \$1000 per hour for a combination of Anchorage and Fairbanks and an additional \$200 per hour if Juneau takes the program also. It is a known fact that the RCA cost is \$800 per hour. It is assumed that this charge is based on the fact that the stations can only afford certain number of hours of satellite use per year and if they were able to use more hours that the hourly cost could be reduced.

It would appear to me as an outside viewer that a use of the satellite on a four hour per day seven day per week basis would earn a substancial reduction in hourly rate. Or even if we talk about an hourly rate of \$1200 to furnish service to the 175 stations in the bush that is a radical reduction in cost from the figures projected above for video cassette tape. Even double this \$1200 figure would be a bargain and at three times the figure it is still well below projected tape costs with an immeasurable reduction in problems.

My conclusion therefore is that even though I am strongly opposed to any state financed program to provide the outlying areas with entertainment that if it is to be done it should be done in the most economical and efficient manner.

As for distribution within the villages themselves I believe that each in an individual case. As was pointed out a mini-transmitter can be installed for \$10,000. This is a single channel device. I believe in many cases cable can be installed for much less than this figure and provide spectrum space for multiple channels.

Very truly yours,



Wally Christiansen

Practice Commentaries

by Arnold D. Hechtman

This section is supplementary to a prior provision rendering one who steals tangible property consisting of "secret scientific material" (defined in § 155.00[6]) guilty of grand larceny in the third degree (§ 155.30[3]). The latter crime applies to one who, for example, steals a document reciting a secret scientific formula. It does not, however, embrace one who with the same larcenous intent photographs or copies such a document, since such conduct does not constitute a *taking* of properties so as to constitute larceny (§ 155.05[1]). The instant section plugs the indicated gap with the crime of "unlawful use of secret scientific material," which, like the larceny offense (§ 155.30), is graded a class E felony.

§ 165.10 Repealed. L.1969, c. 115, § 4, eff. on 120th day after Mar. 25, 1969

Historical Note

Section, which related to theft of services, was added L.1965, c. 1030; amended L. 1967, c. 791, § 24.

§ 165.15 Theft of services

A person is guilty of theft of services when:

1. He obtains or attempts to obtain a service, or induces or attempts to induce the supplier of a rendered service to agree to payment therefor on a credit basis, by the use of a credit card which he knows to be stolen.

2. With intent to avoid payment for restaurant services rendered, or for services rendered to him as a transient guest at a hotel, motel, inn, tourist cabin, rooming house or comparable establishment, he avoids or attempts to avoid such payment by unjustifiable failure or refusal to pay, by stealth, or by any misrepresentation of fact which he knows to be false. A person who fails or refuses to pay for such services is presumed to have intended to avoid payment therefor; or

3. With intent to obtain railroad, subway, bus, air, taxi or any other public transportation service without payment of the lawful charge therefor, or to avoid payment of the lawful charge for such transportation service which has

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been rendered to him, he obtains or attempts to obtain such service or avoids or attempts to avoid payment therefor by force, intimidation, stealth, deception or mechanical tampering, or by unjustifiable failure or refusal to pay; or

4. With intent to avoid payment by himself or another person of the lawful charge for any telecommunications service, he obtains or attempts to obtain such service or avoids or attempts to avoid payment therefor by himself or another person by means of (a) tampering or making connection with the equipment of the supplier, whether by mechanical, electrical, acoustical or other means, or (b) any misrepresentation of fact which he knows to be false, or (c) any other artifice, trick, deception, code or device; or

5. With intent to avoid payment by himself or another person for a prospective or already rendered service the charge or compensation for which is measured by a meter or other mechanical device, he tampers with such device or with other equipment related thereto, or in any manner attempts to prevent the meter or device from performing its measuring function, without the consent of the supplier of the service. A person who tampers with such a device or equipment without the consent of the supplier of the service is presumed to do so with intent to avoid, or to enable another to avoid, payment for the service involved; or

6. With intent to obtain, without the consent of the supplier thereof, gas, electricity, water steam or telephone service, he tampers with any equipment designed to supply or to prevent the supply of such service either to the community in general or to particular premises; or

7. Obtaining or having control over labor in the employ of another person, or of business, commercial or industrial equipment or facilities of another person, knowing that he is not entitled to the use thereof, and with intent to derive a commercial or other substantial benefit for himself or a third person, he uses or diverts to the use of himself or a third person such labor, equipment or facilities.

Theft of services is a class A misdemeanor.

L.1965, c. 1030; amended L.1967, c. 791, § 25; L.1969, c. 115, § 5.

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Historical Note

1969 Amendment. Subd. 1. L.1969, c. 115, § 5, eff. on 129th day after Mar. 25, 1969, added subd. 1. It derived from former subd. 1, repealed L.1969, c. 115, § 5.

1967 Amendment. Subd. 2. L.1967, c. 791, § 25, eff. Sept. 1, 1967, added sentence beginning "A person who falls."

Subd. 5. L.1967, c. 791, § 25, eff. Sept. 1, 1967, omitted "provided by the supplier of the service" following "mechanical device."

Subd. 6. L.1967, c. 791, § 25, eff. Sept. 1, 1967, omitted "of the supplier thereof" following "equipment."

Derivation. Subd. 1. New.

Subd. 2. Penal Law 1909, § 925, added L.1923, c. 563, amended L.1939, c. 579; L.1955, c. 460.

Subd. 3. Penal Law 1909, §§ 1990, 1999-b. Section 1990, amended L. 1917, c. 350; L.1957, c. 823, was from

Penal Code 1881, § 426, amended L. 1890, c. 458, § 1. Section 1999-b, added L.1957, c. 884, amended L.1965, c. 108.

Subd. 4. Penal Law 1909, §§ 967, 1203-c. Section 967 added L.1961, c. 548. Section 1203-c, added L.1916, c. 367, amended L.1941, c. 883; L.1955, c. 477.

Subd. 5. Penal Law 1909, §§ 1431, 1431-a, 1432, 1432-a. Section 1431, was from Penal Code 1881, § 651, amended L.1888, c. 219, § 1; L.1892, c. 692, § 1; L.1892, c. 692, § 1; L. 1893, c. 692, § 1; L.1900, c. 589, § 1; L.1906, c. 453, § 1. Section 1431-a added L.1926, c. 849. Section 1432 was from Penal Code 1881, § 651-a, added L.1902, c. 333, § 1. Section 1432-a added L.1933, c. 414.

Subd. 6. Penal Law 1909, §§ 1431, 1432, 1432-a, for history, see subd. 5 note above.

Subd. 7. New.

Practice Commentaries

by Arnold D. Hechtman

In relation to the former Penal Law, this section is entirely new in form and substantially new in substance.

Since "services" are not "property," "theft" of a service does not constitute larceny; and, if any such conduct is to be proscribed, it must be by special statute. The former Penal Law defines few offenses of that nature (see §§ 927, 967, 1431, 1432, 1432-a). It is not necessary, however, to go to the other extreme of equating services with property and of predicating, wherever possible (mainly in the area of deception), "theft of service" offenses equivalent to those involving thefts of property, or larcenies. Legislation of that character would doubtless lead to hosts of "criminal" charges of a basically civil nature. The instant section steers a middle course by defining seven specific offenses, most involving theft or attempted theft of certain kinds of services.

Subdivision 1, dealing with credit card offenses, was amended in 1969, as one phase of an extensive bill enacted for

Historical Note

99. Penal Code 1887, § 123, amended L. 1890, c. 458, § 1; Section 1203-b, added L.1957, c. 884, amended L.1965, c. 198.

967. Subd. 4. Penal Law 1909, § 967, 1203-c. Section 967 added L.1947, c. 548. Section 1203-c, added L.1916, c. 367, amended L.1914, c. 883; L.1955, c. 477.

967. Subd. 5. Penal Law 1909, § 1431, 1431-a, 1432, 1432-a. Section 1431, was from Penal Code 1887, § 651, amended L.1888, c. 219, § 1; L.1892, c. 692, § 1; L.1892, c. 699, § 1; L. 1893, c. 692, § 1; L.1909, c. 589, § 1; L.1906, c. 479, § 1. Section 1431-a added L.1929, c. 81. Section 1432 was from Penal Code 1887, § 651-a, added L.1902, c. 379, § 1. Section 1432-a added L.1937, c. 414.

967. Subd. 6. Penal Law 1909, § 1431, 1432, 1432-a. For history, see subd. 5 note above.

967. Subd. 7. New.

Commentaries

D. Hecht

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with credit card offenses, was use of an extensive bill enacted for

the purpose of strengthening the Penal Law in its application to conduct involving theft and misuse of credit cards (L.1969, c. 115; see practice commentary upon § 155.99).

Prior to 1969, the general subject of fraudulently obtaining property or services by means of stolen, false or improperly used credit cards was covered by (1) the crime of larceny (by false pretenses) in cases where property was obtained; (2) the "theft of services" offense at hand (§ 165.15 [1]) in cases where a service was obtained; and (3) a misdemeanor entitled "unauthorized use of credit cards," which appeared not in the Penal Law but in the General Business Law (§ 513). The General Business Law statute, defining in rather complex fashion a very broad offense or offenses embracing acquisition of both property and services, covered approximately the same ground as the appropriate Penal Law statutes.

The 1969 credit card bill (L.1969, c. 115) did not work any truly significant change of substance in this area but established a new structural format. The rather redundant General Business Law section (§ 513) was repealed. The Penal Law "theft of services" provision (§ 165.15[1]) was narrowed to apply to the acquisition of services by means of "stolen" credit cards only (rather than acquisition by means of almost any kind of defective card, as was formerly the case). And, finally, a new Penal Law section was added (§ 165.17), defining the crime of "unlawful use of credit card," which does not deal with the use of *stolen* or *forged* cards but renders guilty of a misdemeanor one who "in the course of obtaining or attempting to obtain" either "property or a service displays a credit card which he knows to be *revoked* or *cancelled*".

These offenses together with various others in the larceny and forgery areas have the following overall scope with respect to a person who purchases or attempts to purchase property or a service by means of a credit card which he knows to be in some way defective for the purpose:

(1) Regardless of whether property or a service is the subject of the purchase, and regardless of whether the credit card is stolen or counterfeit, or whether it has merely been canceled or revoked, the culprit is guilty, at the very least, of a class A misdemeanor (§§ 155.25, 165.15[1], 165.17).

(2) If property is the subject of the purchase or attempted purchase, the culprit has committed larceny and, depending upon the value of the property, may or may not also be guilty of a felony (§ 155.99).

(3) If the credit card is a stolen one, the culprit is, undoubtedly, also guilty of criminal possession of stolen property in the second degree, a class E felony (§ 165.45 [2]). In addition, if in making or attempting to make the purchase he signs a voucher, receipt or other paper in the name of the card owner—as he usually would have to do—he is also guilty of forgery in the second degree, a class D felony (§ 170.19[1]).

(4) If the credit card is a forged or counterfeit one, the culprit is, undoubtedly, also guilty of criminal possession of a forged instrument in the second degree, a class D felony (§ 170.25).

Subdivision 2 restates the proscriptions of former Penal Law § 925 but expands the offense to include thefts and payment-avoidance of restaurant services as well as of those provided by hotels, inns and the like.

Subdivision 3 includes certain former Penal Law offenses (§§ 1990[1, 2], 1990-b) but broadens the overall crime to encompass improper acquisition or fee-avoidance of all forms of "public transportation service" rather than of the limited kinds specified in the former statutes.

Subdivision 4 substantially restates former Penal Law § 967 (see, also, § 1293-c).

Subdivision 5 substantially restates certain phases of three former sections dealing in part with fraudulent tampering with gas, electric, steam and water meters (§§ 1431, 1431-a, 1432). The offense is broadened, however, to include meter tampering and similar chicanery relating to any sort of public or private service measured by a meter, whether of the indicated public utility kinds or otherwise.

Subdivision 6 embodies other phases of former Penal Law §§ 1431 and 1432, addressed to the acquisition of gas, electric, steam and water service without the supplier's consent. This offense does not necessarily require intent to avoid payment for the service improperly obtained. It would apply, for example, to one who, having had his gas turned off, succeeds in regaining the service by unauthorized tampering, regardless of whether he intends to pay for the gas thus obtained.

Subdivision 7 is new. 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 an unprofitable use of the mill's machinery to spin a substantial quantity of wool. The judgment was reversed on the ground that the use of the mill's facilities and labor, though of "property" and, hence, could be the subject of larceny, Subdivision 7 herein renders such offenses "larceny."

Theft of Services is a one-degree misdemeanor. Obviously, all the offenses which can be committed are not of equal gravity. It would be reasonable to expect the Legislature to prescribe a number of degrees, prescribing penalties in accordance with the gravity of the prohibited acts. In this section, represented as it is by former New York law when it was included in the Penal Law in 1907. Because of the unreasonably defined crime, to attempt to subclassify it; the expectation that the Legislature would impose reasonable subclassifications would impose reasonable subclassifications in the next legislative session since about 1910. It is introduced, for example, to extract services and make it a violation of the law. Such attempts have not been made because they lacked merit but because of an illogical and unfair distinction between "taxi" services. Hopefully, legislation will soon be forthcoming.

Cross Reference

Buildings may be entered for examination of works, see Transportation Corporation.
Hotels and boarding houses, generally, see to Larceny, see section 150.40 of sep.

Notes of Decisions

Historical 1	found
Hotel service 2	not
Meters or attachments, tampering with 3	not
Refusal to pay fare 4	not
Stealing rides 5	not

I. Historical
The first enactment by the legislature upon the general subject is to be

a stolen one, the culprit is, criminal possession of stolen goods, a class B felony (§ 165.45 making or attempting to make a check, receipt or other paper in his name—as he usually would have done—forgery in the second degree, § 165.10).

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descriptions of former Penal Law offenses are broadened to include thefts and payments for services as well as of those offenses previously described.

former Penal Law offenses are broadened to include the overall crime to which the phrase "theft of services" rather than of the limited categories of offenses previously described.

restates former Penal Law § 165.10.

restates certain phases of former Penal Law § 165.10 in part with amendments to cover tampering with meters and water meters, § 165.15, broadened, however, to include tampering with meters, whether of any kind, relating to any sort of service, whether or not measured by a meter, whether of any kind or otherwise.

phases of former Penal Law § 165.10 are included in the acquisition of gas, electric, or other utility service without the supplier's consent, and only requiring intent to avoid payment for the service lawfully obtained. It would apply, for example, if a person had his gas turned off, sue-ably for the gas thus obtained, by unauthorized tampering, rather than by the person's failure to pay for the gas thus ob-

offense is included for the first time in the present law. See *People v. Ashworth*, 1927, 220 N.Y. 200.

The defendants therein, a husband and wife, 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. Subdivision 7 herein renders such conduct a "theft of services."

Theft of Services is a one-degree crime: a class A misdemeanor. Obviously, all the ways in which this offense can be committed are not of equal seriousness so that it would be reasonable to expect the offense to be defined in a number of degrees, prescribing punishment commensurate with the gravity of the prohibited conduct. As indicated above, this section represented a substantially new concept in New York law when it was incorporated into the revised Penal Law in 1967. Because of its basic novelty as a separately defined crime, no attempt was then made to further subclassify it; the expectation being that, as experience with the impact of the section developed, the Legislature would impose reasonable subclassifications. In almost every legislative session since about 1970, bills have, in fact, been introduced, for example, to extract only the theft of railroad services and make it a violation rather than a class A misdemeanor. Such attempts have thus far been unsuccessful not because they lacked merit but because they created an illogical and unfair distinction between "railroad" and "subway" or "taxi" services. Hopefully, appropriate subclassification will soon be forthcoming.

Cross References

Buildings may be entered for examination of meters, pipes, fittings, wires and works, see Transportation Corporations Law § 14.
Hotels and boarding houses, generally, see General Business Law § 200 et seq.
Larceny, see section 165.00 et seq.

Notes of Decisions

Historical 1
Hotel service 2
Meters or attachments, tampering with 3
Refusal to pay fare 4
Stealing rides 5

1. Historical

The first enactment by the legislature upon the general subject is to be

found in L. 1878, c. 261. That statute made it a misdemeanor for any person to get on or off a freight car or engine while in motion, or to ride on any wood or freight car, unless employed by or with permission from the proper officers of such railroad or the person in charge of such car or engine. Subdivision 1 of section 126 of the Penal Code was plainly a codification of that enactment. By

Note 1

L.1879, c. 474, it was made a misdemeanor for a minor or other person, hinder, or delay the passage or running of any car lawfully running upon any horse or street railroad. Subdivision 3 of section 426 of the Penal Code was, quite as plainly, a codification of that statute. By L. 1880, c. 370, it was made a misdemeanor for a minor or other person, not a passenger, to climb, stand upon, or in any way to attach himself to, a locomotive or car, unless it is done in compliance with law, or by permission, under the lawful rules and regulations of the railroad. The same chapter also made it a misdemeanor to invite or solicit any such minor or other person to come, or to be, or to consent to his remaining upon, any engine, or any freight or baggage car, unless rightfully there by law, or with permission under the rules and regulations of the corporation. Thus, these three statutes had for their object the prevention of the unauthorized riding, or being, upon cars or engines, and of the obstruction, or delaying, of cars upon surface railroads. In the following year, when the Penal Code was established (L.1881, c. 670), section 426 was enacted as it stands at present with the exception that, by an amendment in 1800 (L.1890, c. 458), subdivision 3 was made to apply to steam railways, as well as to horse and street railways, and the caption "Riding on freight trains" was added. It is reasonable to infer that the Penal Code, in the respect which we are now considering, was intended as a codification of, and to retain within its provisions, existing laws. *East v. Brooklyn Heights R. Co.*, 1909, 195 N.Y. 469, 88 N.E. 751.

2. Hotel service

Evidence that guest left hotel with her baggage, leaving an unpaid balance for room rent and telephone charges, did not sustain conviction of obtaining credit or accommodation at hotel with intent to defraud, in absence of proof that when she registered she did so with intent to de-

fraud, and where, aside from indebtedness involved, she had paid all other charges for over 6 months. *People v. Astor*, 1945, 269 App.Div. 250, 55 N.Y.S.2d 283.

Presumption under this section [Penal Law 1909, § 925] of intent to defraud by obtaining credit or accommodation at hotel arising from guest's leaving hotel with baggage and charges unpaid was overcome, where the leaving was not surreptitious but was requested by hotel proprietor. *Id.*

An apartment hotel comprising kitchenette apartments and accommodating transients only very infrequently did not constitute a "hotel" with respect to plaintiff who occupied a small furnished apartment with his family under a six months' lease within this section [Penal Law 1909, § 925]. *Cooper v. Schirmerbecher*, 1941, 176 Misc. 474, 26 N.Y.S.2d 668.

The omission of the term "apartment hotel" in this section [Penal Law 1909, § 925] was deliberate in absence of any expression or action by the Legislature which might be deemed a sufficient basis for ascribing a different intent, and the term "hotel" in this section does not include an "apartment hotel." *Id.*

"A hotelkeeper can require a guest to pay his board in advance. The law gives him a lien upon the guest's baggage and" this section [Penal Law 1909, § 925] "gives him a drastic remedy in all cases of actual fraud either in obtaining credit or in any effort to deprive the landlord of his lien upon a guest's baggage. But the mere fact of a guest not being able to pay a hotel bill is not a crime." *People v. Klas*, 1913, 79 Misc. 452, 141 N.Y.S. 212. See, also, *People v. Nicholson*, 1898, 2^d Misc. 266, 55 N.Y.S. 447.

Where a landlord keeps a board bill and bar bill together and makes no specific application of payments, he cannot claim that the balance due is for board and proceed under this

section [Penal Law 1909, § 925]. *People v. Klas*, 1913, 79 Misc. 452, 141 N.Y.S. 212.

Where a board bill is contracted by a regular boarder at a hotel without misrepresentation and he leaves the hotel openly and takes his baggage openly, he is not guilty of a violation of this section [Penal Law 1909, § 925]. *Id.*

Where there is no evidence that defendant intended to defraud hotelkeeper by making false pretenses, or surreptitiously removed baggage, he left merely to obtain money to pay bill, he cannot be convicted under this section [Penal Law 1909, § 925]. *People v. Nicholson*, 1898, 2^d Misc. 266, 55 N.Y.S. 447.

3. Meters or attachments in use with

This section [Penal Law 1909, § 1431—a relating to meters or attachments] was applicable to civil actions or proceedings. *1911-12, In re New York Edison Co. Inc.*, 1912, 237 App. Div. 315, 261 N.Y.S. 126. See, also, *Esposito v. Consolidated Edison Co. of N. Y.*, 1917, 68 N.Y.S.2d 863; *Bocha v. Consolidated Edison Co. of New York*, 1919, 22 N.Y.S.2d 157; *Parsons Const. Corporation v. City of New York*, 1937, 163 Misc. 922, 29 N.Y.S. 275.

4. Refusal to pay fare

Where leasing corporation, from which defendant was alleged to have engaged a limousine for hire, thereafter unjustifiably failing to pay for services rendered, was engaged in business of providing private limousine services and reserved to itself right to refuse service to members of public it did not wish to serve, that it was a private as opposed to common carrier, service provided by corporation did not fall within scope of subd. 3 of this section providing that a person is guilty of "theft of services" when, with intent to obtain railroad, subway, bus, air, taxi or "any other public transportation service" without payment of lawful

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and, and where, while from hotel-keeper involved, she and paid all other charges for over 6 months. *People v. Astor*, 1945, 230 App.Div. 279, 330 N.Y.S.2d 283.

Presumption under this section and Penal Law 1909, § 925, of intent to fraud by obtaining credit or accommodation at hotel arising from guest's leaving hotel with baggage and charges unpaid was overcome, where the leaving was not surreptitious but was requested by hotel proprietor. *Id.*

An apartment hotel comprising chenette apartments and accommodating transients only very infrequently did not constitute a "hotel" with respect to plaintiff who occupied a small furnished apartment with his family under a six months' lease within this section [Penal Law 1909, § 925]. *Cooper v. Schirrmann*, 1941, 176 Misc. 474, 25 N.Y.S.2d 191.

The omission of the term "apartment hotel" in this section [Penal Law 1909, § 925] was held to be in absence of any expression or intention of the Legislature which might be deemed a sufficient basis for prescribing a different intent, and the term "hotel" in this section does not include an "apartment hotel." *Id.*

"A hotelkeeper can require a guest to pay his board in advance. If he wrongs him a lien upon the guest's baggage and" this section [Penal Law 1909, § 925] "gives him a drastic remedy in all cases of actual fraud either in obtaining credit or in any effort to deprive the landlord of his lien upon a guest's baggage. But the mere fact of a guest not being able to pay a hotel bill is not a crime." *People v. Kline*, 1943, 79 Misc. 452, 31 N.Y.S. 212. See, also, *People v. Nicholson*, 1898, 25 Misc. 296, 55 N.Y.S. 447.

Where a landlord keeps a board bill and bar bill together and makes a specific application of payments, cannot claim that the bill was due for board and proceed under this

section [Penal Law 1909, § 925]. *People v. Kline*, 1943, 79 Misc. 452, 31 N.Y.S. 212.

Where a board bill is contracted by a regular boarder at a hotel without misrepresentation and he leaves the hotel openly and takes his baggage openly, he is not guilty of a violation of this section [Penal Law 1909, § 925]. *Id.*

Where there is no evidence that defendant intended to defraud hotel-keeper by making false pretenses, or surreptitiously removed baggage, but left merely to obtain money to pay bill, he cannot be convicted under this section [Penal Law 1909, § 925]. *People v. Nicholson*, 1898, 25 Misc. 296, 55 N.Y.S. 447.

3. Meters or attachments, tampering with

This section [Penal Law 1909, § 1431-a relating to meters or attachments] was applicable to civil actions or proceedings. *Eff-Ess, Inc. v. New York Edison Co., Inc.*, 1932, 237 App. Div. 315, 261 N.Y.S. 126. See, also, *Esposito v. Consolidated Edison Co. of N. Y.*, 1947, 98 N.Y.S.2d 868; *Recha v. Consolidated Edison Co. of New York*, 1940, 22 N.Y.S.2d 157; *Parsons Constr. Corporation v. City of New York*, 1937, 163 Misc. 932, 298 N.Y.S. 276.

4. Refusal to pay fare

Where leasing corporation, from which defendant was alleged to have engaged a limousine for hire, thereafter unjustifiably failing to pay for services rendered, was engaged in business of providing private limousine services and reserved to itself right to refuse service to members of public it did not wish to serve, so that it was a private as opposed to a common carrier, service provided by corporation did not fall within scope of subd. 3 of this section providing that a person is guilty of "theft of services" when, with intent to obtain railroad, subway, bus, air, taxi or "any other public transportation service" without payment of lawful

charge therefor, he obtains or attempts to obtain such service by unjustifiable failure or refusal to pay. *People v. Lee*, 1972, 71 Misc.2d 239, 330 N.Y.S.2d 18.

Defendant railroad passenger's refusal to show his ticket to trainman on request constituted violation of this section [Penal Law 1909, § 1900] proscribing riding on railway car without authority or permission of proper officers or with intention of not paying therefor. *People v. Glus*, 1966, 49 Misc.2d 883, 298 N.Y.S.2d 644.

Refusal by passenger on railroad train to pay amount of fare demanded of him is prima facie evidence of his intention not to pay for the ride in violation of this section [Penal Law 1909, § 1900] providing that person who rides passenger car with intention of not paying therefor is guilty of an offense. *People v. Pausmith*, 1958, 14 Misc.2d 300, 174 N.Y.S.2d 860.

This section [Penal Law 1909, § 1900] providing that person who rides on passenger car with intention of not paying therefor is guilty of an offense does not apply only to persons who surreptitiously attempt to obtain transportation without paying therefor, but was applicable to passenger who refused to pay to conductor three cents which conductor believed was applicable to fare as federal transportation tax. *Id.*

Once a passenger on railroad train decides to refuse to pay fare demanded, he acts at his own peril, but if passenger tenders an amount equal to correct fare, he does not violate this section [Penal Law 1909, § 1900] providing that person who rides passenger car with intention of not paying therefor is guilty of an offense. *Id.*

Under section 4263 of 26 U.S.C.A. (I.R.C.1954) of Internal Revenue Code providing that 10 per cent excise tax on amount paid for transportation of persons by rail shall not apply to amounts which do not exceed 60

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to amounts paid for commutators for one month or less, no tax was due on 29-cent fare for transportation of passenger, who had monthly commutation ticket, to destination not included within ticket, and passenger, who offered to pay the 29 cents, but refused to pay 3 cents which conductor stated was due as transportation tax, did not violate this section [Penal Law 1909, § 1900] providing that a person who rides on passenger car with intention of not paying therefor is guilty of an offense. *Id.*

5. Stealing rides

The prohibition against stealing rides does not extend to cases where permission to ride on an engine is given by the person in charge thereof, as the defendant. *Grimeshaw v. Lake Shore, etc., R. Co., 1912, 205 N.Y. 371, 98 N.E. 762.*

A violation of this section [Penal Law 1909, § 1900] in riding on a

freight train was adverted to in reversing a judgment for the plaintiff in a negligence action. *Barrett v. New York Cent., etc., R. Co., 1896, 157 N.Y. 663, 52 N.E. 659.*

This section [Penal Law 1909, § 1900] rendered one stealing a ride on a freight train guilty of a misdemeanor. *Sharp v. Erie R. Co., 1904, 90 App.Div. 502, 85 N.Y.S. 553, reversed on other grounds 184 N.Y. 100, 76 N.E. 923.* See, also, *People v. Webster, 1894, 75 Hun 278, 26 N.Y.S. 1007.*

Where an officer sees a person stealing a ride on a freight train and directs another officer to arrest him, who does so and at the station house charges him with vagrancy, he may be convicted of a violation of this section [Penal Law 1909, § 1900], where, on being taken before a magistrate, the first officer charges him with such violation. *People v. Webster, 1894, 75 Hun 278, 26 N.Y.S. 1007.*

§ 165.17 Unlawful use of credit card

A person is guilty of unlawful use of credit card, when in the course of obtaining or attempting to obtain property or a service, he uses or displays a credit card which he knows to be revoked or cancelled.

Unlawful use of credit card is a class A misdemeanor. Added L.1969, c. 115, § 6.

Practice Commentaries
by Arnold D. Hechtman

This section was added by one of a series of amendments contained in a 1969 bill designed to strengthen New York's criminal laws in their application to frauds and misconduct committed by the use of stolen, forged or otherwise defective credit cards (L.1969, c. 115, section 6). An explanation of this section is contained in the practice commentary upon § 165.15.

§ 165.20 Fraudulently obtain

A person is guilty of fraudulently obtaining a signature with intent to defraud or injure a third person if he obtains a signature or initials of a person to a written instrument by a false representation of fact which he knows to be untrue.

Fraudulently obtaining a signature is a class A misdemeanor. L.1965, c. 1030.

Historical

Derivation. Penal Law 1909, §§ 932, 934, 935, 937-a. Section 932 was from Penal Code 1881, § 796. Section 934, amended L.1959, c. 363, was

Practice Commentary
by Arnold D.

This section replaces a variety of provisions directed at those who fraudulently obtain a signature to a written instrument (Penal Law 1909, §§ 937, 937-a, 938).

Cross Ref.

Larceny, see section 155.60 et seq.
Signature defined, see General Construction Law, § 10.

Notes of Law

- Audit and payment of claims 3
- Church collections and contributions 4
- Credit statement 3
- Elements of crime 1
- Legal papers and documents 6
- Spurious documents 7
- Written instrument, generally 2

1. Elements of crime

To be actionable the pretenses used in obtaining property by false token or writing must be calculated to deceive or be capable of defrauding. *People v. Court of Oyer, etc., 1881, 81 N.Y. 430.*

The reliance on the pretense by the prosecutor is an essential element of

by fraudulent statement or device. People v. Price, 1975, 47 A.D.2d 409, 366 N.Y.S.2d 729.

first degree

2d

and proof

defendant which were dismissed at close of the People's case was legally sufficient to support such counts under a theory of larceny by false pretenses or larceny by false promise. People v. Consolazio, 1975, 47 A.D.2d 863, 366 N.Y.S.2d 190.

35. — Second degree larceny

Evidence showing, inter alia, that welfare assistance recipient fraudulently received public welfare funds of over \$5,000 supported conviction of second-degree grand larceny. People v. Price, 1975, 47 A.D.2d 409, 366 N.Y.S.2d 729.

57. — Petit larceny

Evidence that defendant took art works from dealer by giving false promises to sell the works and return the proceeds, rebuys a commission, to the dealer, that defendant failed to respond to various correspondence from art dealer requesting payment or return of the works and defendant's admissions that sales had been completed, and that he had engaged in similar transactions demonstrated beyond a reasonable doubt and to a moral certainty that defendant had a fraudulent intent and was guilty of petit larceny. People v. Newman, 1975, 50 Misc.2d 975, 365 N.Y.S.2d 409.

the

169—ROBBERY

degree

and demanded money from cash register, that defendant took money from her wallet, that an accomplice of defendant took money from cash register, and that defendant participated in harassment and threats to her following the robbery was sufficient to sustain defendant's convictions for first-degree robbery, second-degree robbery, two counts of third-degree grand larceny, and harassment. People v. Plummer, 1975, 33 N.Y.2d 161, 365 N.Y.S.2d 812, 325 N.E.2d 161.

ARTICLE 165—OTHER OFFENSES RELATING TO THEFT

§ 165.05 Unauthorized use of a vehicle

Practice Commentary Cited People v. Alamo, 1974, 34 N.Y.2d 452, 358 N.Y.S.2d 375, 315 N.E.2d 119.

Supplementary Index to Notes

Failure of lessee to return vehicle 10

9. Evidence

Evidence was insufficient to establish defendant's guilt beyond a reasonable doubt of possession of weapons and dangerous instruments and appliances or unauthorized use of a vehicle. People v. Roberts, 1975, 47 A.D.2d 909, 366 N.Y.S.2d 227.

10. Failure of lessee to return vehicle

A failure by a lessee of a commercially rented vehicle to return it to lessor at time stipulated is not a violation of subd. 3 of this section and, at least in absence of a demand by owner and refusal by lessee to deliver, original renting and retention does not become a crime by lapse of time, but is merely a breach of contract. Banner Car. Co. v. Lazar, 1975, 51 Misc.2d 360, 366 N.Y.S.2d 314.

§ 165.15 Theft of services

A person is guilty of theft of services when:

[See main volume for text of 1 to 3]

4. With intent to avoid payment by himself or another person of the lawful charge for any telecommunications service, including, without limitation, cable television service, he obtains or attempts to obtain such service for himself or another person or avoids or attempts to avoid payment therefor by himself or another person by means of (a) tampering or making connection with the equipment of the supplier, whether by mechanical, electrical, nonmetallic or other means, or (b) any misrepresentation of fact which he knows to be false, or (c) any other artifice, trick, deception, code or device; or

[See main volume for text of 5 to 7]

Theft of services is a class A misdemeanor.

As amended L.1975, c. 530, § 2.

1975 Amendment, Subd. 4, L.1975, c. 530, § 2, eff. on the 90th day after July 29, 1975, included cable television service theft for himself or another person.

Supplementary Practice Commentaries

by Arnold D. Hechtman

1975

Subdivision 4 was amended to add "cable television service" (L.1975, c. 530); a phrase which is now defined in subdivision 9 of § 165.00. The amendment was sponsored by the Cable Television Commission which, apparently, considered that the development of cable television use in this State has been inhibited by widespread theft of cable television services. One estimate is that as many as 100,000 people in New York State may be getting cable services without paying for it. Obviously, a serious theft problem exists but that does not mean that the instant amendment is necessary. It assumes—or at least implies—that the theft of cable television services was not heretofore proscribed so that the specific inclusion thereof was necessary.

Subdivision 4, since its initial enactment, has spoken in terms of the theft of "telecommunications services." This phrase, not found in the former Penal Law, was introduced in the 1967 revision as a generic term to encompass just such technical advances as cable television. The former law specifically addressed "telephone" or "teletype" services (former Penal Law §§ 197, 1202-c) and, if such terms had been

§ 165.15

PENAL LAW

continued in the revised law, the instant amendment would be appropriate. But the word "telecommunication" was adopted precisely for the purpose of obviating periodic amendment of this subdivision whenever a new device, such as cable television, is introduced into our culture. As defined, "telecommunications" means: "communication at a distance (as by cable, radio, telegraph, telephone or television)" (Webster's Third New International Dictionary, unabridged). Thus, without further elaboration, the statute clearly included the subject of the instant amendment.

The objection to this amendment is not that it is incorrect but that it is inappropriate. One of the major deficiencies of the former Penal Law was that, by accretion over the years, it became a cumbersome and confusing repository of prohibited conduct directed at very narrow circumstances. The revised Penal Law sought to avoid this undesirable condition by the use of generic or other broadly descriptive terms to encompass the many forms—existing and prospective—that criminal conduct can take. Unfortunately, the instant amendment serves to head this well laid plan awry.

§ 165.50 Fraudulent accounting

Practice Commentary Cited

People v. Brown, 1974, 81 Misc.2d 149, 365 N.Y.S.2d 115.

Elements of crime 3

1. Constitutionality

This section making it an offense to accept person in public place with intent to defraud him of money or property by means of trick, swindle,

or confidence game was not void for vagueness. People v. Brown, 1974, 81 Misc.2d 149, 365 N.Y.S.2d 115.

3. Elements of crime

Essence of offense of fraudulent accounting is the swindling and defrauding of victim after gaining his confidence. People v. Brown, 1974, 81 Misc.2d 149, 365 N.Y.S.2d 115.

§ 165.50 Criminal possession of stolen property in the first degree

Supplementary Index to Notes

Free goods or gifts 6

Market value 5

Purpose 1/2

1/2. Purpose

Purpose of this section and section 155.20 fixing higher degrees of crime of larceny or criminal possession is not related to regulating economic market but to punishing scale of criminal operations by persons charged with offenses under this section and section 155.20. People v. Colaninno, 1974, 35 N.Y.2d 431, 363 N.Y.S.2d 577, 322 N.E.2d 269.

3. Evidence

Evidence, including evidence that defendant was observed by police officers running from a house in whose adjacent garage a stolen automobile was parked, sustained defendant's conviction for criminally possessing property in the first degree. People v. Hoffman, 1975, 47 A.D.2d 618, 361 N.Y.S.2d 322.

5. Market value

Defendant's request of \$19,500 for stolen experimental lithium pills was

a significant admission of value and a confirmation of a market value for purposes of prosecution for criminal possession of stolen property in first degree, even if that market was an illegitimate market. People v. Colaninno, 1974, 35 N.Y.2d 431, 363 N.Y.S.2d 577, 322 N.E.2d 269.

Where at time experimental lithium pills were possessed as stolen property the experimental pills had been recalled by manufacturers and substitute pills of substantially same chemical composition were being manufactured and marketed, market value of substitute pills was relevant to establish current value of the recalled pills in prosecution for criminal possession of stolen property in first degree, and it was immaterial whether the value of recalled pills was that in legitimate or illegitimate market. Id.

6. Free goods or gifts

The uninvited taker of free goods or gifts is just as much a thief as if the goods were distributed for a price. People v. Colaninno, 1974, 35 N.Y.2d 431, 363 N.Y.S.2d 577, 322 N.E.2d 269.

§ 165.60 Criminal possession of stolen property; no defense

Practice Commentary Cited

People v. White, 1971, 77 A.D.2d 717, 354 N.Y.S.2d 586.

TITLE

§ 190.25 C

7. Substantive Defendant and impersonator stopped by to defendant's that defendant, police officers, hicle, or men of any citizen

TITLE

ARTICLE

§ 195.00 C

Supplemental Act relating to Acts of discretion

6. Nonfeasance

Even a willful of a duty creation of a violation of a rule not constituting "official misconduct" neglect or omission a crime only if a rule promulgated the equivalent of effect. People v. A.D.2d 209, 309.

16. Evidence

Evidence was convictions of attorney, deputy chief, and the district attorney in the fourth

ARTICLE

§ 200.00 Brib

Supplementary Action to influence Common law Purpose 1/2

1/2. Purpose

Legislative intent as a public policy

SB

594

SB 594: RELATING TO INSURANCE UNAVAILABLE ON THE VOLUNTARY MARKET

In the course of deliberation over the medical malpractice insurance issue, it became evident that other groups similarly classified as "high risk," have faced the same problem in the past. Fishermen in particular often have found insurance at reasonable rates unavailable. Businesses and home owners in rural areas have encountered the same situation regarding fire insurance. In order to prevent a future insurance crisis for fishermen or other high risk groups, SB 594 was proposed.

SB 594 is similar to one of the provisions of the medical malpractice solution. When the Director of the Division of Insurance determines that insurance in any field is unavailable on the voluntary market, he may by regulation initiate a plan to provide the needed insurance. The Director is also empowered to require the insurance industry to establish a plan, subject to his approval, to fill the insurance gap.

In the establishment of such a plan, the Director is authorized to require participation by all insurance companies operating in the state with the burden spread equitably. The Director is also responsible for regulating rates and underwriting standards.

SB 594 was submitted on the recommendation of Herbert Dennenberg, the legislature's consultant on insurance.

Chancy *[Signature]*

1. No Public hearing
2. No standards of findings
3. Too much discretion
4. Agents - excuse admin convenience

Deenbergh
Re SB 594

Rationale: It's hard to predict what insurance problems will come up in the future. It's better to have a general solution than having to go address each problem area as it arises; thus with a general approach problem areas can be addressed quickly.

History: Insurance problem areas have popped up in many areas - of workman's comp, rent control, etc. They will certainly pop up again - thus the bill provides a solution now to future problems where insurance is not available.

Thus states with this type of legislation are in a much better position to deal with problems of inadequate insurance than states which do not have this type of legislation.

STATE OF WISCONSIN

ASSEMBLY BILL 58

(As Amended and Enacted)

Amended
to JS 594

AN ACT to renumber and amend 619.01 (1) (c); to amend 619.01 (1) (a);
and to create 619.01 (1) (c) 2 and (7) of the statutes, relating
to creation of mandatory risk-sharing plans for health care
liability insurance

The people of the state of Wisconsin, represented in senate and assembly,
do enact as follows:

SECTION 1. 619.01 (1) (a) of the statutes is amended to read:

619.01 (1) (a) Establishment of plans. If the commissioner
finds after a hearing that in any part of this state automobile insurance,
property insurance, health care liability insurance or workmen's compensation
insurance is not readily available in the voluntary market, and that the public
interest requires such availability, he may by rule either promulgate plans
to provide such insurance coverages for any risks in this state which are
equitably entitled to but otherwise unable to obtain such coverage, or may
call upon the insurance industry to prepare plans for his approval.

SECTION 2. 619.01 (1) (c) of the statutes is renumbered 619.01 (1)
(c) 1 and amended to read:

619.01 (1) (c) 1. Each plan, except a health care liability insurance
plan, shall require participation by all insurers doing any business in this state
of the types covered by the specific plan and all agents licensed to represent
such insurers in this state for the specified types of business, except that the

commissioner may exclude classes of persons for administrative convenience or because it is not equitable or practicable to require them to participate in the plan.

SECTION 3. 619.01 (1) (c) 2 of the statutes is created to read:

619.01 (1) (c) 2. Each health care liability insurance plan shall require participation by all insurers insuring persons in this state against liability resulting from personal injuries. Any deficit in a health care liability insurance plan in any year shall be recouped by rate increases for such plan applicable prospectively. Any surplus over the loss reserves in such a plan in any year shall be distributed by rate decreases for such plan applicable prospectively.

SECTION 4. 619.01 (7) of the statutes is created to read:

619.01 (7) HEALTH CARE LIABILITY POLICY LIMITS. Health care liability insurance plans established under this section shall provide minimum coverage to insureds in the amount of not less than \$100,000 for each occurrence and \$300,000 for all occurrences in any one policy year for the protection of persons who are legally entitled to recover damages from the insured for errors, omissions or neglect in the performance of the insured's professional services. If an insured has excess limits liability coverage or such coverage is available to him, the coverage provided under such plans shall be equal to the minimum level of such excess limits coverage. If the insured does not have excess limits liability coverage and such coverage is not available to him, the commissioner may establish minimum levels of coverage higher than the minimum limits specified in this subsection for such plans.

Amended
5/15/59

SENATE BILL NO. 400 - COMMITTEE ON JUDICIARY

CHAPTER.....

AN ACT relating to insurance; authorizing the commissioner of insurance to promulgate regulations establishing a Nevada Essential Insurance Association; vesting administrative powers in a board of directors; assigning powers and duties to the association and the commissioner; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 679B of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 6, inclusive, of this act.

SEC. 2. 1. If after a hearing the commissioner determines that a voluntary or mandatory plan would, in his judgment, fail for any reason to provide essential insurance coverage, he may, by regulation, establish a nonprofit unincorporated legal entity to be known as the Nevada Essential Insurance Association. All insurers required to participate pursuant to subsection 3 of NRS 686B.180 shall become members of the association as a condition of their authority to transact insurance in this state.

2. The association shall perform its functions under a plan of operation established by regulations promulgated by the commissioner pursuant to subsection 1 of NRS 686B.180.

SEC. 3. 1. The administrative powers of the Nevada Essential Insurance Association shall be vested in a board of directors consisting of not less than five nor more than nine members serving terms as established in the plan of organization. The members of the board shall be appointed by the commissioner with due consideration given to the composition of the membership of the association and to the interests of the insureds who are provided essential insurance coverage by the association.

2. Members of the board may be reimbursed from the assets of the association for expenses incurred by them as members of the board of directors and for reasonable and equitable compensation as may be prescribed by the terms of the plan of organization.

3. The board of directors of the association shall submit to the commissioner a plan of organization for the association and make suitable or necessary amendments thereto to assure the fair, reasonable and equitable administration of the association. The plan of operation shall become effective upon approval, in writing by the commissioner.

4. If the association fails to submit a suitable plan of operation within a reasonable period of time, or if at any time thereafter the association fails to submit suitable amendments to the plan, the commissioner shall promulgate a plan as necessary or advisable to effectuate the provisions of this section.

SEC. 4. 1. The Nevada Essential Insurance Association shall, for purposes of this section and to the extent approved by the commissioner, have the general powers and authority granted under the laws of this state to carriers licensed to transact the kinds of insurance defined in NRS 681A.020 to 681A.080, inclusive.

2. The association may take any necessary action to make available necessary insurance, including but not limited to the following:

(a) Assess participating insurers amounts necessary to pay the obligations of the association, administration expenses, the cost of examinations conducted pursuant to NRS 687A.110 and other expenses authorized by this chapter. The assessment of each member insurer for the kind or kinds of insurance designated in the plan shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year bear to the net direct written premiums of all member insurers for the preceding calendar year. A member insurer may not be assessed in any year an amount greater than 5 percent of his net direct written premiums for the preceding calendar year. Each member insurer shall be allowed a premium tax credit at the rate of 20 percent per year for 5 successive years following termination of the association.

(b) Enter into such contracts as are necessary or proper to carry out the provisions and purposes of this section.

(c) Sue or be sued, including taking any legal action necessary to recover any assessments for, on behalf of or against participating carriers.

(d) Investigate claims brought against the fund and adjust, compromise, settle and pay covered claims to the extent of the association's obligation and deny all other claims. Process claims through its employees or through one or more member insurers or other persons designated as servicing facilities. Designation of a service facility is subject to the approval of the commissioner but such designation may be declined by a member insurer.

(e) Classify risks as may be applicable and equitable.

(f) Establish appropriate rates, rate classifications and rating adjustments and file such rates with the commissioner in accordance with NRS 686B.

(g) Administer any type of reinsurance program for or on behalf of the association or any participating carriers.

(h) Pool risks among participating carriers.

(i) Issue and market, through agents, policies of insurance providing the coverage required by this section in its own name or on behalf of participating carriers.

(j) Administer separate pools, separate accounts or other plans as may be deemed appropriate for separate carriers or groups of carriers.

(k) Invest, reinvest and administer all funds and moneys held by the association.

(l) Borrow funds needed by the association to effect the purposes of this section.

(m) Develop, effectuate and promulgate any loss-prevention programs aimed at the best interests of the association and the insuring public.

(n) Operate and administer any combination of plans, pools, reinsurance arrangements or other mechanisms as deemed appropriate to best accomplish the fair and equitable operation of the association for the purposes of making available essential insurance coverage.

SEC. 5. The commissioner and the Nevada Essential Insurance Association may:

1. Give consideration to the need for adequate and readily accessible coverage, to alternative methods of improving the market affected, to the preferences of the insurers and agents, to the inherent limitations of the insurance mechanism, to the need for reasonable underwriting standards and to the requirement of reasonable loss-prevention measures.

2. Establish procedures that will create minimum interference with the voluntary market.

3. Spread the burden imposed by the facility equitably and efficiently.

4. Establish procedures for applicants and participants to have grievances reviewed.

5. Take all reasonable and necessary steps to dissolve the association at the earliest date when essential insurance becomes readily available in the private market. The dissolution of the association, including its assets and liabilities, shall be accomplished under the supervision of the commissioner in an equitable and reasonable manner.

SEC. 6. There is no liability on the part of, and no cause of action of any nature arises, against the Nevada Essential Insurance Association or its agents or employees, members of the board or the commissioner or his representatives for any good faith performance of their powers and duties under sections 1 to 6, inclusive, of this act.

SEC. 7. This act shall become effective upon passage and approval.

SENATE BILL NO. 401 – COMMITTEE ON JUDICIARY

CHAPTER.....

AN ACT relating to insurance; revising provisions relating to mandatory insurance plans when essential insurance coverage is unavailable; clarifying the definition of liability insurance as a form of casualty insurance; eliminating malpractice insurance as a separate form of casualty insurance; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 681A.020 is hereby amended to read as follows:
681A.020 1. "Casualty insurance" includes:

(a) Vehicle insurance. Insurance against loss of or damage to any land vehicle or aircraft or any draft or riding animal or to property while contained therein or thereon or being loaded or unloaded therein or therefrom, from any hazard or cause, and against any loss, liability or expense resulting from or incidental to ownership, maintenance or use of any such vehicle, aircraft or animal, together with insurance against accidental injury to individuals, irrespective of legal liability of the insured, including the named insured, while in, entering, alighting from, adjusting, repairing, cranking, or caused by being struck by a vehicle, aircraft or draft or riding animal, if such insurance is issued as an incidental part of insurance on the vehicle, aircraft or draft or riding animal.

(b) Liability insurance. Insurance against legal liability for the death, injury or disability of any human being, or for damage to property [;], including liability resulting from negligence in rendering expert, fiduciary or professional services; and provisions of medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries or personal representatives of persons killed,

irrespective of legal liability of the insured, when issued as an incidental coverage with or supplemental to liability insurance.

(c) Workmen's compensation and employer's liability. Insurance of the obligations accepted by, imposed upon or assumed by employers under law for death, disablement or injury of employees.

(d) Burglary and theft. Insurance against loss or damage by burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation, or wrongful conversion, disposal or concealment, or from any attempt at any of the foregoing, including supplemental coverage for medical, hospital, surgical and funeral expense incurred by the named insured or any other person as a result of bodily injury during the commission of a burglary, robbery or theft by another, and also, insurance against loss of or damage to moneys, coins, bullion, securities, notes, drafts, acceptances or any other valuable papers and documents, resulting from any cause.

(e) Personal property floater. Insurance upon personal effects against loss or damage from any cause.

(f) Glass. Insurance against loss or damage to glass, including its lettering, ornamentation and fittings.

(g) Boiler and machinery. Insurance against any liability and loss or damage to property or interest resulting from accidents to or explosions of boilers, pipes, pressure containers, machinery or apparatus, and to make inspection of and issue certificates of inspection upon boilers, machinery and apparatus of any kind, whether or not insured.

(h) Leakage and fire extinguishing equipment. Insurance against loss or damage to any property or interest caused by the breakage or leakage of sprinklers, hoses, pumps and other fire-extinguishing equipment or apparatus, water pipes or containers, or by water entering through leaks or openings in buildings, and insurance against loss or damage to such sprinklers, hoses, pumps and other fire-extinguishing equipment or apparatus.

(i) Credit and mortgage guaranty. Insurance against loss or damage resulting from failure of debtors to pay their obligations to the insured, and insurance of real property mortgage lenders against loss by reason of nonpayment of the mortgage indebtedness.

(j) [Malpractice. Insurance against legal liability of the insured, and against loss, damage or expense incidental to a claim of such liability, and including medical, hospital, surgical and funeral benefits to injured persons, irrespective of legal liability of the insured, arising out of the death, injury or disablement of any person, or arising out of damage to the economic interest of any person, as the result of negligence in rendering expert, fiduciary or professional service.

(k) [Elevator. Insurance against loss of or damage to any property of the insured, resulting from the ownership, maintenance or use of elevators, except loss or damage by fire, and to make inspection of and issue certificates of inspection upon elevators.

[(l)] (k) Congenital defects. Insurance against congenital defects human beings.

[(m)] (l) Livestock. Insurance against loss or damage to livestock, and services of a veterinary for such animals.

[(n)] (m) Entertainments. Insurance indemnifying the producer of any motion picture, television, radio, theatrical, sport, spectacle, entertainment, or similar production, event or exhibition against loss from interruption, postponement or cancellation thereof due to death, accidental injury or sickness of performers, participants, directors or other principals.

[(o)] (n) Miscellaneous. Insurance against any other kind of loss, damage or liability properly a subject of insurance and not within any other kind of insurance as defined in this chapter, if such insurance is not disapproved by the commissioner as being contrary to law or public policy.

2. Provision of medical, hospital, surgical and funeral benefits, and of coverage against accidental death or injury, as incidental to and part of other insurance as stated under paragraphs (a) (vehicle), (b) (liability), (d) (burglary), (g) (boiler and machinery), [(j) (malpractice),] and (k) (elevator) of subsection 1 shall for all purposes be deemed to be the same kind of insurance to which it is so incidental, and shall not be subject to provisions of this code applicable to life and health insurances.

SEC. 2. NRS 686B.180 is hereby amended to read as follows:

686B.180 1. If the commissioner finds after a hearing that in any part of this state any essential insurance coverage is not readily available in the voluntary market, and that the public interest requires such availability, he may by [rule] regulation either promulgate plans to provide such insurance coverages for any risks in this state which are equitably entitled to but otherwise unable to obtain such coverage, or may call upon the industry to prepare plans for his approval. *Such plans may also include any kind of reinsurance that is unavailable and that would facilitate making essential insurance coverage available where it would otherwise not be available.*

2. The plan promulgated or prepared under subsection 1 shall:

(a) Give consideration to the need for adequate and readily accessible coverage, to alternative methods of improving the market affected, to the preferences of the insurers and agents, to the inherent limitations of the insurance mechanism, to the need for reasonable underwriting standards, and to the requirement of reasonable loss-prevention measures;

(b) Establish procedures that will create minimum interference with the voluntary market;

(c) Spread the burden imposed by the facility equitably and efficiently within the industry; and

(d) Establish procedures for applicants and participants to have grievances reviewed by an impartial body.

3. Each plan shall require participation by all insurers doing any business in this state of the [types] kinds covered by the specific plan and all agents licensed to represent such insurers in this state for the specified [types] kinds of business, except that the commissioner may exclude kinds of insurance, classes of insurers or classes of persons for administrative convenience or because it is not equitable or practicable to require them to participate in the plan.

4. The plan may provide for optional participation by insurers not required to participate under subsection 3.

5. Each plan shall provide for the method of underwriting and classifying risks, [and] making and filing rates [applicable thereto.], adjusting and processing claims and any other insurance or investment function that is necessary for the purpose of providing essential insurance coverage.

6. The plan shall specify the basis of participation and assessment of insurers [and] as necessary and shall provide for the participation of agents and the conditions under which risks must be accepted.

7. Every participating insurer and agent shall provide to any person seeking coverages of kinds available in the plans the services prescribed in

the plans, including full information on the requirements and procedures for obtaining coverage under the plans whenever the business is not placed in the voluntary market.

8. The plan shall specify what commission rates shall be paid for business placed in the plans.

9. If the commissioner finds that the lack of cooperating insurers or agents in an area makes the functioning of the plan difficult, he may order that the plan set up a branch service office or take other appropriate steps to insure that service is available.

10. The existing assigned risk plan set up under former NRS 694.390 shall continue unless changed in accordance with this chapter.

SEC. 3. Chapter 686B of NRS is hereby amended by adding thereto a new section which shall read as follows:

There is no liability on the part of, and no cause of action of any nature arises, against the commissioner or his representatives or any essential insurance association, its agents or employees, under a plan established pursuant to the provisions of NRS 686B.180, for any good faith action taken by them in the performance of their powers and duties under such plan.

SEC. 4. This act shall become effective upon passage and approval.

SENATE BILL NO. 402 – COMMITTEE ON JUDICIARY CHAPTER.....

AN ACT regarding liability of persons rendering gratuitous emergency care; revising provisions relating to location of emergency; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 41.500 is hereby amended to read as follows:

41.500 1. [Any] *Except as provided in NRS 41.505, any person in this state, who renders emergency care or assistance [at the scene of] in an emergency, gratuitously and in good faith, shall not be held liable for any civil damages as a result of any act or omission, not amounting to gross negligence, by such person in rendering the emergency care or assistance or as a result of any act or failure to act, not amounting to gross negligence, to provide or arrange for further medical treatment for the injured person.*

2. Any person in this state who acts as an ambulance driver or attendant on an ambulance operated by a volunteer ambulance service or as a volunteer driver or attendant on an ambulance operated by a political subdivision of this state, or owned by the Federal Government and operated by a contractor of the Federal Government, and who in

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COMMITTEE REPORT

2/11/76

HOUSE

Mr. Speaker:

Date May 20, 1976

The Committee on JUDICIARY has had SB 597

under consideration. A Majority of the members of the Committee

- recommends it DO PASS
- recommends it DO NOT PASS
- recommends it DO PASS WITH ATTACHED AMENDMENT(S)
- recommends it BE REPLACED WITH CS FOR _____ AND THAT
CS FOR _____ DO PASS
- "and" recommends it BE REFERRED TO THE _____
COMMITTEE
- reports it back WITHOUT RECOMMENDATION
- "other"

Members signing the Majority report:

Terry Anderson - 4/10/76 _____

_____ _____

_____ _____

_____ _____

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

Terry Anderson Chairman

I. REQUEST

Bill No _____
 Title: Fee Structure Recommended by the Department.
 Requested by: _____ Date: _____
 Return Date Requested: _____
 Agency: Revenue Program: Audit

II. FISCAL DETAIL

Budget Request Unit(s) Affected: Audit Division

A. EXPENDITURES: (Thousands of dollars)

OBJECT	FY 76	FY 77	FY 78	FY 79	FY 80	FY 81
100 PERSONAL SERVICES	-0-	39.4	40.6	41.8	44.3	45.7
200 TRAVEL	-0-	5.0	5.0	5.0	5.0	5.0
300 CONTRACTUAL	-0-	6.0	6.0	6.0	6.0	6.0
400 COMMODITIES	-0-	.3	.3	.3	.3	.3
500 EQUIPMENT	-0-	1.2	---	---	---	---
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	51.9	51.9	53.1	55.6	57.0

B. FUNDING: (Thousands of dollars)

GENERAL FUND	-0-	51.9	51.9	53.1	55.6	57.0
FEDERAL FUNDS						
OTHER						

C. POSITIONS:

PERMANENT/TEMPORARY	0 / 0	2 / 0	2 / 0	2 / 0	2 / 0	2 / 0
MAN MONTHS (P./T.)	0 / 0	24 / 0	24 / 0	24 / 0	24 / 0	24 / 0

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

See memo to R. D. Stevenson dated March 23, 1976.

IV. ATTACHMENTS See memo to R. D. Stevenson dated March :23, 1976

V. DATE: 3-23-76 PREPARED BY: [Signature]
 Director, Audit Division

Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

Lewis Nelson

Introduced: 2/2/76
Referred: Judiciary

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 SENATE BILL NO. 597

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 NINTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to date of submission of reports
7 concerning bingo, raffles, and ice pools."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 05.15.080 is amended to read:

10 Sec. 05.15.080. REPORTS BY PERMITTEES. If the licensed activity
11 grosses over \$500, the permittee shall, by January 31 of the year fol-
12 lowing [WITHIN 15 DAYS AFTER] the holding of the specific activity, file
13 for public inspection with the city or borough clerk nearest to the
14 location of the activity licensed and with the commissioner of revenue,
15 an itemized statement showing all income, ^{all} [and] ^{of disbursements and proceeds} expense in connection with
16 the activity. [If the activity grosses over \$20,000, the commissioner
17 may extend the time for filing the report for a period not exceeding 60
18 days.]

19 * Sec. 2. AS 05.15.090 is amended to read:

20 Sec. 05.15.090. REPORTS TO THE LEGISLATURE BY COMMISSIONER OF
21 REVENUE, ATTORNEY GENERAL AND COMMISSIONER OF PUBLIC SAFETY. Before
22 March 2 of [WITHIN 10 DAYS AFTER THE CONVENING OF THE LEGISLATURE] each
23 year the commissioner of revenue shall submit a detailed report contain-
24 ing a summary of all reports required of permittees and recommending a
25 permit fee scale that will cover costs of administration and enforcement.
26 The attorney general and the commissioner of public safety shall,
27 within 10 days after the convening of the legislature each year, submit
28 a jointly prepared, detailed report outlining the effect, if any, of
29 the operation of this chapter on the legal and law enforcement activi-

ties of the state.

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The Honorable Terry Gardiner

Page 2

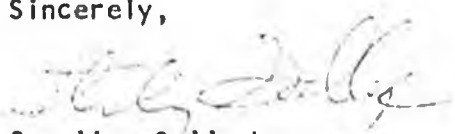
May 17, 1976

from the games operated by the permittees. The increased processing fee plus the one percent annual fee would generate approximately \$89,000 per year, thus providing sufficient funds to employ two full-time staff members to work specifically on the enforcement of this law. These positions have never been specifically funded in the past. In light of today's high cost factors and the considerable enforcement problems that we encounter, I feel these rates would be equitable. To accomplish this, I suggest the following modification to Section 05.15.020:

Sec. 05.15.020. Annual permit and fees. No activity permitted under this chapter may be conducted unless an annual permit issued by the department is first obtained [AND A FEE OF \$10 IS PAID TO THE DEPARTMENT.] ^{#20} A separate processing fee of \$50 shall be paid for each authorized activity. The applicable fees shall accompany the application for a permit. [NO ACTIVITY IS PERMITTED FOR A PERIOD OF 15 DAYS AFTER APPLICATION.] An additional fee of 1% of the ~~gross receipts~~ ^{net proceeds} shall be paid by each permittee annually. This fee is due and payable at the same time as the annual financial statement. ~~Gross receipts~~ ^{net proceeds} for purposes of the annual fee shall be the total monies received by the permittee from all games of chance and skill prior to any deduction for prizes, operating expenses or disbursements of net proceeds.

If you have any questions concerning my suggestions, please contact me.

Sincerely,


Sterling Gallagher
Commissioner

STATE OF ALASKA

DEPARTMENT OF REVENUE

STATE OFFICE BUILDING

POUGH SA - JUNEAU 99811

JAY S. HAMMOND, GOVERNOR

Members
JBSA!

May 17, 1976

The Honorable Terry Gardiner
Chairman, House Judiciary Committee
Alaska State Legislature

Dear Chairman Gardiner:

re Senate Bill 597

This bill attempts to solve some of the major reporting problems that are currently in the statutes regarding Games of Chance and Skill. I would suggest that the re-draft of Section 05.15.080 be further modified to read as follows:

Sec. 05.15.080. REPORTS BY PERMITTEES. [IF THE LICENSED ACTIVITY GROSSES OVER \$500,] the permitte shall, by January 31 of the following year [WITHIN 15 DAYS AFTER THE HOLDING OF THE SPECIFIC ACTIVITY,] file for public inspection with the city or borough clerk nearest to the location of the activity licensed and with the commissioner of revenue, an itemized statement showing all income, [AND] authorized expenses and disbursements of net proceeds in connection with the activity. [IF THE ACTIVITY GROSSES OVER \$20,000, THE COMMISSIONER MAY EXTEND THE TIME FOR FILING THE REPORT FOR A PERIOD NOT EXCEEDING 60 DAYS.]

I feel that this wording would solve the current problems encountered by both the permittees and the Department of Revenue. With the extension of the filing date to January 31 there would be no need for the provision authorizing the Commissioner to allow extensions up to 60 days. Further, it is very important that all reports be filed by the due date so that a proper report can be filed with the Legislature as required.

I would further suggest that the legislature seriously look at raising the permit fees for the operation of Games of Chance and Skill. The current fee of \$10.00 was established in 1960 when the original statute was enacted and no longer approaches covering the cost of administration of this program. I suggest that each activity be subject to a separate application processing fee and that the rates be increased to \$50.00 each. In addition I recommend an annual fee of one percent of the gross receipts

STATE OF ALASKA
DEPARTMENT OF REVENUE

JAY S. HAMMOND, GOVERNOR

OFFICE OF THE COMMISSIONER

POUCH 5 - JUNEAU 99811

February 13, 1976

The Honorable Terry Gardiner
Chairman
House Judiciary Committee
Alaska State Legislature
State Capitol Building
Juneau, AK 99811

Re: Senate Bill No. 597

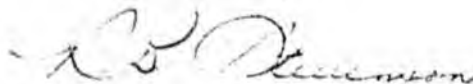
Dear Mr. Gardiner:

Senate Bill No. 597, an Act relating to date of submission of reports concerning bingo, raffles and ice pools was introduced in the House on February 11, 1976 and was referred to the House Judiciary Committee.

For the consideration of the House Judiciary Committee, I am enclosing a copy of a Fiscal Note and accompanying memorandum prepared by Gary L. Jenkins, Director, Audit Division, Department of Revenue as concerns Senate Bill No. 597. It is the opinion of the writer that the material contained in the Fiscal Note and memorandum was not reviewed by the Senate Judiciary Committee due to passage out of the Senate Judiciary Committee to the Rules Committee before the Department of Revenue information was transmitted.

If you or any members of the House Judiciary Committee have any questions on the material submitted, please telephone the writer at 465-2397 and I will contact Mr. Jenkins for further information or testimony at a hearing.

Very truly yours,



R. D. Stevenson
Special Assistant

cc: The Honorable Robert Ziegler
Chairman
Senate Judiciary Committee

Gary L. Jenkins
Director
Audit Division
Department of Revenue

THE LEGISLATURE OF THE STATE OF ALASKA
FISCAL NOTE

Second Session - Ninth Legislature

I. REQUEST

Bill No. Senate Bill 597

Title: Act relating to date of submission of reports concerning bingo, raffles & 1881s

Requested by: _____ Date: February 4, 1976

Return Date Requested: _____

Agency: Revenue Program: Audit

II. FISCAL DETAIL

Budget Request Unit(s) Affected: Audit Division

A. EXPENDITURES: (Thousands of dollars)

OBJECT	FY 76	FY 77	FY 78	FY 79	FY 80	FY 81
100 PERSONAL SERVICES	-0-	38.6	39.8	41.0	42.2	43.5
200 TRAVEL	-0-	5.0	5.0	5.0	5.0	5.0
300 CONTRACTUAL	-0-	6.0	6.0	6.0	5.0	6.0
400 COMMODITIES	-0-	.3	.3	.3	.3	.3
500 EQUIPMENT	-0-	1.2	-----	-----	-----	-----
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	51.1	51.1	52.3	53.5	54.8

B. FUNDING: (Thousands of dollars)

GENERAL FUND	-0-	51.1	51.1	52.3	53.5	54.8
FEDERAL FUNDS						
OTHER						

C. POSITIONS:

PERMANENT/TEMPORARY	0 / 0	2 / 0	2 / 0	2 / 0	2 / 0	2 / 0
MAN MONTHS (P./T.)	0 / 0	24 / 0	24 / 0	24 / 0	24 / 0	24 / 0

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

See memo to R. D. Stevenson dated February 4, 1976.

IV. ATTACHMENTS - See memo to R. D. Stevenson dated February 4, 1976.

V. DATE: 2-4-76 PREPARED BY: [Signature]

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

MEMORANDUM

State of Alaska

TO: R. D. Stevenson
Special Assistant to Commissioner
Administrative Services

DATE: February 4, 1976

FILE NO:

TELEPHONE NO:

FROM: Gary L. Jenkins
Director
Audit Division

SUBJECT: Senate Bill 597

This bill attempts to solve some of the major reporting problems that are currently in the statutes regarding Games of Chance and Skill. I would suggest that the re-draft of Section 05.15.080 be further modified to read as follows:

Sec. 05.15.080. REPORTS BY PERMITTEES. [IF THE LICENSED ACTIVITY GROSSES OVER \$500,] The permittee shall, by January 31 of the following year [WITHIN 15 DAYS AFTER THE HOLDING OF THE SPECIFIC ACTIVITY,] file for public inspection with the city or borough clerk nearest to the location of the activity licensed and with the commissioner of revenue, an itemized statement showing all income, [AND] authorized expenses and disbursements of net proceeds in connection with the activity. [IF THE ACTIVITY GROSSES OVER \$20,000, THE COMMISSIONER MAY EXTEND THE TIME FOR FILING THE REPORT FOR A PERIOD NOT EXCEEDING 60 DAYS.]

I feel that this wording would solve the current problems encountered by both the permittees and the Department of Revenue. With the extension of the filing date to January 31 there would be no need for the provision authorizing the Commissioner to allow extensions up to 60 days. Further, it is very important that all reports be filed by the due date so that a proper report can be filed with the Legislature as required.

I would further suggest that this committee seriously look at raising the permit fees for the operation of Games of Chance and Skill. The current fee of \$10.00 was established in 1960 when the original statute was enacted and no longer approaches covering the cost of administration of this program. I suggest that each activity be subject to a separate fee and that the rates be increased to \$50.00 each for raffles and lotteries, ice classics, dog musher's contests, fish derbies and contests of skill, while the fee for bingo be increased to \$100. In light of today's high cost factors and the considerable enforcement problems that we encounter with bingo, as compared to other games of chance and skill, I feel these rates would be equitable. To accomplish this, I suggest the following modification to Section 05.15.020:

Sec. 05.15.020. Annual permit and fee. No activity permitted under this chapter may be conducted unless an annual permit issued by the department is first obtained [AND A FEE OF \$10 IS PAID TO THE DEPARTMENT.] A separate fee shall be paid for each authorized activity. A fee of \$50 shall be paid for raffles and lotteries, ice classics, dog musher's contests, fish derbies and contests of skill. The fee for bingo is \$100. The applicable fees shall accompany the application for a permit. [NO ACTIVITY IS PERMITTED FOR A PERIOD OF 15 DAYS AFTER APPLICATION.]