Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

theft and fraud

Working Paper 19

Canada

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Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Ontario
K1A 0L6

Commission

Honorable Antonio Lamer, Chairman
Gérard V. La Forest, Q.C., Commissioner
Jean-Louis Baudouin, Commissioner

Secretary

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Special Advisors

Patrick Fitzgerald, M.A., Barrister at Law, England
Jacques Fortin, B.A., LL.L., D.E.S., LL.D.

Research Personnel

Hélène Dumont, B.A., LL.B., LL.M.
Tanner Elton, B.A., LL.B., LL.M.
Anthony Hooper, M.A., LL.B., Barrister at Law, England
Edward R. Myers, B.A.

Table of Contents

I.

Introduction

A law, it's said, is what it does. Criminal law, for instance, isn't merely what the *Criminal Code* says but also what is done by judges, prosecutors, defence counsel, police, prison officers and all who operate our criminal justice system. What all these do is law reform's prime target.

But laws are also what they say. What they do and what they say must harmonize, or form does violence to substance. Criminal law, which serves in our view to bolster basic values, must be expressed in terms that underline, not caricature, those values. More particularly, the law of theft and fraud, which aims in our opinion to bolster honesty, must be written in such a way as to promote that aim and not submerge it in a confused welter of artificiality, technicality and complexity. The language of the law, then, constitutes a secondary target for the law reformer. Given the proper spirit of the law, the reformer then must take heed lest "the letter killeth".

The letter killeth -- the immediate problem with the law of theft and fraud. The underlying notion is simple: "don't be dishonest". But this, as shown in Appendix I, is overlaid with such a plethora of fine distinctions that it has acquired, in the words of one commentator, "a form and content discreditable to a mature system of jurisprudence". Simplification is universally accepted as essential. And simplification is the main objective of this Working Paper.

Objective: A Limited Exercise

This, then, is this Working Paper's main object: to simplify the written law of theft and fraud but leave the substance of that law in essence unchanged.

Clearly this is a limited objective. Equally clearly there are many things this Paper doesn't do. It doesn't, since if confines itself to principles and concepts, deal with procedure, evidence and sentencing. It doesn't concern itself with break and enter, possession of property obtained by a crime, forgery and other offences (which may be dealt with in later Papers). It doesn't reproduce all the specific offences contained in Parts VII and VIII of the present Code, but aims to cover them by its general provisions. Finally, (with exceptions to be noted later) it doesn't aim to change substantive law, correct injustices or rectify deficiencies, although, as lawyers know, changes in form often bring minor changes in substance. Basically, then, substantive law remains unaltered. The schedule of reported cases in Appendix II shows how little the solutions under the proposed draft differ from those under present law.

The objective is also limited in another way. The Draft presented in this Paper is not intended to replace Parts VII and VIII of our present Code as it now stands. For one thing, the Draft is only an ideal conceptual chapter which needs fleshing out in terms of procedure, evidence and sentencing. For another, it is not intended as a final piece of legislation but rather as models on which such legislation could be drafted. And lastly, legislation based on this Draft could only find its proper place within the context of a whole new Code drafted on similar lines.

In short, the object of the exercise is to suggest, from the substantive and conceptual point of view, a way in which theft and fraud law could be simplified in legislative form.

Practice and Consultation

Could such a theft and fraud law work in practice? Those in the field can best predict. Accordingly, we distributed a preliminary version of this Paper and consulted judges and lawyers throughout Canada.

The reactions of those consulted were encouraging and favourable: in general they felt the scheme was workable. In the light of that reaction and of their many helpful comments, criticisms and suggestions, we now publish this revised version. In doing so we would record our gratitude to those consulted both for their time and trouble and for their advice and assistance.

The Plan of the Paper

The overall plan of the Paper is as follows. The Paper consists of three parts. Part I, the Introduction, explains the need to simplify this area of law and describe the essence of the proposed simplification. Part II, the draft chapter, sets out the proposed provisions of the law on theft and fraud. Part III, the annotated draft, provides detailed commentary on the sections.

Part I, the Introduction, demonstrates the present law's complexity — a demonstration amplified in Appendix I —, suggests reasons for it, examines its disadvantages and suggests a new approach based on the central notion of dishonesty.

Part II, the draft, is arranged simply. The offences are primarily divided into four: (1) theft, (2) robbery, (3) blackmail and (4) fraud.

Part III, the annotated draft, is self-explanatory. It shows how in our view a simplified draft can be reasonably intelligible to laymen, expound values enunciated and protected by the law, and yet retain the comprehensiveness of the present Code.

Defects of the Present Law: Complexity

Theft and fraud law, all agree, has many defects. None is so glaring, though, as its complexity. Indeed the hallmark of this area of law is simplicity obscured by detail. The crimes themselves are clear and simple notions. Basically the law says: "Do not be dishonest".* Out of this basic principle, however, has grown a jungle

*As against the notion that theft and fraud law basically serve to underline a shared value of honesty two objections may be raised.

(1) Is there in Canada a shared value of honesty? Though this is obviously a matter lying outside this Paper, this can still be said. No doubt views about ownership, possession and property vary across the country from sub-culture to sub-culture, but no doubt too in each sub-culture some non-consensual appropriations are "off limits". In other words, isn't there a general principle with a varying content? If so, this could be well taken care of in the approach suggested in this Paper. Indeed we don't attempt to impose any value on society; we merely make room in the criminal law for that general principle and leave it to courts and juries to define.

(2) Is honesty the only value promoted by this area of law? What about security of property rights and security of transactions? To this the following can be said. First, property rights and transactions gain primary security through the civil law. Second, they gain secondary security indirectly through criminal law. For one of the purposes of stigmatizing theft is to protect property and one of the purposes of stigmatizing fraud is to protect honest transactions. But this is done indirectly by promoting the central value of honesty.

of provisions dealing with such offences as theft by a bailee, theft by a person required to account, theft by a person holding a power of attorney, misappropriation of money held under direction, criminal breach of trust, false pretences, fraudulently obtaining food and lodging and so on — as many as fifty sections in our *Criminal Code*. In theft and fraud, to steal Marx's terms, base and superstructure are at odds.

This largely stems from history. Our criminal law, like other common law, was made by judges. They fashioned it bit by bit to solve different problems coming before the courts. Originally by theft they meant taking without the owner's consent. Later they extended it to deal with dishonest borrowers, carriers, agents, trustees and finders of lost articles. Given the difficulty of their task and the general adequacy of their solutions, their achievement was substantial. All the same, the law had in it more *ad hoc* pragmatism than logic and simplicity.

If judges made *ad hoc* law, so too did legislators. As theft of different articles posed special problems, Parliament created special new offences. In consequence the *Criminal Code* now deals specially with theft of telecommunication services, taking ore for scientific purposes, fraudulently taking cattle, taking possession of drift timber, destroying documents of title, and theft from mail. Statute law too, then, tends towards a "wilderness of single instances".

Not that the legislator bears all the blame. Some lies on judges who saw statutes as islands intruding in a sea of common law and needing to be submerged as far as possible. They worked restrictively: anything not spelt out in black and white they judged not covered by the statute. So draftsmen learned to spell things out in full. That way they aimed at certainty and comprehensiveness. The cost was clarity.

But, history explains, it never justifies. Common law pragmatism, legislative "ad hocery", drafting for certainty and comprehensiveness — these explain the present law's complexity; they do not justify it. Why should this complexity remain? Why can't we simplify? Clarity, certainty and comprehensiveness — the first of these is always a poor third in law. Why can't we give it its proper place? Could we, for instance, draft a law of theft and fraud that everyone could easily understand?

Bentham thought not. "Thou shalt not steal", he says, "could never sufficiently answer the purpose of a law". As he points out in

his *Introduction to the Principles of Morals and Legislation,** *stealing* means roughly *the taking of a thing which is another's, by one who has no title so to do and is conscious of his having none.* To be complete, however, the law must explain the meaning of *having a title to take a thing.* It must catalogue the events that confer "title" and the events that qualify as a "taking away". Put simply, theft is a kind of trespass to property, "trespass" and "property" are complex legal terms, and so the law of theft must be complex and technical. The truth, they say, is rarely pure and never simple. Bentham would say the same of the law of theft and fraud. To him simplicity here is unattainable.

Dangers of Complexity

All the same, complexity brings dangers. The more complex the law, the harder to see the forest for the trees. This puts a greater burden on policemen, lawyers, judges and all who must administer the criminal justice system. Worse still, it drives a wedge between law and morality. When lawyers make distinctions unrecognized by ordinary common sense, law and morality part company. An act may be honest or dishonest legally without being necessarily so according to our current morality.

There is an even greater danger. Over-refinement of the law may make us look on "honest" and "dishonest" as fixed categories. In truth they are neither categories nor fixed.

First, they are not categories. Although we term acts honest and dishonest, the acts themselves don't come neatly labelled so. We put the labels on and sort the acts into categories. The categories, though, have no real existence. Reality is a continuum, and black and white merge in a no man's land of grey.

Honesty, then, is not a category but a standard. As such it can't be used mechanically. Like any other measuring-rod it must be used with understanding, tolerance and common sense.

Nor is it a fixed standard. Standards change in time, and acts once thought honest come to be thought dishonest and *vice versa.* Over-define our standard and we imprison in a straightjacket that which must stay free and flexible. Standards made artificially rigid pull law and morals apart and defeat the purpose of the criminal law.

*Ed. Burns and Hart pp. 303-304.

A New Approach

Criminal law should support morality, not contradict it. As we said in *Our Criminal Law*, the prime function of the "real"* criminal law is to bolster basic values. But law must underline, not caricature, those values.

The value here is honesty. This, however, is such a basic value that everyone understands its import: everyone knows roughly what is meant by theft and fraud. To underline, not caricature, this value the law must be so devised as to highlight the basic principles involved, to concentrate on the vast majority of "run of the mill" dishonest actions and to avoid devoting all its efforts to the marginal case. In short, the law should make the value and the principles clear enough to underwrite the citizen's general understanding of dishonesty while also providing guidelines for judicial interpretation in border-line cases. The law, therefore, should clearly prohibit only acts commonly reckoned dishonest and avoid prohibiting any act commonly reckoned legitimate. So dishonesty becomes a necessary, but not sufficient, condition of criminality.

This leaves the marginal cases. Cases, for instance, where property law makes it doubtful whether what is stolen counts as *property*. Or cases where the law on representations makes it dubious whether there has been a *false pretence*. How should a clear and single law of theft provide for these?

Our answer is as follows. The more our criminal law serves to bolster values, the less significant is the marginal case. For bolstering values means condemning all those acts and only those acts that are clearly considered wrongful and leaving untouched all acts thought legitimate. Marginal cases, therefore,—acts considered neither clearly wrong nor clearly right—will then require to be dealt with pragmatically.

Here pragmatism means three things. First, it means recognizing the inevitability of marginal cases. Second, it means being concrete. And third, it means operating by the light of principle.

**Our Criminal Law*, following *The Meaning of Guilt* and *The Limits of Criminal Law* recommends that the distinction between "real" crimes and mere regulatory offences should be recognized by law, that the *Criminal Code* be pruned so as to contain only those acts generally considered seriously wrongful and that all other offences be excluded from the Code. What is said in this Working Paper is based on the premise that only "real" crime is being here discussed and that theft, fraud and related offences form a species of real crime.

First then, we have to recognize the inevitability of marginal cases. However we define our terms, there will be a hazy border-line. For one thing, language has an open-texture and descriptions necessarily have blurred edges. For another, life is uncertain and we can't provide for everything in advance. Marginal cases, then, are unavoidable in any kind of drafting even the drafting of our present law. Our approach recognizes this and therefore worries less about it.

Second, pragmatism means being concrete. We can't judge marginal cases in the abstract. The wrongfulness of any border-line behaviour can only be determined in the light of all the actual circumstances. This of course is the rationale of the common law.

Third, pragmatism here involves using not rules but principles. Whereas rules simply lay down the law, principles do more than this: a principle articulates the reason for that law—in other words by being based on common sense and common morality it elucidates, explains and justifies that law. In this way principles point the way to the solution of border-line problems. So here the principles stemming from the value of honesty can guide our approach to marginal cases in the law of theft, fraud and similar offences.

On marginal cases, then, our view is this: the legislator has to leave them to the trial court or jury. Only these know all the facts. Only these can properly measure such cases against the moral standard.

This doesn't mean, however, that each decision must necessarily make new law. Otherwise, the law would soon become as complex as it is today. Instead, border-line cases will be decided by the judge or jury on their own particular facts although courts of appeal will occasionally lay down that certain facts cannot fall within the words of the section. That is generally what happens today. No form of expression in a statute can completely encompass all possible cases.

This does, however, mean that in such cases there will be considerable uncertainty. If all such cases are to be decided on the facts as they arise, we cannot know until the trial court tells us, whether the act is criminal or not. But that is surely right. In moral terms the act is doubtful, on the border-line. The law can't be more precise without being artificial and out of touch with ordinary morality. Where there is moral uncertainty, that surely has to be reflected in the criminal law.

This is our strategy for marginal cases of dishonesty. Don't seek to solve them all by legislation in advance. Leave it rather to the trial court to decide each border-line case in the light of its particular circumstances. Applying the measuring-rod of honesty, the court must ask: *did the accused's conduct fall short of the recognized standard of honesty*? This is no mere objective question, for conduct isn't just an external act but an act accompanied by a state of mind. The question is subjective. We have to ask: *did the accused mean to act dishonestly*? This, however, is answered not by looking at the offender's mind—as Bryan C.J. remarked in the 15th century, "the intention of a man cannot be tried; the devil himself knows not the intention of a man". It is answered by reference to objective tests of evidence. If at the end of the day, there remains a doubt, acquit; for given a doubt, defendant's act hasn't clearly violated the principle of honesty.

But what if the uncertainty—the marginality of the case—arises, not from the law, but from the defendant's ignorance of the law? What if the defendant didn't realize that theft law prohibited his act? In such a case his act will obviously have been dishonest, otherwise it wouldn't be prohibited by law. That being so, he must have known he shouldn't do it; he can't therefore complain that he didn't know the law. Accordingly, with "real" crimes, including theft and fraud, ignorance of law is no excuse. Everyone is required to live up to the common teachings of ordinary morality. Disregard them and he acts at his peril.

This strategy will achieve sufficient clarity, certainty and comprehensiveness. Clarity, because the law will now clearly underline the value of honesty. Certainty, because it will prohibit and condemn those acts and those acts only that contravene this value. And comprehensiveness, because all acts that are obviously dishonest will fall within its scope. Meanwhile the marginal cases won't become the tail that wags the dog.

This, then, is our reply to Bentham. Theft law can and should be clear and simple. Though "property" and "taking" may be terms of art, the ordinary person knows well enough when another's property is being taken. This is sufficient for the criminal law. After all, criminal law is not like property law or contract, where the law must be certain enough to ensure that transactions completed according to the rules are valid and effective. In criminal law, by contrast, we need to be certain (1) that if we do what is ordinarily thought

legitimate, we won't be liable to prosecution; and (2) that if we are prosecuted for an alleged illegality, we know exactly what we have to defend ourselves against. What we need to be sure of, then, is that we will only be penalized for doing acts which ordinary people would consider wrong. Where ordinary people, given all the circumstances, would still be doubtful, the criminal law must hold its hand. This is the essence of our new approach.

The Basic Scheme

Applying this approach, then, we have tried to produce *a simpler law of theft and fraud. It is simpler than the present law, we think, in three respects. First, marginal cases are left to be decided on the facts, and this avoids a mass of detail. Second, this leaves us free to concentrate on the bare bones of theft and fraud and make the underlying principles obvious in our arrangement. Third, it enables us to use a simpler, more straightforward drafting style.* The first point has been dealt with earlier. Here we underline the other two.

(1) Arrangement

Theft and fraud are offences against property rights. Now a person may be "done out of" his property in four different ways:

(i) without consent;
(ii) without consent, through force or threat of immediate violence;
(iii) with consent obtained by threats of non-immediate harm; and
(iv) with consent obtained by deceit.

Equally there are four different crimes:

(i) theft;
(ii) robbery;
(iii) blackmail; and
(iv) fraud.

(i) *Theft*

Theft is dishonest appropriation without consent. We divide it into three separate species: (a) taking with intent to treat as one's own, (b) converting and (c) using utilities without paying. Of these

(a) covers the basic offence of stealing, (b) covers the offence of dishonest conversion where the offender comes by property innocently and subsequently misappropriates, and (c) is self-explanatory.

This definition of theft clearly excludes cases of intent to deprive temporarily. To cover this, we add the new offence of *dishonest taking.*

(ii) *Robbery*

Robbery, being an aggravated form of theft, follows immediately. It consists of using violence or threats of immediate violence for the purposes of theft.

(iii) *Blackmail*

Blackmail differs from robbery although the dividing-line is sometimes difficult to draw. This is specially so with robbery by threats. The difference, however, is that in robbery the threats are of immediate violence while in blackmail they are not. Also in blackmail the threats needn't be of violence only; they may be threats of injury to reputation.

(iv) *Fraud*

Fraud consists of dishonestly inducing someone by deceit or other similar means to part with property or suffer a financial loss. It therefore covers dishonest appropriation by deceit — cases where the owner is deceived into willingly parting with his property. It therefore includes (a) larceny by a trick, (b) false pretences, (c) obtaining credit by fraud, and (d) fraud now covered by s. 338.

In fraud there has to be deceit or similar conduct. Since this is sometimes hard to prove, we add the offence of *dishonest obtaining.* This covers dishonestly obtaining food, lodging, transport or other services without paying.

(2) Drafting Style

Our law of theft and fraud is put forward as an illustration. We don't try to advance a definitive draft. Rather we suggest the lines a draft might follow.

The main feature of our draft is simplicity. First we avoid trying to take care of all marginal cases, and so paint with a comparatively broad brush. Second, we forbear from defining our most basic terms.

Basic terms are known to all. As such they can only be defined by other words less well known. But why define the known by the unknown? After all, all definition must stop somewhere. Our draft, therefore, deliberately leaves undefined such words as "taking", "using" and "dishonestly".

Particularly important is the case of "dishonestly". Indeed it is crucial to our whole approach. "Dishonestly" is the fundamental *mens rea* term, as in the English *Theft Act* 1968, section 1(1) of which provides that "a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it". Like the draftsman of that Act, we don't define "dishonestly" in terms of "fraudulently", "claim of right" or "colour of right" because "dishonestly" is better understood than any of these. Indeed, we don't define it at all—no draftsman could. We all know what it is to take another's things dishonestly. It means *taking them when we know we oughtn't.* We don't define it further.

Accordingly, we introduce "dishonestly" as a measuring-rod or standard for courts and juries to apply. But this is only to write into the letter of the law what happens all the time in practice. Judge after judge has told us that he tells the jury that in the end they have to ask themselves: "Did the accused behave dishonestly?" Indeed a well-known work for judicial directions in criminal cases instructs the judge in case of theft to ask the jury to consider whether the defendant acted fraudulently or deceitfully or dishonestly. As an English Appeal Court Judge recently observed,

> Jurors when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people. In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a Judge to tell them what amounts to dishonesty.*

In short, what we have done is to effect a paper change. We have made the written law reflect what judges do in practice. We have brought form into harmony with substance.

*Per Lawton L.J. in *R. v. Feely* [1973] Q.B. 530 at 537.

Conclusion

This, then, is the arrangement, style and substance of our approach. It concentrates on central cases, classifies offences according to the victim's consent, avoids defining basic terms, states the law in short and simple sentences, and brings theory into line with practice.

II.

Draft Statute

Introductory Section: General

Dishonest acquisition of property consists of

(1) Theft
(2) Dishonest Taking
(3) Robbery
(4) Blackmail
(5) Fraud
(6) Dishonest Obtaining

Section **1.1.** *Theft*

A person commits theft who dishonestly appropriates another's property without his consent.

Section **1.2.** *Without Consent*

For the purposes of section 1.1, appropriation by violence or threat of immediate violence is appropriation without consent.

Section **1.3.** *Appropriating Property*

"Appropriating property" means

(*a*) taking, with intent to treat as one's own, tangible movables including immovables made movable by the taking;

(*b*) converting property of any kind by acting inconsistently with the express or implied terms on which it is held; or

(*c*) using electricity, gas, water, telephone, tele-communication or computer services, or other utilities.

Section **1.4.** *Another's Property*

For the purposes of section 1.1 property is another's if he owns it, has possession, control or custody of it or has any legally protected interest in it.

Section **2.** *Dishonest Taking*

A person commits dishonest taking who dishonestly and without consent takes another's property though without intent to permanently deprive.

Section **3.** *Robbery*

A person commits robbery who for the purposes of theft uses violence or threats of immediate violence to person or property.

Section **4.** *Blackmail*

A person commits blackmail who threatens another with injury to person, property or reputation in order to extort money, property or other economic advantage.

Section **5.1.** *Definition of Fraud*

A person commits fraud who dishonestly by

(*a*) deceit, or

(*b*) unfair non-disclosure, or

(*c*) unfair exploitation,

either induces any person including the public to part with any property or causes him to suffer a financial loss.

Section **5.2.** *Deceit*

For the purpose of Section 5.1 "deceit" means any false representation as to the past, present or future.

Section **5.3.** *Puffing*

Deceit does not include mere exaggerated commendation or depreciation of the quality of anything.

Section **5.4.** *Unfair Non-Disclosure*

For the purpose of Section 5.1 non-disclosure is unfair where a duty to disclose arises from

(*a*) a special relationship entitling the victim to rely on the offender, or

(*b*) conduct by the offender creating a false impression in the victim's mind, or

(*c*) circumstances where non-disclosure would create a false impression in the mind of any reasonable person.

Section **5.5.** *Unfair Exploitation*

For the purpose of Section 5.5 "unfair exploitation" means exploitation

(*a*) of another person's mental deficiency;

(*b*) of another person's mistake intentionally or recklessly induced by the offender;

(*c*) of another person's mistake induced by the unlawful conduct of a third party acting with the offender.

Section **5.6.** *Parting with Property*

"Parting with Property" means relinquishing ownership, possession, control or other interest in it.

Section **6.** *Dishonest Obtaining*

A person commits dishonest obtaining if he dishonestly obtains food, lodging, transport or services without paying.

III.

Draft Statute and Notes

Introductory Section: General

Dishonest acquisition of property consists of

(1) Theft
(2) Dishonest Taking
(3) Robbery
(4) Blackmail
(5) Fraud
(6) Dishonest Obtaining

This is the organizing section. It classifies dishonest acquisition of property into six offences: four basic and two minor:

Theft — dishonestly appropriating without consent;
Robbery — theft with violence;
Blackmail — threatening in order to extort; and
Fraud — dishonestly appropriating by deceit.

The two minor offences,

Dishonest Taking — dishonestly taking though without intent to permanently deprive, and
Dishonest Obtaining — dishonestly obtaining food, etc., without paying

complement the offences of theft and fraud.

The classification follows common sense as well as legal tradition. It rests on the common sense distinctions (a) between theft and robbery, (b) between robbery and blackmail, and (c) between theft and fraud.

(a) *Theft and Robbery*

The difference between theft and robbery is merely one of degree. Theft is simple stealing; robbery is aggravated stealing — theft

aggravated by the use of force (the paradigm is the bank-robber). But common sense and common law have always thought robbery so special as to deserve a special name. The draft, therefore, retains robbery as a special offence.

(b) *Robbery and Blackmail*

Blackmail differs from robbery in two ways. First, regarding the threat involved. Second, regarding the victim's consent.

First, threats. In robbery the offender either uses violence or threatens immediate violence. A takes B's wallet by actual force. C forces D at gunpoint to hand over his wallet. In blackmail the harm threatened is less immediate. E threatens to kill F next week, to burn down F's house or to expose F's sexual habits unless F pays "hush-money". In robbery there is a "clear and present danger". In blackmail there isn't.

Second, consent. Robbery by force clearly excludes consent and qualifies as theft. But why is robbery by threats theft while blackmail isn't? It is arguable that both are in the same category: in both the victim doesn't really consent, so both are theft; alternatively in both the victim has a choice and does consent, so that neither is theft. Why draw the line between blackmail and robbery?

To this there are three answers. First, that is where common sense and legal tradition draw it. Second, there is a continuum running from non-consent (X takes Y's wallet by force) to consent (Y makes X a present of his wallet), and the law sensibly distinguishes between cases where "clear and present danger" prevents a settled choice and cases where, despite mistake, fraud or threat of distant harm, time allows opportunity to choose. Third, the distinction is obvious if the offender's bluff is called: the robber then actually uses violence to take the property, the blackmailer carries out his threats but doesn't now get the property demanded.

Accordingly the draft maintains the present position. Robbery is one crime, blackmail is another.

(c) *Theft and Fraud*

Here again the difference relates to consent. Theft is misappropriation without consent — the paradigm is the pickpocket. Fraud is misappropriation with consent induced by deceit — the paradigm is the con-man. This distinction, though blurred by present law, is fundamental. It is also central to the draft.

In sum, the draft classifies by reference to consent. In theft the victim doesn't consent to the misappropriation. In robbery he doesn't consent — his will is overborne by violence or threat of violence. In blackmail he consents — he chooses the lesser of two evils. In fraud he consents — he is tricked into consenting.

Section **1.1.** *Theft*

A person commits theft who dishonestly appropriates another's property without his consent.

This definition covers every kind of theft. Theft of whatever property by whatever means is now covered by one section. This accords with popular ideas of theft, simplifies the law, and reduces complexity due to multiplicity of sections.

Dishonesty

The key word in the definition is "dishonesty". This, the *mens rea* term, has a common sense meaning, is universally understood and is only definable in less comprehensible terms. Accordingly the draft leaves it undefined.

This draft term, "dishonestly", replaces the three *Criminal Code* terms:

(1) *fraudulently,*
(2) *without colour of right, and*
(3) *with intent to deprive.*

For this replacement there are several reasons. First, *clarity*. The Code terms proved quicksands for judicial interpretation. "Fraudulently" — "the mystery element of theft"* is sometimes interpreted as summing up the other two terms and sometimes as adding a third ingredient of moral turpitude. "Colour of right" is sometimes interpreted as an honest mistake of fact or an honest mistake of law and sometimes as being confined to an honest mistake regarding private rights. And "intent to deprive" is far from clear: if a prankster is acquitted of theft, is this because he lacks intent or because he doesn't act fraudulently? Such problems are largely avoidable, and clarity more obtainable, by substituting the single term, "dishonestly".

Secondly, *simplicity*. Substituting "dishonestly" for the Code terms brings theft law closer to the ordinary idea of stealing. Since dishonesty is the central element of theft, splitting it into three sub-elements is artificial and confusing. Artificial, because the three sub-

*See Appendix A, p. 44.

elements can't be treated separately without reference to the over-riding principle of honesty: in fact, directions to juries often refer to dishonesty as the summation of the *mens rea* of theft. Confusing, because terms (2) and (3), unlike "dishonestly", don't manifest the wrongfulness of theft or the reason for its criminality. In this, the draft does not change the law but merely puts it in line with prevalent practice in the courts.

Some concern has been expressed that the use of honesty as a standard might make it impossible for judges to direct juries as to its meaning and application. Case law, however, shows that judges and juries are quite familiar with honesty as a standard: "colour of right" is defined to juries in terms of honesty — an honest belief on the part of the accused that he has a lawful right; "fraudulently", is defined in terms of conduct that is dishonest and morally wrong. Indeed, failure by the trial judge to define "fraudulently" and "without colour of right" is a non-direction to the jury amounting to misdirection, and is cause for a new trial. Besides, most appeal courts hold that "fraudulently" and "without colour of right" should be defined in terms of dishonesty, moral wrong, moral obloquy and so on, precisely the approach adopted in the draft. It substitutes for technical terms not readily understandable to jurors a word in common use referring to current standards of ordinary decent people.

We have, however, considered giving a partial definition of "dishonesty". The draft could, like the English *Theft Act*, 1968, list circumstances where appropriation is not dishonest — e.g. appropriation under an honest belief in a lawful right, a belief that the owner would have consented if asked, or a belief that the owner cannot be discovered by taking reasonable steps. Alternatively the draft could provide "badges" of dishonesty for courts to apply as guidelines. There may be some advantage to the English approach. Among other things, it appears to tie the draft more obviously to pre-existing law and thus may ensure against radical departures in policy by the judiciary.

In the end, however, we decided to leave dishonesty wholly undefined. For one thing, partial definitions of "dishonestly" would seem to help more than they really do: in fact they only deal with the most obvious instances, for which courts need no help, while marginal cases would still need the application of the basic standard of honesty. For another, partial definitions themselves require interpretation, add therefore little certainty and lose simplicity by over-burdening the draft with detailed definitions distracting from, instead of focusing on, the fundamental issue: *Did the accused mean to be dishonest?*

Thirdly, the question of *values*. As we argued above, "real" criminal law exists to bolster fundamental values. The value here at stake is honesty: honesty is what law affirms, dishonesty what it denounces. The term "dishonestly" makes this crystal clear. The three Code terms do not.

One final reason. In theft dishonesty is not only the wrong denounced, but also the state of mind justifying denunciation. In theft we ask: *did the accused's conduct fall short of the recognized standard of honesty?* This as we said earlier is a subjective question: *did the accused mean to act dishonestly?* This, however, is answered by reference to objective tests of evidence.

Applying such objective tests, a court should act as follows. It should acquit the accused if there is any reasonable doubt, i.e. any factor suggesting he was not dishonest. Such factors are: mistake of fact and sometimes mistake of law.

(a) *Mistake of Fact*

A takes B's car mistaking it for his. Here A is clearly not dishonest: he doesn't knowingly intend to take another person's property, he means to take his own but is mistaken. No one would morally hold him guilty of dishonesty. Nor does criminal law: the value of honesty hasn't been infringed so A's act isn't theft. The draft maintains this position.

(b) *Mistake of Law*

X takes Y's floating logs mistakenly believing that he has a right to take them. Does X here commit theft? The answer is more complex. Common law and the Code say ignorance of law is no excuse. Does this exclude X's excuse?

First consider the general rule itself. The rationale of the rule that ignorance of law is no excuse isn't that convictions would be impossible if prosecutors had to prove that each and every accused knew the law he broke. It is rather that society *requires* each individual to live up to basic social values like truth, honesty and non-violence. It matters little whether the defendant to a murder charge knows the precise legal rules about intention, recklessness or "year and a day". He knows that murdering is wrong, he knows the values "real" criminal law underlines, and so he must live up to them.

Apply the general principle to the particular problem. X takes Y's floating logs mistakenly believing that he has a right to take them. Has he committed theft? It depends on the precise nature of X's mistake.

Does X erroneously believe that Y has abandoned the logs and therefore anyone is free to take them? If so, at common law, he makes a mistake of fact. This will excuse him both at common law and under the Code. Common sense puts the same thing differently: X doesn't steal because he isn't dishonest. The draft puts it the same way: no dishonesty, no theft.

Alternatively, does X erroneously think the law of property allows anyone to take possession of floating logs? If so, he misunderstands property law. But property law is far too complicated for the ordinary citizen to understand it all. For this reason, for the reason that he is not acting dishonestly, and also for the reason that no one would blame him, X should be acquitted. Whether he would be under present law is far from clear -- a criticism less of X than of our present law! The draft, however, would allow acquittal.

Finally, does X wrongly believe that taking other people's property is no crime? Here two possibilities arise. Suppose X comes from a a different culture where things are free to take and the concept of theft non-existent. Here X isn't dishonest and shouldn't be convicted. On the other hand, suppose X has lived for many years in one of our large cities but doesn't know (he claims) that taking other people's property is wrong and criminal. In reality, he asserts a belief in a moral right to take the property. On principle, this is insufficient to acquit him; his belief, although mistaken, must at least concern a lawful right. Even if he is telling the truth, therefore, the law should take its course -- it is time he learned the meaning of honesty. These unusual cases, however, can best be dealt with by common sense, as in fact they now are. If in the circumstances the accused may possibly have acted honestly, he should be acquitted. The draft's use of "dishonestly" allows this approach.

Honesty as a Standard

Honesty, then, is a standard. Whether the accused attained the standard is ultimately a question of fact. This is illustrated by reference to (a) consent, (b) finding and (c) mistake:

(a) *Consent*

A takes B's car without consent. He thinks B would have consented if asked. Is A Dishonest? It depends.

(i) If A has good reason to think what he does, he isn't dishonest. Under the draft he doesn't commit theft.

(ii) If A has no reason to believe B would consent, vaguely hopes he might, doesn't really care, but takes a chance, preferring not to ask and risk refusal, he is dishonest. Under the draft here A commits theft.

(b) *Finding*

(i) X finds money on the sidewalk, doesn't know whom it belongs to, has no hope of finding out, and keeps it. This isn't dishonest. Under the draft X doesn't commit theft.

(ii) Y finds a diamond ring on the sidewalk, doesn't know who the owner is, takes no steps to find out, and keeps it. Here Y acts dishonestly, because by taking reasonable steps he probably could have identified the owner but he preferred to avoid the risk. Under the draft Y commits theft.

(c) *Mistake*

(i) A takes B's umbrella in mistake for his own. Here A isn't dishonest. Under the draft he commits no theft.

(ii) A takes B's umbrella not knowing if it is his or someone else's and not caring. This is dishonest disregard for others' property. Under the draft A commits theft.

(iii) A takes B's umbrella genuinely thinking it is his, although a quick careful check would have shown it was B's. Here A has been careless — he hasn't taken as much care as a reasonable man would take. But he hasn't deliberately infringed B's rights. Nor has he trampled on them with wanton disregard. Ordinarily we wouldn't say A had been dishonest. Under the draft, as under present law, A commits no theft.

Dishonesty and Negligence

This last example underlines the fact that theft can be committed intentionally and recklessly but not carelessly (or negligently). Dishonesty means deliberately or wantonly disregarding others' property rights. It means more than failing to take reasonable care to respect them. Like common law and like the Code, the draft has no concept of "theft by carelessness".

Definitions

Certain terms are now defined in sub-sections (3) and (4). Terms like "appropriation of property", though seemingly clear, must be shown not to have the same technical meaning as in certain other areas of law (e.g. contracts, wills, conveyancing). Certainty and comprehensiveness requires theft law to "control" its fundamental concepts.

To maximize simplicity, however, basic words like "takes", are not defined. Their meaning is already well understood. Besides, they are only explainable in terms of words less well understood.

Finally, the draft follows Bentham's advice on definition. Phrases like "appropriates property" are not defined in terms of each separate constituent word. They are defined as complete expressions.

Section **1.2.** *Without Consent*

For the purposes of section 1.1, appropriation by violence or threat of immediate violence is appropriation without consent.

At common law consent to misappropriation ruled out theft. The Code, however, fails to make this clear. Its definition of theft, therefore, is incomplete and only fully comprehensible by reference to the common law. To remedy this defect the draft provides explicitly in section 1.1 that theft is appropriation without consent.

As outlined above, consent obtained by force, threats, fraud or mistakes caused special problems.

(a) *Consent Obtained by Force*

Consent obtained by force was never true consent in law. A forcibly takes B's wallet. Here B doesn't consent. Theft is not, therefore, ruled out, but aggravated — A commits *robbery*. On this the draft maintains the present law.

(b) *Consent Obtained by Threats*

Consent obtained by threats may or may not be true consent.

(i) The threat is of immediate violence. X pulls a gun on Y saying "your money or your life". Y acquiesces. Here Y gives the money but not voluntarily — there isn't time to think. Therefore there is no true consent. X commits theft and *robbery*.

(ii) The threat is of non-immediate harm. P writes to Q "Pay up or I'll tell all". Q acquiesces. Here Q pays by choice — he does have time to think. Therefore there is consent. P commits, not theft, but *blackmail*.

In both cases the draft follows present law.

(c) *Consent Obtained by Fraud*

Consent obtained by fraud is more complex. A deceives B into parting with his property. Here at common law B's consent is nullified by A's deceit, *so long as B consents to transfer possession only*.
(i) A tricks B into lending him his watch and A misappropriates it. Here B consents only to transfer possession, his consent is negatived by A's deceit and A commits theft.

(ii) A tricks B into lending him five dollars, which A never intends to repay. Here B consents to transfer ownership: he doesn't expect the return of those very bills — he will be satisfied with their equivalent. Here, at common law, B's consent isn't nullified by A's deceit, B transfers ownership and A commits, not theft, but *fraud*. This too is the position under the Code.

The draft operates differently. Going back to the more fundamental difference between theft and fraud, it distinguishes between parting with property voluntarily and parting with it involuntarily. In theft and robbery the victim parts with his property unwillingly — under compulsion. In blackmail and fraud he parts with it voluntarily although he is threatened or tricked. This distinction is more basic than that between transferring possession and transferring ownership. It is maintained by section 1.2, which provides that consent obtained by violence or threat of immediate violence is not consent. By implication consent induced by deceit remains true consent. Accordingly, in both the above examples — the one concerning the watch and the other the five dollars — consent isn't nullified, theft is ruled out and both offenders commit *fraud*.

(d) *Consent Resulting from Mistake*

Consent may also result from the victim's own spontaneous mistake. A hands B a twenty-dollar bill by mistake for a two-dollar bill, and B, not responsible for A's mistake but nevertheless aware of it, decides to misappropriate. Here though A parts voluntarily with the twenty-dollar bill, at common law his consent to do so is negatived by his mistake. If, therefore, B dishonestly takes advantage of that mistake, in present law he commits theft.

Again, the draft works differently. It doesn't specify that consent is nullified in such a case since this would be fictitious—A does consent. Instead, it covers this case as *theft by converting* under section 1.3(*b*). Where A mistakenly gives property to B, as soon as B realizes A's mistake a legal duty arises to return it—indeed A's mistake and B's knowledge of it impose an obligation on B. For B to take advantage of the mistake and keep the property would be to act inconsistently with those terms. And this is theft by converting.

Section **1.3.** *Appropriating Property*

"Appropriating property" means

(*a*) taking, with intent to treat as one's own, tangible movables including immovables made movable by the taking;

(*b*) converting property of any kind by acting inconsistently with the express or implied terms on which it is held; or (*c*) using electricity, gas, water, telephone, telecommunication or computer services, or other utilities.

Appropriation involves both a physical and a mental aspect. The physical aspect varies according to the nature of the property. Tangible movables can be taken hold of. Intangible things, like stocks and shares, can't be taken hold of but only converted. Utilities, like electricity, can't be taken hold of or converted but only used. Accordingly the draft defines three methods of appropriating.

(1) taking,
(2) converting, and
(3) using.

(1) *Taking*

This word is basic and so not defined. Its ordinary meaning is "taking hold of". Though ordinarily applied to tangible movable things that can be grabbed and taken away, the word also applies to immovables made movable, e.g. a shrub uprooted and taken away.

Mere taking, however, isn't appropriation. The taker must also assume some kind of right over the object taken. Section 1(3)(*a*), therefore, adds: "with intent to treat as one's own". Merely moving a thing or laying hands on a thing isn't appropriation. A moves B's car a few feet from A's driveway. Here A takes it physically but because he has no intent to treat it as his own, he doesn't appropriate under section 1(3)(*a*).

In this the draft differs from the Code. Code section 283(2) provides that "a person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved or begins to cause it to become movable". This aims to distinguish attempted and completed theft. Such distinctions, however, should rely on general rules about attempt rather than on special rules about theft. Given the intent to misappropriate, courts can, as with any other crime, differentiate between completion and attempt. The draft doesn't try to do it for them.

The kind of property that can be taken is limited. "Taking" only applies to things that can be touched. One cannot take a debt or share, though one can take the paper representing it, i.e. the I.O.U. or share certificate. "Taking" also applies only to movables including immovables made movable. Other immovables can't be taken. A person

doesn't take a house by squatting in it (though he may commit another offence e.g. forcible entry or detainer). A tenant doesn't take by holding over when his lease expires.

(2) *Converting*

"Converting" means acting inconsistently with the terms on which something is held. "Held" is the widest word to cover possession, custody, part-ownership or ownership on trust. Examples are having another's property for repair, cleaning, storage, management, carriage, or sale; having it on loan or hire; being given property by one's employer or by a third party for a specific purpose.

Often the terms will be expressly laid down, but may also arise by implication. A sells his car to B, delivery is postponed and A then sells the car. Here A holds the car on implied terms to keep it for B so that the sale is converting under section 1(3)(*b*).

What counts as acting inconsistently depends on the terms. Generally there must be a positive act: the offender must *do* something inconsistent with the terms on which he holds the property—e.g. sell, pledge or give it away. An omission usually isn't enough: mere failure to return an object hired or lent is not conversion. Sometimes, however, omission is conversion, e.g. failure to account when the terms on which you hold the property oblige you to account. Unlike Code section 290, draft section 1(3)(*b*) doesn't lay this down specifically because failure to account is clearly inconsistent with the terms on which the property is held.

The kinds of property that can be converted are unlimited. They include real or personal, movable or immovable, tangible or intangible property.

(3) *Using*

Section 1(3)(*b*) replaces Code section 287. A special provision is necessary because utilities, being services rather than property, can't be taken or converted but only used. Use without consent is theft under section 1(3)(*c*).

"Using" is a basic term and therefore undefined. It includes "abusing" or "wasting".

Section **1.4.** *Another's Property*

For the purposes of section 1.1 property is another's if he owns it, has possession, control or custody of it or has any legally protected interest in it.

Theft is appropriating another's property. That other needn't be the full owner. First, theft shouldn't be restricted to dishonest takings from full owners. Second, prosecutors shouldn't have to identify the full owner in each case and establish his lack of consent. Third, the law has long since extended the term "theft" to cover stealing from people with interests less than complete ownership and section 1.4 merely maintains this extension.

Under section 1.4, then, property is another's if he owns it, has a legally protected interest in it or has custody of it. A steals an article from a store by snatching it from B, a clerk: here A steals from B (who has mere custody of the article), from the manager (who has possession and control), and from the owner of the store (who has ownership, possession and control).

"Possession" needn't be lawful. A thief possesses what he has stolen. A takes from B an article B stole from C. Here B had possession and A is guilty of theft from him.

A "legally protected interest" is a legally recognized right falling short of ownership. A gives his car to B, a garage owner, to repair. Here, as against C or any other third party, B has possession. But what if A dishonestly takes away the car to avoid paying the repair bill? Can A defend himself against a charge of theft by saying he has taken, not another's property, but his own? No, because section 1.4 provides that property is another's if that other has some legally protected interest in it. B has such an interest in the car -a *lien* over it till the repairs are paid for. So A commits theft from B.

In one respect the draft here differs from the Code. Code section 289 provides that spouses cannot steal each other's property except in special circumstances. This appears to be based on the fact that the marriage relationship can give rise to ambiguous situations in property matters and that the criminal law may be an inappropriate instrument in these situations. There is certainly something to be said for this argument, but the predominant view of the Commission at this time is that such cases can adequately be dealt with by reference to the general principle of honesty, and that special distinctions between marital and other close relationships are unnecessary. This, however, is a policy question and we will need further feedback before finally making up our minds on the question.

Section **2.** *Dishonest Taking*

A person commits dishonest taking who dishonestly and without consent takes another's property though without intent to permanently deprive.

This offence complements the offence of theft by taking. While theft by taking requires an intent to treat the property taken as one's own, dishonest taking requires no such intent. Under the present law such takings are theft. Code section 283 provides that an intent to temporarily deprive suffices. It is worthy of note, however, that judges sometimes find ways of avoiding this result in marginal cases. That is probably owing to the fact that common sense (like common law) distinguishes between dishonest taking and stealing. Indeed, an argument can be made that it shouldn't be a crime at all, except in the special case of automobiles and certain other narrowly restricted articles, because this stretches the ambit of the criminal law too widely. That, however, is a policy question, on which further feedback will be useful. Meanwhile, the draft here keeps the law in line with common sense by distinguising the two offences.

Whether an appropriator intends to treat the thing taken as his own depends on the circumstances. Taking another person's money normally implies intent to misappropriate. Taking a car, however, does not — the taker may be only borrowing.

The offence of dishonest taking created by section 2 replaces the present offence of taking without permission of motor vehicles or vessels. In fact it encompasses dishonest taking of any property capable of being taken.

Section **3.** *Robbery*

A person commits robbery who for the purposes of theft uses violence or threats of immediate violence to person or property.

Robbery is aggravated theft. Actual theft, however, needn't be committed. Violence or threat of violence for the purpose of theft is enough.

Section 3 simplifies the present law. Code section 302 defines robbery as:

(*a*) stealing, and for the purposes of extorting the thing stolen or to overcome resistance to the stealing, the use of violence or threats of violence to a person or property;
(*b*) stealing from a person, and using any personal violence to that person at the time of the stealing, or immediately before or immediately after;
(*c*) assaulting a person with intent to steal from him; and
(*d*) stealing from a person while armed with an offensive weapon or imitation thereof.

Reduced to their basic elements, all the above merely combine two elements: (1) theft or attempted theft and (2) violence or threats of violence. Section 3 combines these elements into one general offence.

Violence or Threats of Violence

In robbery violence is immediate. There is either actual harm, or else immediate harm is threatened. Where the harm threatened is not immediate, the offence is not robbery but blackmail.

Section 3 includes violence, or threat of violence, to property. A threatens here and now to bash in B's car unless B hands over his wallet. This is robbery.

Violence includes any interference with the person amounting to an assault. It therefore includes pulling a gun on someone. It doesn't, however, necessarily include "being armed with an offensive weapon". X picks Y's pocket, and at the time X happens to be carrying a gun. Here there is no threat of violence. X commits not robbery but simple theft.

Whether there is a threat of violence depends partly on the reaction of the offender. (i) A goes into a store displaying a large gun in his belt and demands the contents of the till. B, the clerk, is put in fear by A's gun. Here A impliedly threatens violence. (ii) A, armed as above, makes off with the contents of the till while B isn't looking. B never sees A and is never put in fear. Here A doesn't threaten violence. (iii) A, a huge, aggressive individual, swaggers up to the clerk, B, a young individual of slight build, and loudly demands the money in the till. Here a jury may well decide that A put B in fear. (iv) A shoplifts an article from a store. B, the clerk, is put in fear by seeing this. Here, though B is frightened, there is no threat expressed or implied of violence.

For the Purposes of Theft

These words describe the *mens rea*. Theft needn't actually be committed. Violence used for the purposes of theft is enough.

Violence used "for the purposes of theft" is not restricted to violence used prior to the theft. It includes violence used during the theft and violence used after the theft in order to facilitate escape.

Section **4.** *Blackmail*

A person commits blackmail who threatens another with injury to person, property or reputation in order to extort money, property or other economic advantage.

Section 4 replaces Code section 305. In so doing, it substitutes for the Code term "extortion" the more popular term "blackmail".

Section 4 is narrower than Code section 305. The Code doesn't restrict extortion to economic interest, but extends it to cover an intent to extort consent to sexual intercourse. That sort of conduct, however, is best dealt with by the law on intimidation (Code section 381) or sex offences. It has no place in the area of dishonest acquisition of property. The draft restricts blackmail accordingly.

Blackmail, like theft, fraud and robbery, is primarily an invasion of economic interests. It differs from these three offences, though, as regards the method used to obtain the property. In theft and fraud, dishonesty is the key element. In robbery and blackmail, the key element is violence. In the former, violence is immediate; in the latter it is not. But all four offences are concerned with modes of acquiring property.

Ordinarily "blackmail" means extortion by threats. Following this ordinary meaning, section 4 defines the physical element of blackmail as threats and the mental element as an intent to extort.

The physical element is threatening injury to person, property or reputation. Here section 4 is more explicit than Code section 305. But it maintains the present law that the victim of the blackmail needn't be the person to whom the harm is threatened. A threatens to blow up B's son's house unless B buys A off. Here A commits blackmail.

Section 4 is narrower than the Code as regards threats of legal proceedings. Threats of civil proceedings aren't threats for the purposes of extortion under present law, nor are they under section 4. But threats of prosecution are threats for the purposes of extortion under present law but not necessarily under section 4. They are only threats under section 4 if they also constitute threats of injury to reputation.

The reason for this restriction lies in policy. Code section 129 makes compounding an indictable offence a crime. Accordingly an agreement for valuable consideration to conceal an indictable offence is a crime. A agrees not to prosecute B for theft if B pays him a sum of money. A is guilty of compounding. Such situations, however, have primarily to do with abuse of criminal process and the integrity of the criminal justice system. As such, they should be dealt with under the law relating to such matters and not under dishonest acquisition of property.

Section 4 makes no explicit reference to justification or excuse. Such matters can be raised regarding any offence and come within the general part of criminal law.

Section **5.1.** *Fraud*

A person commits fraud who dishonestly by

(*a*) deceit, or

(*b*) unfair non-disclosure, or

(*c*) unfair exploitation,

induces any person including the public to part with any property or causes him to suffer a financial loss.

The draft simplifies the law by defining fraud as one single offence replacing the three Code offences of fraud, obtaining property by false pretence, and obtaining credit by false pretence or fraud. This is done for several reasons. First, all three are variants of the same fundamental wrong-doing: *defrauding*. Second, all three violate the same basic value: *truthfulness*. Third, merging the three offences highlights the basic value and rids the law of technicalities.

"Fraud" is wider than any of the separate Code offences. It consists of dishonestly inducing or causing someone, by deceit, unfair non-disclosure or unfair exploitation, to part with property or suffer a financial loss.

Note that there must be dishonesty. Here, as with theft, "dishonesty" is left undefined; what was said earlier under Theft, therefore, applies. In particular, this means two things.

First, fraud, like theft, can only be committed intentionally or recklessly, not negligently. A knowingly makes a false representation to B and so induces B to part with property—he commits fraud. A makes a false representation to C, not caring whether it is true or false, and so induces D to part with property—he commits fraud. A makes a false representation to D, thinking it true but failing to take reasonable care to make sure, and so induces D to part with property—here A is careless but not deceitful or dishonest, and so he commits no fraud. This is common sense, common law and also the law of the Code. The draft retains this principle.

Second, inducement effected by deceit etc. but with an honest motive doesn't qualify as fraud. X lends his typewriter to Y. Y continually fails to return it. Eventually, while Y is at work, X goes to Y's home, tells Y's wife that Y has sent him to take the typewriter to Y's office, and gets her to hand it over to him. Here X deceives Y's wife. But clearly X

is not dishonest: he has a claim of right—the typewriter is his. X, therefore, commits no fraud.

Although it may be contended that deceit always entails dishonesty, deception motivated by an honest purpose shouldn't count as fraud. Here we agree with the reasoning of a distinguished authority*, who, commenting on the English *Theft Act* 1968, s. 15 covering "obtaining by deception", observed:

> ... it is reasonable to assume that one who obtains property by deception but under a claim of right made in good faith is not guilty.

Like the *Theft Act* 1968 and the common law, our draft excludes honestly motivated deception from the category of fraud.

The draft concept of fraud, however, neither narrows nor extends existing law; it merely merges the three main Code offences. It does this in various ways. It specifies that the inducement etc. can be effected by deceit, unfair non-disclosure or unfair exploitation. It defines "deceit", in s. 5.2, as false representation as to the future as well as to the present and the past. And it provides that fraud is committed either by inducing a person to part with property or by causing him to suffer a financial loss.

Here section 5.1 differs from the Code. Code sections 320 and 338, by using terms like "obtaining" and "defraud", suggest that fraud is not complete unless the offender gets something. Case law is different. Case law says it is enough if the victim is deprived, e.g. parts with property or has something to which he is entitled withheld from him. In accordance with the case law section 5.1 creates two types of fraud.

Both types clearly overlap. Type (1) is a sub-species of type (2) and applies to any kind of property including credit.

Type (2) provides for the case where a person suffers a loss without parting with property. For example, A obtains services from B by falsely pretending that he has already paid for them. Here A causes B a loss—B works for A but gets no pay for doing so. Here A commits fraud.

The loss must be financial. This excludes losses not assessable in terms of money. X, a golf player, by deceit gains access to a private club to which he has no right to be admitted; he pays his fee. Here there has been deception but still no financial loss to the club. Accordingly no fraud has been committed. But if X had falsely represented that he was

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*J. C. Smith, *The Law of Theft*, 1968, p. 78.

a member, and had then been charged 10 dollars instead of the 15 dollars normally charged non-members, he would have caused the club 5 dollars' loss. This would be fraud.

Section **5.2.** *Deceit*

For the purpose of section 5.1 "deceit" means any false representation as to the past, present or future.

The essence of fraud is deceit. Common law restricted deceit to false representation as to past or present fact. Code section 338, however, extends it by implication to false representations as to the future. The draft retains this position.

Section **5.3.** *Puffing*

Deceit does not include mere exaggerated commendation or depreciation of the quality of anything.

Puffing isn't by itself deceit. Section 5.3 merely reproduces Code section 319(2). Traditionally, vendors have a certain licence to commend their wares provided they avoid dishonesty. X, a car dealer, tells Y, a prospective purchaser, that the car is the best one on the market at that price. The fact that many people might think another car a better bargain doesn't make X guilty of fraud. It would be different, however, if the car was obviously a rotten buy — riddled with defects and hopelessly designed. Here X would abuse his licence and commit fraud.

Section **5.4.** *Unfair Non-Disclosure*

For the purpose of section 5(1) non-disclosure is unfair where a duty to disclose arises from

(*a*) a special relationship entitling the victim to rely on the offender, or

(*b*) conduct by the offender creating a false impression in the victim's mind, or

(*c*) circumstances where non-disclosure would create a false impression in the mind of any reasonable person.

Non-disclosure is like deceit except that it consists of some omission, while deceit consists of some positive act. Where such non-disclosure is unfair, section 5(1) puts it on a level with deceit and makes it an element in the offence of fraud. Section 5(4) then defines "unfair" non-disclosure.

The sub-section provides that non-disclosure is unfair in three different kinds of cases.

(1) There is a special relationship between victim and offender such that the former is entitled to rely upon the latter. A acts as B's lawyer in the matter of purchase of a lot from C. A discovers a defect in title. To help C, A conceals this defect from B. B buys C's lot. Here there is a lawyer/client relationship between A and B, B is entitled to rely on A, A has a duty to disclose and so his non-disclosure is unfair. A commits fraud.

(2) The offender creates a false impression in the victim's mind. X offers to sell Y a boat. Describing a recent cruise in the boat, X leads Y to conclude that the boat is seaworthy. In fact the boat recently ran aground and needs substantial repairs. X knows he has misled Y but fails to correct Y's false impression. Y buys the boat. Here X has a duty to correct Y's false impression by disclosing what happened to the boat, his non-disclosure is unfair and he commits fraud.

(3) There are circumstances such that non-disclosure would mislead any reasonable person in the victim's shoes. C sells D a new car. In that part of the country new cars are so universally rust-proofed that buyers rely on this being the case unless the contrary is explicitly stated. C knows the car is not rust-proofed but conceals this from D. Here general practice and D's justified reliance on it imposes on C a duty to disclose, makes his non-disclosure unfair and renders C guilty of fraud.

Section **5.5.** *Unfair Exploitation*

For the purpose of Section 5.1 unfair exploitation means exploitation

(*a*) of another person's mental deficiency; or

(*b*) of another person's mistake intentionally or recklessly induced by the offender; or

(*c*) of another person's mistake induced by the unlawful conduct of a third party active with the offender.

Section 5.5 provides that exploitation of another's weakness is unfair in three kinds of cases.

(1) Exploitation of another person's mental deficiency is unfair under 5(5). A dishonestly takes advantage of B's feeble-mindedness to get him to part with property. A commits fraud.

(2) Equally unfair under section 5(5) is exploitation of another person's mistake induced deliberately or recklessly by the offender. X

deliberately behaves in such a way as to make Y, a customer in a store, mistake X for a clerk. Y hands X money for a purchase. X realizing Y's mistake, retains the money. X commits fraud.

(3) Likewise unfair is exploitation of a mistake induced by the unlawful conduct of a third party acting with the offender. This covers cases of conspiratorial fraud. A,B,C and others, as part of a scheme, sell shares to depress their market value. X thinks the shares are falling because of some intrinsic weakness. Y, in league with A etc., buys X's shares at a reduced price. Here Y commits fraud because the actions of A etc. are unlawful. If, however, A etc. acted lawfully and sold their shares simply because they thought them over-valued, or if Y was not in league with A etc. but merely bought what he considered a good bargain, Y would not commit fraud.

Section **5.6.** *Parting with Property*

"Parting with Property" means relinquishing ownership, possession, control or other interest in it.

Under this head two aspects fall to be considered: (1) the thing parted with, and (2) the right relinquished. As to (1), Code s. 2 defines property to include "real and personal property of every description", though here it can hardly extend to knowledge, ideas, processes and similar items dealt with by patent and copyright law. The draft, by leaving property undefined, preserves the Code position. As to (2), fraud is complete if there is a transfer of custody, possession or some greater interest, e.g., ownership.

Section **6.** *Dishonest Obtaining*

A person commits dishonest obtaining if he dishonestly obtains food, lodging, transport or services without paying.

Dishonest obtaining complements the offence of fraud. It also overlaps with it. There are two differences, though. First, in fraud, but not in dishonest obtaining, there must be deceit. A free loader, for example, does not actually deceive the restaurateur—he just dishonestly omits to pay. Second, in dishonest obtaining, but not in fraud, there has to be an obtaining. Merely causing a financial loss is not enough.

In general dishonest obtaining will cover minor acts of dishonesty. As such it will mainly serve to facilitate prosecutions where fraud would be difficult to establish. In certain cases, however, the offence could be more than trivial financially. Stowaways from Halifax to Vancouver, free-loaders enjoying gastronomic banquets and spongers who refuse to pay for costly dental care —all these have gone beyond the trivial.

APPENDIX A

Theft and Fraud through History

Law, like other human institutions, can only be fully understood through history. This is especially true of common law systems, where the present is often the prisoner of the past and yesterday's expediencies become tomorrow's lumber. It is particularly true, however, of the law of theft and fraud.

This paper, then, examines theft and fraud in the light of its common law development. The paper divides into three sections as follows:

(1) The English common law of theft and fraud;

(2) The transition from common law to the present Criminal Code; and

(3) Theft and Fraud under the present Code.

I. English Common Law

Our present Code provisions on theft and fraud derive originally from Stephen's Digest. Stephen in turn built upon and simplified the common law. Writing in the nineteenth century about theft and fraud in English law, he said, "no branch of law is more intricate, and few are more technical".[1]

The intricacy of theft and fraud law derives from several factors. First, there was the sheer length of time taken by common law to develop. Second, there was the special place held by real property in English law. And third, there was the principle of escheat.

[1]Stephen: *History of the Criminal Law* III, 122.

First, then, the time-span of the common law. Given long enough, any area of law can develop technicalities and artificialities. In theft, or larceny, as it was then called, the main outline was fixed during the 17th century; subsequent development consisted partly of court decisions elaborating the principles by applying them to various fact situations, and partly of statutes patching up defects in the common law.[2] The result was naturally an elaborate patchwork.

Second, the special place of real property. From early times land was protected by special provisions, common law gave special remedies to persons dispossessed of it, early common law was largely land law, and civil actions were concerned with real property.[3] This left goods and chattels to be protected by the criminal law—the law of theft (or larceny). Real property, then, remained outside the law of theft: land, things growing on land, fixtures and even deeds (which "savoured of the realty") could not be stolen. Growing things and fixtures severed from the land, however, were stealable. In consequence there was a complex and somewhat artificial boundary to the category of things capable of being stolen.

Third, and perhaps most curious, was the rule of escheat.[4] According to this rule, the goods of a person who either died without heirs or was convicted of a felony were forfeited to his lord. Since larceny was a felony, conviction for larceny resulted in the stolen goods reverting, not to the original owner, but to his lord. Stephen writes[5]:

> When the movable property of one man, got into the hands of another, the owner's chance of recovering it was lost by a prosecution on indictment.... Hence it was in the interest of everyone concerned to extend the scope of the law of trespass and to restrain the scope of the law of larceny, and this may, I think, have been one reason why it was said to be essential to larceny that the taking.... should be fraudulent, and why so many things should have been held not to be the subject of larceny.... these considerations may have had more to do with the narrow limitations put on it than scruples as to the infliction of capital punishment.

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[2] *Ibid.*, 141.

[3] "Land was by far the most important article of property in the Middle Ages and a large proportion of all litigation was connected with it". Radcliffe and Cross, *The English Legal System* (3rd ed.) p. 37.

[4] *Potter's Historical Introduction to English Law* (4th ed.) p. 490-491. Escheat for felony or treason was abolished by the *Forfeiture Act* 1870.

[5] Stephen *Op. Cit.* 133-134.

Three Types of Misappropriation

Misappropriation of property can take place in three different ways: by theft, by fraud and by fraudulent conversion. Common law, however, focussed originally only on the first. Theft was a crime; fraud and fraudulent conversion were not.

There was a reason for this "tenderness" to fraud. Apparently common law took the view that while open violence was obviously to be prevented, fraud was something people could protect themselves against by not too lightly trusting people[6] — *caveat emptor.* A fool and his money are soon parted, said the proverb, and the victim of a fraud had only himself to blame for his folly. "Shall we indict one man for making a fool of another?" asked Holt C.J. in *R. v. Jones*[7]. True, common law cheating (using false weights and measures) was an offence, because no ordinary consumer could guard against that sort of fraud. Obtaining by false pretences, however, did not become a crime till 1757.

Common law showed equal tenderness to fraudulent breach of trust, and for a similar reason. People "could protect themselves against breaches of trust by not trusting people—a much easier matter in simple times, when commerce was in its infancy, than in the present day."[8] Meanwhile in England such act remained largely outside the criminal law till 1901.

1. *Theft*

The main form of misappropriation, and the first to become a crime, was theft. Theft was essentially an offence against possession. There were four elements. To steal a person had to:

(1) take
(2) without the possessor's consent
(3) something capable of being stolen
(4) with *animus furandi*, or larcenous intent.

We consider each of these in turn.

(1) *Taking*

Theft was essentially a trespass—an offence against possession. Indeed "owner" in the common law definition of theft means

[6]Stephen *Op. Cit.* 151.

[7](1703) 2 Ld. Raymond 1013.

[8]Stephen *Ibid.*

"possessor". This had two corollaries: (i) it was never theft if the accused already had possession before he misappropriated; (ii) it was never theft if the accused obtained not only possession but also the right to possess, i.e. the ownership, or property, in the goods.

(i) *Where the Accused Already Had Possession*

In early law it was already well established that for theft there had to be a "treacherous taking."[9] If A lent B his horse, then originally (with one exception to be noted later) any misappropriation by B could not be stealing because B already had possession. A person in possession could not steal.

This principle naturally caused several difficulties. First, could the servant cleaning his master's silver steal it by misappropriating it? Could a guest or lodger steal by misappropriating things given him to use? The common law solved this problem by inventing the notion of "custody". Servants, guests, and lodgers, it was held, had no possession, but only custody. Possession stayed with the master, host or inn-keeper. Accordingly such misappropriations could be larcenous.

Next, what about people given temporary possession—borrowers, carriers, warehousemen? These certainly had more than custody: they were bailees. But could a bailee steal? Originally not, until in 1473 the *Carrier's Case*[10] decided that a carrier of bales of wool, who broke open the bales and misappropriated the contents, was guilty of larceny. The court held that he had been entrusted with the bales but not the contents, and that by "breaking bulk" he stole. This fiction wouldn't work for things like horses where the article and contents couldn't be distinguished. Such misappropriations, therefore, stayed unpunished until Parliament intervened in 1857 and made fraudulent conversion by bailees theft. Statute had to supplement the common law.

Then there was the wrongdoer who misappropriated before the victim ever got possession. A hands goods to B to deliver to C, but B makes off with the goods. This wasn't theft from A because A gave

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[9]The first comprehensive definition of theft for English law, given by Bracton (Lib. 3, c. 32, fo. 150b), speaks of "contrectatio. . *fraudulenta*" (fraudulent handling). And see the *Mirror of Justices* (written about 1290) pp. 134-135: "Larceny is the treacherously taking away. . . ."

[10](1473) Y.B. 13 Ed. IV, fo. 9, pasch, pl. 5.

possession willingly – B took with A's consent. Nor was it theft from C because C never had possession—B never took from C. To meet this difficulty the law devised the offence of embezzlement prohibiting clerks and servants from misappropriating property received by them for their employees. Once again statute had to supplement the common law.

Finally, what if the misappropriator was not a clerk or servant? X, the treasurer of a club, instead of banking the subscriptions collected from the members, makes off with them. Here X has no duty to bank the specific notes or coins but only their equivalent. He doesn't, therefore, commit larceny or embezzlement. This problem was solved by statutory creation of various offences of fraudulent conversion in 1901.

Custody, breaking bulk, larceny by a bailee, embezzlement and fraudulent conversion—all these were special developments necessitated by the common law principle that larceny was an offence against possession.

(ii) *Where the Accused Obtained the Property or Ownership*

This was the more difficult of the two corollaries: the defendant didn't steal if he obtained, not only possession, but also ownership. The underlying notion seems to be this: if you dishonestly take my goods, you steal because you dispossess someone with a right to possession, but if you dishonestly obtain the property or ownership, you do not steal because the person you dispossess has no longer the right to possession. In the former case the rightful possessor is offended, in the latter he is not. The former case, therefore, was theft; the latter was, if anything, a kind of fraud. Unfortunately common law distinguished curiously between the two offences. As Stephen puts it, "there obviously is a distinction, though it is by no means a broad or a clear one between the two offences; but the common law doctrine drew the line in the wrong place".[1] To understand this further, we must consider the second element of stealing—without consent.

(2) *Without Consent*

To steal, i.e. to commit an offence against possession, you had to take without consent. Naturally, if the victim consented to the

[1]Stephen *Op. Cit.* 160.

taking, he hadn't been offended. No wrong was done to him—provided the consent was real.

Consent, then, must be real or genuine. Consent obtained by force or threats or fraud was no consent. In such cases the taking remained *invito domino,* against the possessor's will, and constituted theft—unless by fraud the taker obtained property or ownership. This gave the curious result that consent to transfer possession would be nullified by fraud, but consent to transfer ownership would not. In the second case ownership and possession passed to the offender.

Dealing with this distinction, Stephen explains the law as follows:

> It was held at a very early period in the history of the law that, though a wrongful taking is essential to theft, it is nevertheless theft to obtain the possession of a thing by fraud and then to appropriate it. A asks B to allow him to try B's horse, and having got leave to mount for that purpose rides off with the horse. Here the taking is permitted by B, and is so far lawful, but, inasmuch as the leave of B is obtained by fraud, the taking under the fraud is regarded as wrongful, and the subsequent conversion as theft. If, however, A obtained from B by a false pretence the property in the horse, and not merely the possession of him, the act of taking was not regarded as theft.[12]

As Stephen said, the common law drew the line in the wrong place.

> If it had said to misappropriate the property of another is theft, whether at the time of the misappropriation the property is or is not in the owner's possession; but to persuade the owner by fraud to transfer his property is obtaining by false pretences and not theft; the distinction would have been just and plain. The distinction . . . is both hard to understand and hard to apply to particular states of fact.[12]

At common law, then, taking with consent obtained by fraud was either larceny by a trick or obtaining by false pretences. Which it was depended on whether the accused obtained mere possession or also ownership. And this in turn depended on whether the victim had the authority and the intention to transfer the ownership.

Another way in which the owner's apparent consent could be nullified was by his own mistake. A, meaning to give B one pound note, by mistake (not induced by B) gives him two, and B, knowing of A's mistake, decides to keep the second pound note. Here, at

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[12] *Ibid.*

common law, A's consent was negatived by B's dishonest taking advantage of A's error, and B commited theft.[13]

(3) *Something Capable of Being Stolen*

Because larceny was an offence against possession, nothing was stealable unless it was capable of being possessed, was possessed and was worth possessing. Indeed, to be capable of being stolen, a thing had to fulfill four requirements:

(i) It had to be *tangible* — intangibles, like debts, patents, copyrights and so on, were never larcenable at common law, but had to be provided for by statute.

(ii) It had to be *movable* — land, as we saw, was outside the scope of larceny and so were things growing on, or fixed to, land. Before they could be stolen such things had to be severed. On severance, though, possession belonged in law to the person severing. Stealing apples off a tree, then, wasn't theft. Once the severer abandoned the thing, however, possession in law reverted to the landowner. Any subsequent taker (including the severer) could then commit theft. In due course statute law made special provisions in this area.

(iii) It had to be *possessed* — things not possessed by anyone couldn't be stolen. "Things which are not the property of anyone, and *a fortiori* things which cannot be the subject of property, cannot be misappropriated fraudulently or otherwise."[14] Such things included wild animals at large, for at common law no one — not even the landowner — owned or possessed, say, the rabbits, hares and pheasants on his land. Human corpses, too, were in this category: unless being used as an anatomical specimen, a corpse at law was in no one's possession and "body-snatching" was no theft at common law. Finally, things abandoned by the possessor were in no one's possession, were free for anyone to take and were incapable of being stolen.

(iv) It had to have some *value* — "in earlier times it seems to have been thought that 'valuable' implied serious practical importance as opposed to mere fancy or amusement".[15] Dogs

[13] *R. v. Middleton* (1873) L.R. 2 C.C.R. 38.

[14] Stephen *Op. Cit.* 127.

[15] *Ibid.*

and hawks were at one time considered incapable of being stolen due to lack of value. Later, however, almost everything could in law be considered as being of some value. Accordingly, this fourth requirement lost importance.

(4) *Animus Furandi — Intent to Steal*

From earliest times it was established that to constitute theft the taking must be done with *animus furandi.* This came to include four elements: (i) fraudulently, (ii) without a claim of right made in good faith, (iii) with intent at the time of taking, (iv) permanently to deprive the owner.

(i) *Fraudulently*

What was meant by "fraudulently" over and above "without claim of right" is difficult to establish. Indeed "fraudulently" has been termed "the mystery element in theft".[16]

(ii) *Claim of Right*

"Without claim of right" is easier to understand. To take goods thinking you have a right to take them (because they are yours, because no one possesses them, because the owner consents to your taking them etc.) was not theft. Sometimes to say there was a claim of right was another way of saying the defendant had a defence of mistake. But whereas the defence of mistake only applied to mistakes of fact, claim of right extended to mistakes of law regarding property rights.

(iii) *With Intent at the Time of Taking*

Equally basic to the common law notion of theft was the requirement that the taking be accompanied at the time by intent to deprive. An innocent taking followed later by an intent to misappropriate was no larceny at common law. As Stephen points out, this was one of the great distinctions between the Roman and the English law of theft. In both there had to be a *contrectatio,* i.e. handling, but in Roman law this could "take place after the thing stolen had come honestly into the thief's possession."[17] So, for example, a finder of lost property who took it meaning to restore it to the owner, but who later

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[16]Atrens 'The Mental Element in Theft' (1967) 3 of U.B.C. 1 Law Review 112 at 129.

[17]Stephen *Op. Cit.* 130.

misappropriated it, committed theft in Roman, but not in English, law.

In practice, however, the rule that the taking and intent must coincide left fewer gaps than might appear, for common law found various ways of closing them. First, many innocent takers would be bailees and misappropriation by bailees eventually came to qualify as theft. Second, if the innocent (i.e. non-criminal) taking constituted trespass — and one has to bear in mind that mistake is no defence to trespass — then a subsequent intent to misappropriate was deemed to relate back to the taking, or alternatively the trespass was regarded as continuing, so that taking and intent coincided and theft was committed.[18] Third, as we saw earlier, to get *possession* of a thing by fraud and later misappropriate it was theft.

Finally, in some instances an innocent taking occasioned by the owner's own spontaneous mistake and followed by misappropriation could be theft. X, meaning to give Y a shilling, hands him a sovereign; Y thinks it is a shilling but later finds it is a sovereign and decides to keep it. Here, in one celebrated and must disputed case[19], it seems to have been held that Y "did not take till he knew what he had got". At that moment, however, Y decided to misappropriate, taking and intent coincided, and he committed theft.

(iv) *Permanently to Deprive the Owner*

Particularly important at common law was the need for the thief to intend to deprive the owner *permanently* of the stolen property. Dishonest borrowing was never theft at common law. Nor indeed was it any crime at all. When borrowing motor cars became a social problem jurisdictions which retained this principle, had to create special statutory offences of "joy-riding" and so on.

2. *Fraud*

At common law, as explained earlier, fraud was in general no offence. Common cheating apart, the principle of *caveat emptor* held sway. It was up to each person to look out for himself. "To be

[18] *R. v. Riley* (1853) Dears C.C. 149.

[19] *R. v. Ashwell* (1885) 16 Q.B.D. 190.

punished at common law it was necessary that the cheat should (a) be effected by some false token or device of a tangible character, and (b) be one against which common prudence would not have guarded."[20] Otherwise, there was no crime. In *R. v. Wheatley*[21], for example, where the defendant was prosecuted for delivering to Richard Webb 16 gallons of amber beer when he had been paid for 18, Dennison J. asked rhetorically: "What is it to the public whether Richard Webb has or has not his 18 gallons of amber beer?"

In due course, however, English law developed two statutory offences: false pretences and obtaining credit by fraud.

(1) *False Pretences*

The offence of false pretences contained three elements: (i) obtaining (ii) of certain property (iii) by false pretences.

(i) *Obtaining*

To commit false pretences the defendant had to obtain not just possession but also ownership. This is the converse, as it were, of theft.

(ii) *The Property*

False pretences only applied to certain kinds of property — property capable at common law of being stolen. A dog, therefore, could not be obtained by false pretences.

(iii) *False Pretences*

Finally, the property had to be obtained as the result of a false *pretence*. By this was meant a false representation (by words or conduct) of past or present fact. This didn't include false statements of law or of opinion, false statements about the future, or false statements of intention. Common law was always careful not to penalize as criminal mere failure to perform a promise. Nor would it assume that one who broke a promise never meant originally to keep it.

(2) *Obtaining Credit by Fraud*

This was a less serious crime and one that carried a lesser penalty[22]. By virtue of the *Debtor's Act* 1869 anyone incurring a liability and obtaining credit by fraud was guilty of a misdemeanour.

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[20]Kenny's *Outlines of Criminal Law* (17th ed. by J.W.C. Turner) p. 322.

[21](1761) 1 Wm. Bl. 273.

[22]The maximum penalty was one year's imprisonment whereas for larceny and false pretences it was five years.

A borrows money from B dishonestly without intending to repay the loan. Here all three elements are present: A incurs a liability — to repay B; he obtains credit; and he obtains by fraud — concealing his dishonest intention of not repaying. So A would be guilty under the Act.

The most important difference between this offence and the previous one relates to "fraud". This term is wider than "false pretence" and not restricted to representations of past or present fact. Any dishonest trickery qualified. Here, unlike common law, statute penalized misrepresentation of intent.

3. *Fraudulent Conversion*

Fraudulent conversion was no crime at common law. Certain conversions, as we saw, came under the umbrella of theft — conversion by bailees became a crime by statute in 1857. Even after this, however, writes Kenny[23],

> . . .there still remained instances of fraudulent breach of confidence which the criminal law did not reach. It often happens that a man is entrusted with property which he has to deal with on behalf either of the person who gives it to him or on behalf of someone else, but where it is *not* required that he should deliver up the identical thing handed to him; in such cases he becomes owner of the thing and is not the bailee of it. The commonest instance is where the property consists of money.

In such cases courts sometimes put a strained interpretation on the facts and held there was a bailment[24], but more often they found it impossible to construct a bailment out of the evidence.[25] In England this defect was remedied by statute in 1901.

Fraudulent conversion had one main difference from theft. In theft the offender only got possession. In fraudulent conversion he acquired ownership as well. Indeed fraudulent conversion was a kind of abuse of ownership — the offender misappropriated the property by applying it (or its proceeds) to his own (or a third party's) benefit instead of applying it as intended by the person entrusting it to him.

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[23]Kenny, *Op. cit.*, p. 252.

[24]See *R. v. Bunkall* (1864) Le. and Ca. 371, *R. v. de Banks* (1884) 13 Q.B.D. and *R. v. Aden* (1873) 12 Cox 512.

[25]*R. v. Hassall* (1861) Le. and Ca. 58.

Fraudulent conversion and theft had also one important feature in common — a need for *fraudulent* intent. To this there were two aspects. First, lack of fraudulent intent or a claim of right made in good faith would negative guilt in both theft and fraudulent conversion. Second, in both offences there had to be *intent* — mere carelessness was not enough. In fraudulent conversion, then, as well as theft, there had to be in every case an intent to defraud[26]. In short both offences had a similar *mens rea*.

II. From Common Law to Criminal Code

In England, as we have seen, Parliament bit by bit moved in to supplement and rectify the law of theft and fraud. In Canada the story was the same: legislation was enacted to improve the common law on theft and fraud. Often, however, it only served to make that law unduly complex by a host of statutory provisions designed to deal with particular instances.

There was, for example, the *Larceny Act* 1869.[27] Based almost *verbatim* on the English *Larceny Act* 1861, it was enacted by the Parliament of Canada "to assimilate, amend and consolidate the statute law of the existing provinces" and to extend to all Canada a uniform legislation on theft and fraud.

Perusal of *Larceny Act* 1869 shows its complexity. For one thing, it gives no definition of larceny but leaves it to be gathered from the cases. For another, while abolishing the distinction between grand and petty larceny, it prescribes procedure, evidence, and punishment for a litany of different types of larceny — larceny of cattle, dogs, animals kept in confinement and not subject to larceny at common law, oysters, valuable securities, documents, records, railway tickets, metal, trees, fences, plants in gardens, vegetables not in gardens, and so forth.

In 1892, however, Canada adopted a Criminal Code. Based on the English Draft Code, commissioned, but not adopted by, the English Parliament in 1880, on Stephen's Digest of Criminal Law and on Burbidge's Digest of Canadian Criminal Law, this new Code

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[26]See for example *R. v. Hignett, The Times* 22 February 1950.

[27]32-33 Vict. Ch. 21, consolidated with other criminal statutes in 1887 R.S.C., ch. 164.

changed the law of theft and fraud, an area of law said to be in a state of most bewildering confusion.[28]

Indeed it changed this area of law in some regards substantially. It gave a comprehensive definition of theft to "embrace every act which in common language would be regarded as theft" and "to avoid all the technicalities arising out of the common law rules as well as the intricate and somewhat arbitrary legislation on the subject".[29] It also gave definitions of such difficult concepts as "thing capable of being stolen". Such definitions, though, served primarily to rationalize and simplify the law. Meanwhile for the most part previous English and Canadian law remained unchanged.

Basically, the 1892 Code reduced theft to three kinds of appropriation: (1) taking, with intent to steal, property in the possession of another, (2) appropriating another's property while in possession of it, and (3) obtaining another's property by false pretences. Fraud was defined in terms of a conspiracy to defraud, and this remained so until 1948. Indeed, apart from fraud and theft by a bailee, practically every provision of our present Code is found, with or without modifications, in the 1892 Code and in the English Draft Code, as is the *mens rea* of theft — "absence of colour of right", "fraudulently" and "intent to permanently or temporarily deprive the owner".

But while the 1892 Code aimed to simplify the law of theft and fraud, it nevertheless retained one feature that proved detrimental to this aim — concern for detail. The Code devoted nearly twenty sections to specific kinds of theft. These varied according to the nature of the thing stolen or the relationship between the thief and the owner, and each had its own specific punishment. This remained so until the Code of 1955 adopted a single penalty section and further simplified the definition by stating that theft could be committed upon "anything whether animate or inanimate".

The basic definitions of theft and fraud, therefore, as well as the arrangement of this area of our law, date back to 1892. Since then our legislators have tried to delete from, rather than add to, this basic arrangement. In consequence the earlier common law is

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[28]Cited in *Martin's Annual Criminal Code* (1955), Cartwright and Laws Ltd., Toronto, p. 480.

[29]Report of the Commissioners on the English Draft Code, quoted in Martin's Annual Criminal Code 1955, and in Crankshaw's Annotated Criminal Code 1894.

merely a historic source of law on theft and fraud. Since the present *Criminal Code's* adoption in 1955, except for contempt of court, there are no common law crimes; offences are made either by statute or by regulation.[30]

Not that common law is without influence on our theft and fraud law. On the contrary, it influences it in two ways. First, Code definitions of theft and fraud are largely based on nineteenth century common law and are expressed in terms of basic concepts stemming directly or indirectly from the common law. Second, judicial interpretation of such concepts largely depends upon nineteenth century case law. Common law, then, is still present in our law — so much so indeed that many Code provisions are only understandable by reference to it. Common law is an implicit background to our present law of theft and fraud.

This can cause difficulty. In a recent case, for instance, the Supreme Court of Canada asserted that judicial interpretation must concern itself, not with the previous law, but with the plain meaning of the *Criminal Code:*

> We are not concerned with larceny here but with theft by conversion as defined by the *Criminal Code of Canada*. . . . We are concerned here with a *Code*. We start with the Code and not with the previous state of the law for the purpose of inquiring whether the Code has made any change. On the plain meaning of our Code the facts of this case show the commission of an indictable offence — theft.[31]

Despite this dictum, earlier common law still helps shape judicial interpretation of the Code. Our courts still use early precedents to guide them in interpreting difficult concepts like "colour of right", "fraudulently" and so on. The historic source of common law remains important.

Meanwhile our legislators have striven for more comprehensiveness, simplicity and clarity. In this they took a major step. The question remains, however, whether there is now a need to go still further. Do we need to bring yet more comprehensiveness, simplicity and clarity? Should we reduce still further the gap between this area of law and common sense?

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[30]Cr.C. Section 8.

[31]*R. v. Maroney* (1975) 18 C.C.C. (2d) 257, per Judson J. for the Supreme Court of Canada, at p. 259.

III. Our Present Law of Theft and Fraud

In our view this area of law still needs improvement; it needs to be expressed less in terms of rules and more in terms of principles, so as to increase comprehensiveness, simplicity and clarity. As yet there remain certain obvious faults: redundancy, complex drafting, undue technicality, and nevertheless lack of comprehensiveness. Theft and fraud differ, though, in one respect: theft law provides a mass of detail and lacks a fully comprehensive general section; fraud law provides an all-encompassing general section but contains much superfluous detail.

Despite these differences, however, discussion of both offences follows the same plan. It falls into two sections: (1) outline of the legal framework in the Code and (2) examination of the law's defects.

The outline of the legal framework is straightforward. Theft law is basically contained in section 283 and all the other sections speak to detail. Fraud can be divided basically into three offences, two covered by section 320 and one by 338, but section 338 is really wide enough to cover all three.

Examination of the law's defects centres round three different causes for criticism: (1) redundancy together with unnecessary detail; (2) complexity of arrangement and of drafting; and (3) uncertainty and lack of clarity resulting from gaps and lacunae in an area of law still less than fully comprehensive but relying implicitly on the common law.

Such defects are plain and obvious. Indeed English law was criticized for just such defects two hundred years ago by Jeremy Bentham. His main criticisms of the form of English law concerned its overbulkiness, redundancy, long-windedness and disorderliness.[32] To illustrate his point he took two sentences of a statute making it a non-clergyable felony to steal horses and showed how they could be reduced from 628 words to forty-six. He added:

> I have thought somewhat on the subject, and scruple not to avow this persuasion: that a decent attention, together with *an adherence to the common modes of phraseology and not the technical* might reduce the whole compass of the Statute Law a proportion not very

[32]Bentham, *Nomography* in *Collected Works* (ed. Bowring) III pp. 238ff.

much inferior [roughly to a fifteenth]: of the Common Law in a proportion ten or twenty times as great.[33]

In theft law, though, complete simplicity seemed to Bentham unattainable[34]. Since theft was a kind of trespass to property and "trespass" and "property" complex technical terms in law, the law of theft, he thought, was bound to be to that extent complex and technical. 'Thou shalt not steal', in his opinion 'could never sufficiently answer the purpose of a law'.

All the same, between these two extremes — the simplistic and the complex — there is a half-way house: simplicity. This is the position set out in our *Working Paper on Theft and Fraud*. It consists in stating the law in simple terms, making clear the relevant social values, recognizing the inevitability of marginal cases and leaving them to be decided in the light of principle[35].

THEFT

(1) *Legal Framework*

Theft is defined in section 283 of the *Criminal Code*. The definition is as follows:

> **283.** (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,
>
> (*a*) to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it,
> (*b*) to pledge it or deposit it as security,
> (*c*) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or
> (*d*) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

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[33]In *Comment on the Commentaries* (ed. C.W. Everett, 1928) p. 143, italics added.

[34]Bentham, *Introduction to the Principles of Morals and Legislation* (ed. Burns and Hart) pp. 303-304. See also *Working Paper on Theft and Fraud*, pp. 8-9.

[35]This approach is similar to that adopted by the English Court of Appeal to the meaning of 'dishonesty' in the *Theft Act* 1968 in *R. v. Feely* [1973] Q.B. 530. And see *Working Paper* pp. 21-22.

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(4) For the purposes of this Act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

(5) For the purposes of this section a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

Two features stand out in this definition. First, the section creates two types of theft: (1) fraudulent taking and (2) fraudulent conversion. In other words the three types of misappropriation — theft, fraud and fraudulent conversion — are by the present Code arranged under two heads. Theft and fraudulent conversion are now different species of one offence, while fraud remains a separate crime.

Second, s. 283 allows for two kinds of *animus furandi*. The offender may intend to deprive the owner either permanently or temporarily. Here s. 283 differs from English common law, where borrowing was never theft. As Hale said, the unauthorized borrowing of a neighbour's plough or horse was no larceny.[36] Accordingly both the English *Larceny Act* 1916 and its replacement the *Theft Act* 1968 retained the intent to permanently deprive. In Canada, however, Code s. 283 makes dishonest borrowing technically theft.

But section 283 does not contain the sum total of our Code's provisions on theft. There are besides no less than eight pages containing twenty-four other sections that have to do with theft. These sections concern (a) theft of special kinds of property, (b) theft by or from special categories of persons, and (c) related offences.

(a) *Theft of Special Kinds of Property*

The Code contains specific provisions for numerous types of property. These include:

[36] 1 Hale P. C. 509.

— oysters (s. 284), electricity (s. 286), ore, (s. 293), motor vehicles and vessels (s. 295), cattle (s. 298), drift timber (s. 299), documents of title (s. 300), credit cards (s. 301.1), mail (s. 314), mines (s. 354) and the mint (s. 417).

(b) *Theft by or from Special Categories of persons*

Special categories of persons specifically provided for by the Code include:

— bailees of goods under lawful seizure (s. 285), agents pledging goods (s. 286), persons with a special property or interest (s. 288), husbands and wives (s. 289), persons required to account (s. 290), persons holding power of attorney (s. 291) and public servants refusing to deliver property (s. 297).

(c) *Related Offences*

These include:

— possession of a device to obtain telecommunication facility or service (s. 287.1), misappropriation of money held under direction (s. 292), criminal breach of trust (s. 296), fraudulent concealment (s. 301), fraudulent sale of real property (s. 345) and fraudulent disposal of goods (s. 347).

(2) *Defects*

As outlined earlier, the law's defects are considered under three separate heads: (i) redundancy and unnecessary detail; (ii) complexity of arrangement and of drafting; and (iii) further uncertainty and lack of clarity resulting from gaps and lacunae.

(*a*) *Redundancy and Unnecessary Detail*

To start with, redundancy appears even within the general definition in s. 283. There is redundancy concerning intent, taking, fraudulently, and property.

First, intent. Take for example 283(1)(*b*)—[with intent] "to pledge it or deposit it as security". This subsection is manifestly superfluous in view of 283(1)(*a*), which requires intent "to deprive, temporarily or absolutely, the owner". An intent to pledge your goods is *a fortiori* an intent to deprive you temporarily of them. Accordingly 283(1)(*b*) adds nothing to 283(1)(*a*). Or take s. 283(1)(*c*)—[with intent] "to part with it under a condition with respect to its return that the person who parts with it may be unable to perform". An intent to part with your goods under such a condition likewise arguably entails an intent to deprive you, temporarily at least, of them. So 283(1)(*c*) also adds nothing to

283(1)(*a*). Or again take s. 283(1)(*d*)—[with intent]"to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted". Such an intent likewise arguably implies an intent to deprive. So. 283(1)(*d*) too adds nothing to 283(1)(*a*).

Second, there is redundancy regarding the term "takes". Subsection 283(1) provides that "everyone commits theft who. . . takes". This provision is surely wide enough to cover also 283(2), which provides that "a person commits theft when . . . he moves it or causes it to move or be moved or begins to cause it to become movable". Moving a thing and causing it to move are arguably species of takings, while beginning to cause it to become movable is arguably attempted taking. As such these concepts are unnecessary details and 283(2) adds nothing to 283(1).

Third, "fradulently", s. 283(1) provides that "everyone commits theft who fraudulently....". Whatever "fraudulently" may mean—we saw it has been termed "the mystery element in theft" it doesn't mean merely "secretly". So s. 283(3) which lays down that "a taking.... may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment", becomes otiose.

Finally, two redundancies regarding the stolen property. First, s. 283(4) provides that it is immaterial whether the property converted "is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it". In law, however, it has never been necessary to have lawful possession before converting something. One may convert property while taking possession, after having taken lawful possession, or after having taken unlawful possession. So s. 283(4) is unnecessary.

The second redundancy regarding property relates to wild animals. At common law wild animals formed "the most important of all classes of things which have no owner. . . For the general principle of law is that all true ownership of living things depends upon actual control of them...But a sufficient control may of course be created... by their being killed, or caught, or tamed".[37] This general principle makes it unnecessary to specify in s. 283(5) that "a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in

[37]Kenny, *op. cit.* p. 268, citing *R. v. Rough* (1779) 2 East P.C. 607.

captivity. . .". The subsection continues, however, with the words "and after it has escaped from captivity". This is unsatisfactory as it stands because it blurs the distinction between a wild creature that happens to have been captured and one that is ordinarily kept in captivity. A zoo may reasonably be regarded as retaining a special property in its tigers even if they manage to escape. But can the same be said of one who captures, say, a raccoon, which escapes within the hour? The section is in part superfluous and in part contrary to common sense and legal principle.

The above redundancies obtain within the general definition section itself, s. 283. There are, however, others arising from the various further sections dealing with (a) special property, (b) special persons, and (c) related offences. Many of these sections merely add unnecessary detail, reduplicate a general definition adequate to cover such specific points, and thereby result in overlap and confusion.

(i) *Property*

The subject matter of theft under the Code is very wide. Whereas s. 2 defines property as "real and personal property of every description", the theft section (s. 283(1)) defines theft as the taking of "anything whether animate or inanimate". This makes the ambit of the crime extremely wide; indeed under the Code anything, it seems, can be stolen, including such intangibles as credit or funds in a bank,[38] though not such items as knowledge, ideas and processes—things dealt with by patent and copyright law. The wide scope of theft, therefore, makes strictly unnecessary any special provisions concerning oysters (s. 284), motor vehicles (s. 285), cattle (s. 298), drift timber (s. 299) or documents of title (s. 300).

Cattle (s. 298), for instance, need no special provisions. There is no need to specify that stealing cattle (288(1.1)) is an offence, since this is already covered by the general definition of theft. Nor is there any need, surely, to make special provision for theft of straying cattle (298(1)(*a*)) and to assign a lower penalty—surely today if misappropriation of stray cattle calls for a lesser punishment than misappropriation of cattle not straying, this can be dealt with by the sentencing court's discretion. Nor is there any necessity for special provisions concerning fraudulent branding and so on (298(1)(*b*))—surely such acts will involve a fraudulent taking, a fraudulent

[38] *R. v. Scallen* (1974) 15 C.C.C. (2d) 441 (B.C. C.A.).

conversion or an attempt at either. Nor, finally, should there be any need for special evidentiary provisions with reserve onus clauses (s. 298(2) and (3)).

Equally unnecessary, it can be shown, are separate provisions regarding the other items of property listed above—oysters, motor vehicles and vessels, drift timber and documents of title. To take one more example, fraudulent destroying, cancelling, concealing or obliterating documents of title, valuable securities or testamentary instruments, and judicial or official documents, (s. 300), all involve both physical taking and intent to deprive the owner absolutely or temporarily, and could therefore strictly qualify as theft under s. 283(1). On the other hand, in so far as the purpose of s. 300 is the protection of documents and registration rather than the penalizing of dishonesty, the section may merit retention but not within the general law of theft.

Some items of property, however, may need special provisions. Such are electricity (s. 287), credit cards (s. 301.1), mail (s. 314), mines (s. 354) and the mint (s. 417). These items may merit special sections for different reasons.

Take first s. 287. Electricity, telecommunication etc. don't in ordinary parlance count as things, nor can they be taken or converted in the same way as ordinary material objects. To make sure, therefore, that their fraudulent abstraction is a crime some special provision is necessary.[39] So too perhaps is s. 287.1, which concerns possession of devices for abstracting telecommunication facilities.

The other items — credit cards, mail, mines and the mint — raise different considerations. Credit cards, the mail and the mint all constitute particular social institutions which may need special protection. While theft in general is basically violation of two general values — honesty and security of property rights — theft etc. of a credit card is an attack on the whole credit card system, theft of mail an attack on the postal system and theft from the mint an attack on the coinage system. As such these offences may well deserve a place in a Criminal Code, not under the general heading of theft but rather under a separate heading of offences against social institutions. Likewise theft etc. from mines may be worth keeping as a separate offence, not again under the general heading of theft but

[39]Cr. C., s. 287.

rather under a separate heading of offences concerning natural resources.

Apart from these special items, the law should surely stick to generalities. After all, in law as in other disciplines, we need to escape from the burden of single instances and the tyranny of the particular. Just as the physicist doesn't have to record the fall of every individual apple, so the lawyer shouldn't have to deal with a separate provision for each different type of property item. Law, like science, should aim to reflect, in Ernst Mach's words, "experience arranged in economical order".

(ii) *Persons*

Redundancy concerning persons can be more quickly dealt with. While s. 283 lays down that "Everyone commits theft who . . .", the Code refers specifically to bailees of goods under lawful seizure (s. 285), factors and agents (s. 286), persons having a special property or interest (s. 288), husband and wife (s. 289), persons required to account (s. 290), persons holding power of attorney (s. 291) and public servants failing to deliver property (s. 297). With one exception, however, all these are also covered by the general provision of s. 283(1).

The one exception relates to husband and wife. S. 289(1) preserves the earlier rule that husbands and wives can't in law steal from each other while living together. S. 289(2) lays down that they can do so if living apart or on desertion. S. 289(3) makes it theft to assist, or to receive property from, a husband or wife committing what would, but for s. 289(1), be theft. It is arguable that s. 289(2) is clearly covered by the general offence of theft, that cases falling under s. 289(1) could be decided on the facts, by considering whether such taking is fraudulent, and that this removes the necessity for s. 289(3). It is also arguable, however, that the marriage relationship is such that theft law shouldn't apply where husband and wife are living together. In these circumstances s. 289 can't be deemed simply redundant or unnecessary.

(iii) *Related Offences*

Redundancy concerning related offences can also be dealt with fairly quickly. The terms "taking" and "converting to his own use or to the use of another person" in s. 283(1) are wide enough to cover

most of the particular activities specially dealt with in the Code. Wilful refusal to deliver goods (s. 285), fraudulent failure to account for or pay (s. 290), fraudulent conversion by a person with power of attorney (s. 291), misappropriation of money held under a direction (s. 292), criminal breach of trust (s. 296) and fraudulent disposal of goods on which money has been advanced (s. 347), are surely all types of fraudulent conversion.

There remain refusal by a public servant to deliver property, fraudulent concealment and fraudulent sale of real property. The first, refusal to deliver (s. 297), is arguably a dealing inconsistent with the ownership of the person owning the property or of the person authorized to demand it, and is arguably therefore a species of conversion covered by s. 283(1). Fraudulent concealment (s. 301) will normally involve some form of taking covered by s. 283(1). Fraudulent sale of real property (s. 345) is different. The gist of the offence, the defeating of a prior unregistered right, is neither a taking nor a conversion, and isn't therefore covered by s. 281. It may reasonably, therefore, find a place in a new Code but not under the general law of theft.

(*b*) *Complexity*

The second defect in theft law is complexity. Of this there are two kinds discernible in the present Code: complexity in arrangement and complexity in style.

Complexity in arrangement is the inevitable result of a proliferation of different sections. When theft law is contained in nearly thirty different sections which overlap with, and reduplicate, one another, any hope of simplicity must be abandoned. Complexity, then, arises naturally from redundancy.

Complexity of style, however, is a different problem. While theft law can't compare with certain other areas, e.g. tax law, as regards complexity, nevertheless it does contain subsections drafted in an unduly complicated manner. These include s. 287.1(1), s. 290(2) and s. 292(1). Each of these subsections is unduly long — ten, eleven and nine lines respectively. Each is of such grammatical structure as to obscure its meaning. Each, therefore, falls short of one very important goal for criminal law — ready accessibility and comprehensibility for the ordinary members of the society served by this law.

Take by way of illustration s. 290(2). It reads as follows:

> (2) Where subsection (1) otherwise applies, but one of the terms is that the thing received or the proceeds or part of the proceeds of it shall be an item in a debtor and creditor account between the person who receives the thing and the person to whom he is to account for or to pay it, and that the latter shall rely only on the liability of the other as his debtor in respect thereof, a proper entry in that account of the thing received or the proceeds or part of the proceeds of it, as the case may be, is a sufficient accounting therefor, and no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for shall be deemed to have taken place.

This sentence suffers from two distinct defects. One concerns "embedding", the other "phrasing".

First, the question of embedding. As linguists point out,[40] there is a limit beyond which embedding clauses lead to unintelligibility. Given three or more embeddings a sentence tends to become incomprehensible. Now s. 290(2) contains four levels of clauses. First it contains a subordinate *where*-clause which has two limbs: (1) *where subsection* (1) *otherwise applies;* and (2) *and one of the terms is that* . . . . Next in limb (2) there are embedded two *that*-clauses: (a) *that the thing . . . . shall be an item . . . . between the person . . . . and the person*; and (b) *that the latter shall rely . . . . in respect thereof.* Then in *that*-clause (a) there are two relative clauses: (i) *who receives the thing;* and (ii) *to whom he is to account for it.* Finally, only after these six complex lines do we reach the main clause: *a proper entry* etc, and even this has a further clause embedded in it: *as the case may be.* And all this constitutes a single sentence.

Second, the question of phrasing. In much technical writing nowadays, including legal instruments, the subjects and objects of sentences are often complex noun phrases. For instance in s. 390(2) the subject of *shall be* in *that*-clause (*a*) is *the thing received or the proceeds or part of the proceeds of it,* the subject of *is* in the main clause is *a proper entry in that account of the thing received or the proceeds or part of the proceeds of it,* and the subject of *shall be deemed* in the last line is *no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for.* Such phrases are too heavy stylistically, too long for easy retention in the mind, and too difficult for simple understanding.

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[40]See, for instance, John Lyons, *Chomsky*, pp. 89-93.

(*c*) *Gaps, Lacunae and Lack of Comprehensiveness*

Despite redundancy and excess detail our theft law isn't fully comprehensive. Though spelled out in great detail in eight pages and a plethora of sections, it lacks completeness. The notion of "theft" can't be fully gleaned from simply looking at the Code provisions, for these are only fully understandable in the light of common law. The reason for this is twofold: first, the Code uses certain technical terms whose meanings are not defined but must be gathered from the previous case law; and second, there are certain gaps in the Code regarding basic elements of the offence of theft—elements defined by common law, left unmentioned in the Code, yet clearly required by implication.

(i) *Technicalities*

First, technicalities. The general definition of theft in s. 283 employs three terms of art without defining them—terms which have been refined by a great deal of common law learning and which can only be understood by reference to that learning. These are (a) "fraudulently", (b) "without colour of right" and (c) "special property".

"Fraudulently"

"Fraudulently" has caused difficulties. Commenting on the use of this term in the English *Larceny Act* 1916, one authority writes:

> There seems to be no real need for the inclusion of the word 'fraudulently', in the definition. The Act does not assign any precise meaning to the word and its use in the old cases is no more definite. As it cannot be found to connote anything more than dishonesty, it is unnecessary; since, where there is no claim of right, made in good faith, to take the thing, the taking must be done dishonestly and therefore 'fraudulently'.[41]

Yet in the English case of *R. v. Williams*[42] the Court held that the word "fraudulently" did add something to the definition[43]. They held that it meant that

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[41]Kenny *op. cit.* 277.

[42][1953] 1 Q.B. 660.

[43]*Larceny Act* 1916, s.1 provides: "a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

> the taking must be intentional and deliberate, that is to say, without mistake. . . We think that the word 'fraudulently' in Section 1 must mean that the taking is done intentionally, under no mistake and with knowledge that the thing taken is the property of another person.[44]

Yet the later words in the section 'with intent, at the time of such taking, permanently to deprive the owner thereof', show the need for both intention and knowledge that the thing taken is the property of another person[45]. So "fraudulently" adds nothing.

Another problem concerning "fraudulently" arises from the fact that the *Criminal Code*, unlike common law and the English *Larceny Act* 1916 and the English *Theft Act* 1968, makes dishonest borrowing theft. In England, therefore, taking something temporarily for a joke isn't theft—there is no intent to permanently deprive. In Canada, however, it could be. To avoid convicting in trivial cases, Canadian courts have developed the notion of the "prank". In *R. v. Wilkins*[46] an accused who took a policeman's motorcycle for a joke was held not to have committed theft under s. 283 but only to have taken a motor vehicle under s. 295 because he intended no conversion to his own use. The rationale, though, is unconvincing: he took the cycle with intent to temporarily deprive the owner of it, and to this extent fell under s. 283(1)(*a*)[47]. In *R. v. Kerr*[48], however, the accused, who took an ashtray for a prank intending to return it, was held to have no *animus furandi*. Since he clearly intended temporary deprivation, this can only mean that, because it was a prank, he wasn't acting fraudulently.

In short, "fraudulently" has become technical through case law, it is uncertain what the term adds to "colour of right" and "intent to deprive", and the issue of *mens rea* is confused.

"Colour of Right"

This too, like the English term 'claim of right', is a term of art. The two terms clearly allow for the defence of mistake. The problem is, however, how far they permit a defence of mistake of law.

[44]Per Lord Goddard C.J. at p. 666. Much the same was said in the Canadian case of *R. v. Petricia* (1974), 17C.C.C. (2d) 27. (B.C. C.A.)

[45]Kenny *op. cit.* p. 278, Atrens *op. cit.* 129.

[46][1965] 2 C.C.C. 189, 44 C.R. 375 (Ont. C.A.). See also *Handfield v. R.* (1953) 17 C.R. 343, 109 C.C.C. 53 (Que. C.A.).

[47]This was the approach of the Quebec Court of Appeal in *R. v. Bogner* (1976) 33 CRNS 348.

[48][1965] 4 C.C.C. 37, 47 C.R. 268 (Man. C.A.).

Generally mistake of law is no defence. In *R. v. Howson*[49], however, it was stated that the phrase 'colour of right' must be construed broadly: if upon all the evidence, it may be fairly inferred that the accused acted under a genuine misconception of fact or law, there would be no offence of theft[50]. Yet in *R. v. Shymkowich*[51] the Supreme Court of Canada was divided on the question whether a person who took logs out of a booming ground, thinking he had a right to do so, committed theft. The majority allowed the prosecutor's appeal from the British Columbia Court of Appeal. Locke J., dissenting, relied on East, who wrote

> . . .in any case if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal.[52]

'Colour of right', then, still poses problems. Can mistake of law count at all as a defence to theft? If so, to what extent? These questions aren't answered, in fact they are concealed, by the present Code. In this respect again, therefore, Code law on theft is incomplete.

Special Property

'Special property' is yet another technical term left undefined. S. 288 provides that theft may be committed by or from persons having a special property or interest, but doesn't define what a special property or interest is. According to the case law the term covers something less than ownership or possession, e.g. liens, custody or even equitable interest.[53]

(ii) *Gaps and Lacunae*

Most serious of all perhaps is the fact that the Code omits certain basic elements of the offence of theft—elements which were in the common law and which must be in the present law by

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[49][1966] 3 C.C.C. 348, 47 C.R. 322 (Ont. C.A.).

[50]For a discussion of the meaning of colour of right see *R. v. DiMarco* (1973) 13 C.C.C. (2d) 369 (Ont. C.A.) and *R. v. Hemmerly* (1977) 30 C.C.C. (2d) 141 (Ont. C.A.).

[51][1954] S.C.R. 606. But see Paul Weiler, "The Supreme Court of Canada and the doctrines of Mens Rea", (1971) Can. Bar Rev. 281 at 294.

[52]East, *Pleas of the Crown* Vol 2, p. 659.

[53]e.g. *R. v. Ben Smith; R. v. Harry Smith* (1963) 1 C.C.C. 68 (Ont. C.A.) and *R. v. Hagen* (1969) 68 W.W.R. 348.

implication to avoid absurdity. There are at least two of these elements. They concern (a) consent and (b) passing of property.

Consent

Theft started life as an offence against possession—as trespass. As such it clearly could only be committed *invito domino*, against the owner's will. If the owner consents to the taking, there could at common law be no trespass and therefore no larceny. This principle, however, is not articulated in the Code.

Normally of course a person who takes with the consent of the owner will have a colour of right and won't take fraudulently. Suppose, however, A intends to steal B's goods and for the purposes of detection B acquiesces in the taking. At common law in such a case there was no theft provided the acquiescence went beyond mere facilitation of the taking and constituted a consent to it. As Foster said, "it is of the essence of robbery and larceny, that the goods be taken against the will of the owner."[54] The law in Canada is presumably the same although the Code nowhere states as much.

Property Passing

As we saw earlier, it was fundamental to larceny that the accused only got possession. If he got ownership as well, this couldn't be theft but at most only false pretences. For instance in the English case of *Edwards v. Ddin*[55], where the defendant asked a garage attendant to fill his car with gasoline and then drove off without paying, it was held that no theft was committed. Once the gasoline had been mixed with that already in the car, it was, with the assent of both parties, unconditionally appropriated to the contract, so that the property in it passed to the defendant. There was, therefore, no "appropriation of property belonging to another" as required by the English *Theft Act* 1968.[56] In Canada despite the Code's silence on the point the outcome would no doubt be the same. In *R. v. Dawood*[57] it was held by a majority of the court in a

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[54]Foster, *Crown Cases*, 123. See also Kenny *Op. Cit.* 256.

[55][1976] 3 All E.R. 705.

[56]On 4 January 1977 the English Criminal Law Revision Committee (Cmnd: 6733) in its thirteenth report recommended *inter alia* that there should be a new offence of "making off without payment" to cover such behaviour.

[57](1975), 27 C.C.C. (2d) 300, 31 C.R.N.S. 382, (Alb. S.C. Ap.D.).

clothing price-tag switching situation that the store had placed its cashier in the position of accepting the cash offered by customers for the goods with the intention of passing the property in the goods to the customers, and that therefore the offence was not theft but false pretences.

FRAUD

(1) *Legal Framework*

There are three basic fraud offences in the Code:

(1) obtaining property by false pretence — s. 320(1)(*a*);
(2) obtaining credit by false pretence or fraud—s. 320(1)(*b*);
(3) fraud—s. 338(1).

The first two fall, with theft, under "Offences against Rights of Property" (Part VII); the third under "Fraudulent Transactions relating to Contracts and Trade" (Part VIII).

The reason for this arrangement lies in history. Obtaining property by false pretence was made a specific offence because the victim's consent to part with his property ruled out theft. Obtaining credit by false pretence or fraud was made a specific offence because credit was not a thing that could be stolen.[58] Both these offences, then, were created to close gaps in the law of theft. Both naturally, therefore, ended up in Part VII alongside theft together with such other related offences as obtaining execution of a valuable security by fraud (s. 321), fraudulently obtaining food and lodging (s. 322) and pretending to practise witchcraft (s. 323).

Fraud had a different history. Till 1948 there was no general offence of fraud, only conspiracy to defraud the public or any person or to affect the public market. In that year, however, the conspiracy requirement was removed, resulting in the emergence of a new offence.[59] Purporting to deal only with stock market transactions, this new offence (now contained in s. 338) was judicially extended so

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[58]Prior to the 1955 Code theft could only be committed in respect of tangible movables. The present definition of theft now applies to "anything whether animate or inanimate". This would include credit: see *R. v. Scallen sup.* p. 33 n. 38.

[59]The explanatory note accompanying the Bill stated the purpose of the amendment to be the removal of the requirement of conspiracy in respect of fraudulent schemes in the stock-market. See Harvey, "Recent Amendments to the Criminal Code", (1948) 26 Can. Bar Rev. 1319.

widely as to acquire a most wide-ranging connotation.[60] It ended up, however, in Part VIII together with such specific fraud offences as obtaining property by an instrument based on forged documents (s. 333), fraudulently selling property (s. 345), fraud in collection of fares etc. (s. 351), fraud in relation to minerals (s. 352) and so on—all offences whose need for retention meanwhile hadn't been re-assessed.

The legal framework of all these offences, however, is more readily understood by focussing on three aspects: (a) the difference between fraud and false pretences; (b) the requirement of obtaining; and (c) related fraud offences.

(a) *Fraud and False Pretences*

The hallmark of all fraud offences is deceit. Sometimes what is required is false pretences—s. 320(1)(*a*); sometimes it is false pretence or fraud—s. 320(1)(*b*). The difference is as follows: false pretence, as defined by s. 319, is "a false representation of a matter of fact either present or past, made by words or otherwise"; fraud includes false pretences as so defined, false representations as to future fact, and even bogus promises.[61] A merchant selling water as gin obtains money by false pretences; a contractor paid on the basis of a bogus promise to repair a roof obtains money by fraud. The former can be convicted under s. 320(1)(*a*) or s. 338(1), the latter only under s. 338(1).

(b) *Obtaining and Defrauding*

In some offences, e.g. false pretences, there must be an obtaining: a property interest must be acquired by the accused. In others, e.g. fraud, there must be a defrauding: the victim must be defrauded by the accused. The difference between obtaining and defrauding is as follows: obtaining something is only possible if the victim parts with it[62]; defrauding someone is possible provided the victim somehow acts to his detriment.[63]

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[60] *R. v. Bolcev* (1951) 102 C.C.C. 239 (C.A. Ont).

[61] To contrast fraud and false pretences, see for example *R. v. Stanley* (1950) 109 C.C.C. 220, 26 C.R. 180 (B.C.C.A.).

[62] In England "to obtain" meant to acquire some property interest as opposed to mere possession. *Theft Act*, 1968, s. 15, however, defines it as obtaining ownership, possession or control. In Canada, although the prevailing view is to the same effect, the law is still unsettled. See *R. v. Vallillee* (1971) 17 C.C.C. (2d) 409 (Ont. C.A.) where the authorities are reviewed.

[63] *Vid. inf.* 56-57.

(c) *Related Fraud Offences*

There are, however, several fraud offences that may be committed without obtaining or defrauding. Using mails to defraud (s. 339), fraudulent concealment of documents (s. 343, giving misleading receipts etc. (s. 346), fraudulent disposal of goods (s. 347), fraud in relation to mines (s. 354), publishing a false prospectus (s. 358), personation (s. 361-2) and forgery of trademarks (s. 364-370)—all these "prophylactic" offences are complete without anyone's being actually defrauded.

In all there are, at a rough estimate, 65 different Code provisions on fraud or false pretences. Some (e.g. s. 320 and 338) deal primarily with general crimes. Others (e.g. s. 348, offences concerning fraudulent receipts, and s. 360, indebted traders' failure to keep accounts) deal with activities regulated by other statutes (e.g. the *Bankruptcy Act*).

Outside the Code, however, there exists a host of fraud offences created by other statutes, e.g. the *Bankruptcy Act*,[64] the *Food and Drugs Act*[65] and the *Combines Investigation Act*.[66]

(2) *The Generic Offence of Fraud*

Code s. 338(1) defines the offence of fraud as follows:

> Everyone who, by deceit, falsehood, or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security, is guilty etc."

In this offence there are four elements:

(*a*) deceit, falsehood or other fraudulent means;
(*b*) defrauds;
(*c*) property, money or valuable security;
(*d*) *mens rea*.

We consider each in turn.

(a) *Deceit, Falsehood, Other Fraudulent Means*

These terms have created few difficulties. "To deceive" says a classic judicial definition, "is by falsehood to induce a state of mind;

[64]R.S.C. 1970, c. B-3, s. 164, 171 and 172, for example.

[65]R.S.C. 1970, c. F-29, s. 5 and 9 for example.

[66]R.S.C. 1970, c. C-23, s. 36.

to defraud is by deceit to induce a course of action."[67] This distinguishes means and ends—deception and the results of deception.

"Deceit" and "falsehood" imply positive conduct—some positive false representation (*suggestio falsi*) and not mere non-disclosure (*suppressio veri*). A man trading an imported car for another car plus fifty dollars without disclosing that customs duty on the car had not been paid was acquitted of fraud on appeal, because such non-disclosure didn't constitute deceit, falsehood or other fraudulent means.[68] Sometimes, however, non-disclosure may amount to deceit, e.g. where there is a duty to disclose and breach of it actually deceives the victim. A company director buying shareholders' stock at market price without disclosing that he has a purchaser for it at a higher price violates this duty and so commits fraud.[69]

"Other fraudulent means" is wider than "deceit" and "falsehood", and includes dishonest schemes.[70] Comparing fraud with false pretence a court observed:

> Fraud has a much wider scope. It includes all these calculated and wilful false statements, half-truths, omissions, even mere secrecy, all these direct or indirect lies and falsehoods, disloyal or fraudulent means deliberately used by its author to his benefit or the benefit of third parties which may not be characterized fully as a false pretence, but which create a state of mind inducing a person to follow a course of action to his detriment and injury. . .[71]

(b) *Defrauds*

"To defraud", says another passage of the above mentioned classic definition, "is to deprive by deceit; it is by deceit to induce a man to act to his injury".[72] Though coupled with "property, money or valuable security", the term isn't limited to deprivation of

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[67] *Re London and Globe Finance Corp. Ltd.* [1903]1 Ch. 728 per Buckley J. at 732-733.

[68] *R. v. Charters* (1957) 119 C.C.C. 223 (Ont. C.A.).

[69] *R. v. Littler* (1974) 13 C.C.C. (2d) 530 (C.S.P. Que.); *Littler v. R.* (1976) 27 C.C.C. (2d) 216 (Que. C.A.).

[70] *Cox and Paton v. R.* (1963) 2 C.C.C. 148, 40 C.R. 2 (S.C.C.); *R. v. Renard* (1974) 17 C.C.C. (2d) 355 (Ont. C.A.).

[71] *R. v. Littler sup.* at 550.

[72] See *sup.* n. 67.

economic advantage or to infliction of economic loss. According to judicial interpretation, a person is defrauded who is induced by deceit to act to his detriment.

There are, then, two situations: (1) the offender obtains (for himself or another) property from the victim and the victim acts to his detriment in parting with it: a seller deceives a buyer into paying more than the market price for his purchase—the offender obtains money and the victim suffers a loss[73]; (2) the offender obtains property from the victim but the victim suffers no economic loss in parting with it: a seller of oil shares induces the purchaser to buy them at market value by falsely representing that the company has recently struck new oil—the victim suffers no economic loss but the offender obtains the victim's money and induces him to act to his detriment in buying something lacking the quality it is said to have.[74]

Fraud victims, however, don't have to part with any property; it is enough if something to which they are entitled is withheld from them. A owes B money; C, by falsely stating that he has bought A's debt from B, induces A to give the cheque to him—here by deceit practised on A, C withholds from B a valuable security to which he is entitled.[75]

Finally, fraud victims needn't own the property of which they are defrauded; having some lesser legal interest in it is enough.[76] A pledger of goods, by falsely pretending he has already paid for their redemption, persuades the pawnbroker to hand him the goods—here fraud is committed although the offender only obtains and the victim only parts with possession.

(c) *Property, Money, Valuable Security*

Code s. 2 defines "property" as "real and personal property of every description". This includes not only choses in possession, which are tangible, movable and visible, but also choses in action, which are intangible and evidenced by deeds, documents or titles. It also includes the proceeds of any property.

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[73]e.g. *R. v. Stanley* sup. n. 61.

[74]*R. v. Knelson and Baran* (1962) 133 C.C.C. 210 (B.C.C.A.).

[75]*R. v. Renard sup.* p. 55 n. 70.

[76]*R. v. Vallillee* sup. p. 53 n. 62.

Wide though this definition of property is, it has limits. It doesn't extend to knowledge, ideas, words or processes.[77] Such things fall rather under patent and copyright law.

"Money" and "valuable security" are straightforward terms. "Money" has its ordinary meaning: currency or funds in a bank.[78] "Valuable security" is defined by s. 2 to include shares, bonds, deeds, receipts and so on which evidence choses in action.

The subject-matter of fraud, then, is virtually anything of economic value: real property, chattels, a cheque representing money not yet existing, and finally even credit.

(d) *Mens Rea*

Code s. 338 is silent on *mens rea*. The word "defraud", however, implies *mens rea* in two respects. First, the offender has to act intentionally or recklessly—mere carelessness is not enough. Second, we must have dishonest intent: "defraud" is a pejorative term ruling out such things as colour of right. Such dishonest intent is normally implied by proof of intentional or reckless deceit. In complicated and sophisticated frauds, however, *mens rea* may be inferred from evidence of system and similar conduct.[79]

(3) *Overlap between the general offence of Fraud and Other Offences*

Fraud under s. 338(1) is so wide as to encompass practically all the other fraud offences in the Code, including the two false pretence offences under s. 320(1).

(*a*) *Obtaining Property by False Pretence*

S. 320(1) provides:

> everyone commits an offence who
>
> (a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be committed or causes it to be delivered to another person;

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[77]See for example *R. v. Falconi* (1976) 31 C.C.C. (2d) 144.

[78]*R. v. Scallen sup.* n. 38.

[79]e.g. *R. v. Gregg* [1965] 3 C.C.C. 203 (Sask. C.A.).

This offence overlaps with the offence of fraud in three ways. First, from the words "whether or not it is a false pretence within the meaning of this Act" in s. 338, it is clear that "fraud" in that section includes "false pretence". Second, as we have seen, "defraud" in s. 338 is wider than, and so includes, "obtain". Third, the subject matter of obtaining by false pretence, anything that can be stolen, is, if anything, narrower than, and included in, the subject matter of the offence of fraud, defined in s. 338 as "any property, money or valuable security".

In one respect, however, the two offences differ. S. 320(4) specifically provides that a maker of an N.S.F. cheque, charged with obtaining property by false pretences, bears the burden of showing reasonable grounds to believe, when issuing the cheque, that it would be honoured. There is no analogous provision in s. 338 regarding fraud.

(b) *Obtaining Credit by False Pretence*

S. 320(1)(*b*) provides:

> everyone commits an offence who...
> (*b*) obtains credit by a false pretence or fraud.

This differs from obtaining property by false pretence in two respects. First, the means is wider: credit can be obtained not only by false pretence but also by fraud—in this it is on all fours with the offence of fraud under s. 338. Second, the subject-matter may be different: s. 320(1)(*b*) concerns credit, something intangible, while s. 320(1)(*a*) concerns "anything in respect of which the offence of theft may be committed", a phrase which prior to 1955 included only tangibles but which now, by virtue of s. 283, includes "anything whether animate or inanimate" and so may cover credit.[80]

On the other hand this offence is completely covered by fraud under s. 338. First, the means—false pretence or fraud—is included in the means referred to under s. 338. Second, "credit" in s. 320(1)(*b*) is covered by "property" in s. 338 because that is defined by s. 2 to include "personal property of every description".

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[80]See for example the definition of credit in *R. v. Selkirk* (1964) 44 C.R. 170 (Ont. C.A.).

(4) *Defects*

Fraud too suffers from redundancy of offences, complexity of style and arrangement, and lack of comprehensiveness.

(a) *Redundancy*

In fraud redundancy arises from the overlap between the generic offence under s. 338 and all the more specific offences which are in fact already covered by it. This overlap is due to history: the crimes of obtaining by false pretences were created when fraud, absent conspiracy, was no offence, but became unnecessary when fraud was judicially widened—witness the recent decline in s. 320 charges and the increase in s. 338 prosecutions. Nevertheless, as we have seen, there are some "prophylactic" offences, which, insofar as they penalize preparatory acts, are not redundant. In addition there are some fraud offences—e.g. fraud in relation to minerals (s. 372)—which concern particular industries and which could be better dealt with in statutes relating to such matters rather than in the general law of fraud.

(b) *Complexity*

Fraud law is also complex in arrangement and in style of drafting. As to arrangement, fraud offences are contained in Parts VII and VIII, which constitute less a logical arrangement than a hodge podge of offences. As to drafting style, the definitions are long-winded, tortuous and not readily accessible even to professional sophistication.

(c) *Lack of Comprehensiveness*

Like theft, fraud is not fully comprehensible without resort to case law. The offence is virtually defined in terms of one word, "defraud", a word only intelligible in the light of general criminal law theory and jurisprudence. In fact this word contains both the *actus reus* and the *mens rea* of fraud, while spelling out the basic elements of neither. Whether non-disclosure qualifies as fraud, whether deprivation of mere possession is enough, and whether the victim has to suffer economic loss—these questions are only answerable by reference to the cases. The Code itself on all these matters is incomplete.

Conclusion

In short, our Code provisions on theft and fraud are seriously defective. First, they involve excess detail, redundancy and overlap. Second, they draw the line between theft and fraud in the wrong place, focussing on ownership instead of consent. Third, they are incomplete: much of the relevant law remains outside the Code, which only works because the courts fill in the gaps. In consequence these provisions obscure, rather than highlight, the underlying values—honesty, security of ownership and security of transactions.

In adopting the present law some twenty-five years ago our legislators took a major step towards comprehensiveness, simplicity and clarity. By doing so they helped reduce the gap between common sense morality and this area of law. In our view there is now a need to go further: undue technicality should give way to simple common sense drafting, artificial distinctions between theft and fraud should disappear, and the basic values should be articulated in a comprehensive fashion—in short, the Code should match what judges do. As pointed out by the Supreme Court of Canada, "we are concerned here with a Code". Accordingly, our attitude to this whole area of law is summed up in the words of Martin J. concerning s. 338:

> In my view, the meaning of the section must be gathered from the ordinary meaning of the words used. The interpretation of the section ought not to be encumbered by concepts which were in the outgrowth of excessively technical doctrines relating to the offence of larceny which no longer have any application under our *Criminal Code*.[81]

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[81] *R. v. Vallilee* (1974) 15 C.C.C. (2d) 409 at 413.

APPENDIX B

Schedule of Cases

This is a schedule of cases on theft and fraud taken from the Canadian Abridgment, the Canadian Criminal Cases and the Criminal Reports, New Series. Its purpose is to show how the Proposed Draft leaves the substance of the law virtually unchanged.

The cases are presented under five columns as follows:

(1) Name of Case
(2) Facts
(3) Decision
(4) Relevant Section of Proposed Draft
(5) Decision under Proposed Draft

The following abbreviations are used:

G. — Guilty D. — Defendant or Accused
N.G. — Not Guilty P. — Prosecutor or Victim

The cases are grouped under headings as follows:

I. *Theft*

(1) Fraudulently and without Colour of Right
(2) Takes
(3) Converts
(4) Intent to Deprive
(5) Theft of Telecommunication Services
(6) Theft by Person Having a Special Interest
(7) Theft by Person Required to Account
(8) Theft by Person Holding Power of Attorney
(9) Misappropriation of Money Held under Direction
(10) Joyriding

(11) Criminal Breach of Trust
(12) Taking Drift Timber
(13) Extortion
(14) Theft from the Mail

II. *Fraud*

(1) Deceit
(2) Falsehood
(3) Meaning of Defraud
(4) Fraudulent Scheme
(5) Property, Money or Valuable Security
(6) Stock Market (Sec. 340)

III. *False Pretences*

A. *Obtaining Property by False Pretences*

(1) Meaning of Obtaining by False Pretences
(2) N.S.F. Cheques

B. *Obtaining Credit by False Pretences or Fraud*

CASE DECISIONS

AND

DRAFT DECISIONS

I. THEFT (sec. 283)

(1) FRAUDULENTLY AND WITHOUT COLOUR OF RIGHT

Case	Facts	Decision	Draft Section	Draft Decision
R. v. DeMarco, (1974) 13 C.C.C. (2d) 369 (Ont. C.A.) *See also — *R. v. Feisel* (1924) 42 C.C.C. 150 (Sask. C.A.)	D rents car from P for one day — keeps it for one month — says he intended to pay extra charges on returning it and thought that the rental arrangement permitted this. D convicted	*N.G.* — Appeal allowed. Question of fact for jury whether D had honest belief in a state of facts that if true would amount to negation of fraudulently.	S.1 SS. (1) and (3)	*Same* Question for jury whether D behaved dishonestly.
R. v. Meloche, (1971) 1 C.C.C. (2d) 187 (Ont. C.A.)	D steals cosmetics from P store — D claims store not able to own anything, only persons so able.	*G.* — Not incumbent on Crown to prove Corporate status of store P — lack of proof not prejudice P.	S.1 SS. (4)	Same.
R. v. Bucci, (1974) 17 C.C.C. (2d) 512 (N.S. County Ct.)	D, spectator of accident, asked by tow truck driver to assist in pulling stolen car from ditch — car pulled out, D drives into tow truck then drives down road and into ditch again — D heavily under influence of drug. — D charged with theft of car.	*N.G.* — impairment of D negatives presumption that D intended natural consequences of his act — no intent by D to deprive owner of property.	S.1 SS. (1) and (3)	Same — Intoxication may disprove intent to appropriate and dishonesty.

R. v. Konken, (1971) 3 C.C.C. (2d) 348 (B.C. C.A.) *See also *R. v. Campbell,* (1899) 8 Que. K.B. 322; 2 C.C.C. 357.	D innocently takes abandoned pump from dump — later overhears talk that pump belongs to another — makes no effort to find true owner — pump unconcealed so true owner could claim it if he saw it.	*Held: N.G.* — not fraudulently taken or concealed without colour of right — no actual knowledge of ownership brought home to accused.	S.1 SS. (1) and (3)	Same as D — would appear not to have acted dishonestly.
R. v. Duncan (1945) 84 C.C.C. 113 (S.C.C.) *See also *R. v. Dodge,* (1969) 4 C.C.C. 112 (Ont. C.A.).	D, salesman for company P, delivers company's goods to customer when owner of company P was away. D did not bill customer as company's pricing policy was uncertain. When owner of company P returned, D charged with theft.	*Held: G.* — D claimed he acted in company P's best interest but court did not accept this. Taking was fraudulent.	S.1 SS. (1) and (3)	Same — dishonesty would have to be assessed on facts.
R. v. Murphy, (1973) 23 C.R.N.S. 49 (Ont. C.A.) *See also *R. v. Mudry,* [1935] 2 W.W.R. 225; 64 C.C.C. 177.	D takes motorcycle from P after D repossessed on failure to keep up payments.	*Held: N.G.* of theft — did not act fraudulently or without colour of right — honest belief he still owned cycle.	S.1 SS. (1) and (3)	Same — colour of right negates dishonesty.

(1) FRAUDULENTLY AND WITHOUT COLOUR OF RIGHT—*Cont'd*

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Wallace, (1974) 15 C.C.C. (2d) 503 (Prov. Ct. of B.C.)	D replaces $6.06 price tag with $3.31 price tag on meat package and pays cashier $3.31. D charged with theft.	*Held: G.* of theft of that portion of meat that wasn't paid for — i.e. $2.75 — facts constitute false pretences.	S. 5 SS. (1) and (2)	N.G. of theft on account of consent. D would be charged with fraud.
R. v. Pelletier, (1970) 3 C.C.C. 387 (N.B. S.C. App. Div.)	D aids X in stealing roll of wire by leaving X at gate of P's factory and collecting X 15 minutes later. D charged with theft and claims lack of intent.	*Held: G.* — fact that incident happened at night, that X had to climb high fence and condition of wire etc. point to culpability.	S. 1 SS. (1) and (3)	Same — D's guilt depends on knowledge and intent — was D acting dishonestly?
R. v. Pace, 50 M.P.R. 301; (1965) 3 C.C.C. 55; 48 D.L.R. (2d) 532 (N.S.A.C.)	D, RCAF cook, took loaf destined as garbage.	D committed theft in acting without colour of right — D admitted taking loaf, admitted knowledge that loaf was property of crown, knowledge that officers not consent to taking loaf and knew loaf not abandoned by crown. Taking fraudulent.	S. 1 SS. (1) and (3)	If charged with theft D's guilt would depend on court finding as to whether or not D acted dishonestly. In circumstances of this case, D admitted his dishonesty and his only defence is low value of loaf.

R. v. Howson, [1966] 2 O.R. 63; 47 C.R. 322; [1966] 3 C.C.C. 348; 55 D.L.R. (2d) 582 (C.A.).	P left his car, without authorization, in parking lot. Lot operator had P's car towed from parking lot by D. D refused to release car to P until towing and storage charges paid. D charged with theft.	D – *N.G.* of theft — D honestly but mistakenly believed he had a legal right to retain car — he did not act "fraudulently or without colour of right".	S. 1 SS. (1) and (3)	Same — D's belief in a legal right negates dishonesty.
Boisjoly v. R., (1960) Que. Q.B. 766; 34 C.R. 159 (C.A.) *See also *R. v. Luke*, 17 C.R. 317; [1953] O.R. 1009, 107 C.C.C. 97 (C.A.)	D prepares payment with CNR to buy rails etc. — before CNR agrees, D takes material. D charged with theft.	*Held: G.* — hope of obtaining contract does not constitute colour of right.	S. 1 SS. (1) and (3)	Same – D's belief not inconsistent with dishonesty.
R. v. Wudrick, (1959) 123 C.C.C. 109 (Sask. C.A.)	D takes melons from abandoned R.R. car believing them to be waste or abandoned. — D charged with theft.	*Held: N.G.* — explanation by D was believable in the circumstances and constituted honest mistake of fact.	S. 1 SS. (1) and (3)	Same – Mistake of fact negates dishonesty.

(I) FRAUDULENTLY AND WITHOUT COLOUR OF RIGHT—*Conc'd*

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Comeau, (1914) 43 N.B.R. 77; 25 C.C.C. 165; 27 D.L.R. 692 (C.A.).	D, on orders from employer, warns P that sewing machine will be repossessed on payment default—P defaults and D takes machine. D charged with theft.	*Held: N.G.* — D acted under colour of right.	S. 1 SS. (1) and (3)	Same — Colour of right negates dishonesty.
R. v. Clark, (1901) 3 O.L.R. 176; 5 C.C.C. 235 (C.A.)	D, manager of branch store, arranges with clerk of parent factory not to make out proper slip for goods sent to customer (i.e. factory has no record of missing goods) — customer does not pay D & D claims. This was done to give customer long period of credit. — D charged with theft of goods.	*Held: G.* of theft - D caused goods to be taken from firm without colour of right and with intent to deprive.	S. 1 SS. (1) and (3) or S. 5 SS. (1)	Same although, as in present law, D could be charged with fraud or theft by conversion.
St. Denis v. The King, (1948) 92 C.C.C. 307 (Que. Ct. of King's Bench) *See also *Re Young and Ward,* (1920) 18 O.W.N. 434.	D, tenant, cuts trees on landlord's property and sells wood. D charged with theft of wood. D says he stole trees, not wood.	*Held: G.* of theft of wood. Trees became wood and were no longer trees after D had cut them.	S. 1 SS. (1) and (3)(a)	Same.

Smith, Schonbrun, et al v. R., [1962] S.C.R. 215; 36 C.R. 384; 131 C.C.C. 403, reversing 35 C.R. 323; 131 C.C.C. 14.	D signs cheque written on company P's bank account. D charged with theft.	*Held:* D — *N.G.* of theft - cheque forged but company has no "Special property or interest" in cheque - company not vested with any proprietary rights or special property or interest -- cheque never owned by company so D could not steal or convert.	S. 5 SS. (1)	Fraud.
R. v. Hutton, (1911) 19 W.L.R. 907; 24 C.C.C. 212 (Alta.)	D's neighbour gets water from city at flat rate - D takes water from neighbour's pipes to avoid paying city. D charged with theft.	*Held: G.* of theft from city - D takes water from neighbour without permission, the water belonged to city because it was supplied at a flat rate rather than through meter.	S. 1 SS. (1) and (3)(c)	G. -- D dishonestly appropriates property by using water.

(2) TAKES

Case	Facts	Decision	Draft Section	Draft Decision
Tremblay v. R. (1936) 60 Que. K.B. 306, 65 C.C.C. 387; (C.A.)	Partners in hotel operation stipulate that neither should draw money except by mutual consent and by equal division. D, partner, fakes receipt as salary, without authorization — D charged with theft and claims colour of right.	*G.* no colour of right —D's behaviour contrary to expressed understanding with partner.	S. 1 SS. (1) and (3)	Theft by D—dishonest taking of another's property without consent.
R. v. Dawood, (1976) 27 C.C.C. (2d) 300 (Alta. S.C.)	D takes jumper and blouse from store - takes price tag from blouse and tries to buy both items as under one price -- charged with theft -- D says no theft but false pretences. — D charged with theft.	*N.G.* of theft — when D takes item to check-out cashier, D offers to purchase - cashier accepts so contract complete though voidable due to fraud vendor consent to transfer of property as well as possession of item. Would be G. of false pretences.	S. 5 SS. (1)	D would be charged with and found G. of fraud.
R. v. Sparrow, (1968-69) 5 C.R.N.S. 189, (B.C. County Court) *See also *R.v. Carmichael,* (1915) 22 B.C.R. 375; 26 C.C.C. 443 (C.A.)	D, alcoholic, borrows P's car without permission but arranges to have P informed as to car's whereabouts — D starts drinking and doesn't recover for some days later and keeps car for that time. D charged with theft.	*N.G.* of theft - taking not fraudulent — no intent to deprive at time of taking and unable to form intent after drinking.	S. 2	D could be charged with dishonest taking of car but intoxication could negate dishonesty.

R. v. Thomas, [1928] 2 W.W. R. 608; 23 Alta. L.R. 523; 50 C.C.C. 117 (C.A.).	Accused obtained gas and oil at service station but had no money to pay and knew could not arrange for credit. Attendant said to leave the car until D could pay. D drove off. — Charged with theft.	Implied sale for cash. Property passed to D therefore *G.* of theft.	S. 5 SS. (1)	G. of fraud but not of theft because of consent.
R. v. Malhotra (1976) 28 C.C.C. (2d) 551 (York Prov. Ct., Crim. Div.)	D switches price tags on garments and buys item for lower price.	*G.* — cashier has no authority to accept contract without owner's consent — therefore contract void and theft complete — if contract was properly accepted there would be no theft.	S. 5 SS. (1)	D would be charged with fraud because of deceit and dishonesty.
R. v. Wallace (1915) 8 W. W.R. 671; 8 Alta. L.R. 472; 24 C.C.C. 95, 24 D.L.R. 825 (C.A.).	D obtained $600. from P's wife while P absent. P's wife of unsound mind and incapable of understanding transaction. D failed to show that she was unaware of this. -- Charged with theft.	*G.* — taking from imbecile etc. is theft, unless D thinks the giver is able and intends to give.	S. 5 SS. (1)	G. of fraud. Deceit by exploitation of another's mental deficiency. Not theft because of consent.
R. v. Monnink, (1972) 17 C.R.N.S. 126 (Ont. C.A.)	D, milk salesman, delivers milk to P, storeowner — D bills P for 45 containers but had only really delivered 27 containers from P's old stock.	*N.G.* of theft -- no actual taking of goods -- should have been charged with fraud.	S. 5 SS. (1)	Same — D would be charged with fraud.

(3) CONVERTS

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Brown, (1956) O.W.N. 525; 16 C.C.C. 112 (C.A.)	D, travel agent, receives money from P for trip for P and 20 others. D uses money to make arrangements for himself but is unable to finance trip. — D charged with theft.	*N.G.* of theft. P did not specify what the money was to be used for. No agency relationship between P and D — breach of contract only.	S. 1 SS. (1) and (3)	Same — D, N.G. of theft because on the facts D did not act inconsistently with the terms on which the money was held — no dishonesty due to actions in terms of contract.
Brochu v. R. (1950) 10 C.R. 183 (Que. C.A.).	D cashes a $1,500. cheque and teller mistakenly gives him $1,000. too much. Teller phones D who denies over-payment.	S. 347 (now 283) goes beyond common law definition of theft. Deliberate keeping of money after discovery of mistake is converting it. D therefore *G.* of theft by conversion.	S. 1 SS. (1) and (3)	Same — theft by converting. D's dishonesty shown by his denial of over-payment.
R. v. Martin, [1932] 3 W. W.R. 1; 40 Man. R. 524; 50 C.C.C. 8, [1933] 1 D.L. R. 434 (C.A.).	Accused, sole owner and controller of brokerage firm, withdrew large sum of client's money for personal speculation. — Charged with theft.	*G.* — Broker had no authority to speculate with client's funds on own account. *G.* of theft by conversion.	S. 1 SS. (1) and (3)	G. of theft by converting money. D acted in-consistently with expressed terms on which money held. Dishonesty shown by lack of authority to act as accused did.

R. v. LeBlanc (1947) 6 C.R. 51; 21 M.P.R. 136, 92 C.C.C. 302 (N.B. C.A.)	P, having had previous business with D in selling cars, loans D his car — D sells car for $1300. P denies giving D authority to sell but says post facto that he would agree to sell for $1350. — D charged with theft.	*G.* of theft — no prior authorization and P did not receive money for transaction — no excuse that P thought D would authorize.	S. 1 SS. (1) and (3)	Same — theft by converting — belief that P would consent, if asked, does not negative dishonesty.
R. v. Bouchard, (1970) 5 C.C.C. 95 (N.B. S.C.)	D, manager of co. induces Ps to buy units of co. Syndicate with cheques marked "trust" — units to be converted into shares of common stock — D takes money received and pays personal debts. D charged with theft.	*G.* of theft by conversion when D used money for personal debts, deprived syndicate of funds — when cheques marked "trust" meant more than vendor and purchaser relationship.	S. 1 SS. (1) and (3)	Same — theft by converting property — D acted inconsistently with terms.
R. v. Markoff, (1940) 2 W.W.R. 326; 74 C.C.C. 65; (1940) 3 D.L.R. 189 (Sask. C.A.) *See also *R. v. Kabutoff,* (1941) 1 W.W.R. 85 (Sask.); *R. v. Curtis,* (1920) 1 W.W.R. 1058; 33 C.C.C. 106; 52 D.L.R. 427 (C.A.); *R. v. Hassell,* (1971) 2 W.W.R. 48; 27 C.C.C. 322; 34 D.L.R. 370 (Man.); *R. v. Sullivan,* (1924) 42 C.C.C. 44 (Sask. C.A.).	P (lessee) leases land from D (lessor) to sow crops. D sells whole crop. D charged with theft.	*G.* of theft — under *Crop Payments Act* lessor (D) is made trustee for lessee (P) and P given interest in crop from time of sowing.	S. 1 SS. (1) and (3)	Same — theft by converting.

(3) CONVERTS—*Conc'd*

Case	Facts	Decision	Draft Section	Draft Decision
Holden v. R., (1929), 48 Que. K.B. 109 (C.A.).	D agrees to buy cattle from P. D takes cattle before paying full price against expressed orders of P.	*G.* of theft — under contract of sale property remains vendor's unless vendor says otherwise.	S. 1 SS. (1) and (3)	Same — D converted property.
R. v. Speigal, 41 O.W.N. 335; 58 C.C.C. 297; (1932) 4 D.L.R. 709 (C.A.).	D, real estate agent, receives down payment ("trust money") for premises — D refused to return money (as he was told to do by owners) when deal fell through and prospective buyer demanded return of money. D charged with theft and obtaining by false pretences.	*G.* of theft but *N.G.* of false pretences — D not entitled to commission until sale went through and money in question was prospective buyer's until that time — D converted money and had no colour of right. Money was his when sale completed.	S. 1 SS. (1) and (3)	*Same.* D converted money in circumstances showing dishonesty.
R. v. Wolfe, (1961) 132 C.C.C. 130 (Man. C.A.).	D, car dealer, sold P's car. D left cheques from sale with employee to pay P. D goes on vacation and employee does not pay P. D then goes bankrupt and cannot pay P. — D charged with theft by conversion.	*N.G.* of theft by conversion — although evidence shows carelessness — does not show fraudulent intent. Court says D should be charged with theft by failure to account.	S. 1 SS. (1) and (3)	D could be charged with theft since D converted money and failed to account. However, court would have to appreciate on the facts if D acted dishonestly.

R. v. Jean, (1968) 2 C.C.C. 204 (Que. Q.B.)	D, vending machine repairman, allows coins to accumulate in defective machine — D keeps coins. D charged with theft.	*G.* — no colour of right or reasonable grounds for belief — D pretended coins belonged to him as much as to the company because buyers received nothing in return.	S. 1 SS. (1) and (3)	*G.* Theft by converting. On the facts, it would appear D acted dishonestly.
R. v. Turner, (1968) 3 C.C.C. 22 (N.S. C.C.).	D, registrar of deeds, issues foreclosure certificates for several P's. D draws cash from till when P pays for service with cheque — D does not register transactions made by cheque — several thefts of $20. taken as continuous theft.	*G.* — aggregate value of thefts should be taken into account.	S. 1 SS. (1) and (3)	*G.* — theft by conversion.
R. v. Eist, (1945) 2 W.W.R. 236; 61 B.C.R. 288; 84 C.C.C. 97, (1945) 3 D.L.R. 590 (C.A.).	D sells magazine subscriptions on commission — keeps some of money collected. — D charged with theft.	*G.* of theft — the fact that D told P that he kept commission money is no defence to charge. D acted without colour of right.	S. 1 SS. (1) and (3)	*Same* — D converted money in circumstances showing dishonesty — warnings that D will keep money is no defence

(4) INTENT TO DEPRIVE

Case	Facts	Decision	Draft Section	Draft Decision
Handfield v. R. (1953) 17 C.R. 343; 109 C.C.C. 53 (Que. C.A.).	D takes election banner of candidate and erects it on opposition's property. — D charged with theft.	*N.G.* — wished only to "play a trick" — no criminal intent.	S. 1 SS. (1) and (3) or S.2	*Same* — circumstances inconsistent with intent to appropriate. If charged with dishonest taking, requirement for dishonesty not met in circumstances.
Bogner v. The Queen, (1976) 33 C.R.N.S. 348 (Que. C.A.).	D and others take chair from hotel — P, hotel owner, chases D and D throws chair into bushes — D claims tried to dissuade others from taking chair.	*G.* (absolute discharge) — although prankish taking constitutes theft but must be decided by law within 'great clemency'.	S. 1 SS. (1) and (3) or S. 2	D, if dishonest, could be charged with dishonest taking.
R. v. McCormick, (1969) 4 C.C.C. 154 (Que. Q.B.). *See also *R. v. Heminger and Hornigold,* (1969) 3 C.C.C. 201 (Man. C.A.).	D, Expo employee, finishes work, drinks 8-10 draft beers and takes flag from pole on Expo grounds — D claims flag taken as practical joke.	*N.G.* — Action by ordinary law abiding citizen that would better be dealt with as mischief.	S. 1 SS. (1) and (3) or S. 2.	D — N.G. of theft not of dishonest taking if he did not act dishonestly.
R. v. Kerr, (1965) 47 C.R. 268; 52 W.W.R. 176 (Man. C.A.)	D, "celebrating", took large ashtray from airport.	N.G. — circumstances showed absence of criminal intent.	S. 1 SS. (1) and (3)	D, N.G. of theft because no intent to appropriate. N.G. of dishonest borrowing because D lacked dishonesty.

(5) THEFT OF TELECOMMUNICATION SERVICES (sec. 287)

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Brais, (1973) 20 C.R.N.S. 190 (B.C. C.A.).	D makes telephone calls through B.C. telephone and has charges sent to phoney credit card.	*G.* — D intentionally and deliberately obtained telecommunication service knowing it was not his to take.	S. 5 SS. (1)	D would be charged with fraud.
R. v. Maltais et. al., April 4, 1977, Supreme Court of Canada (as yet unreported) Weekly Criminal Bulletin no. 25, p. 244.	Ds(13) and others entered radio station after closing time and occupied posts including microphone used to transmit over airwaves Ds' views on labour strike — Ds charged with theft of telecommunications service.	*N.G.* as transmission of signals effected through hertzian waves not by wire or cable as is specified in Code section 287 amended in 1975 to cover circumstances of this case.	S. 1 SS. (1) and (3)	D, G. of using telecommunication services.

(6) THEFT BY PERSON HAVING SPECIAL INTEREST (Sec. 288)

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Smith and Smith, (1963) 1 O.R. 249; 38 C.R. 378; [1963] 1 C.C.C. 68; 36 D.L.R. (2d) 613 (C.A.).	D, without authority, used company funds to buy shares for personal use — several theft and fraud charges — acquitted on some.	*G.* — special property or interest covers equitable interest.	S. 1 SS. (1) and (4)	Same — victim deprived of a legally protected interest.
R. v. Beauvais and Montour, (1924) 36 Que. K.B. 347 (C.A.).	D takes wampum-belt from X — D claims no fraudulent conversion because X not owner.	*G.* — X lawful possessor and keeper of belt... has right to possession and is in position of owner — sufficient interest.	S. 1 SS. (1) and (4)	*Same.* — victim deprived of possession.
R. v. Huffman, (1948) 90 C.C.C. 362 (Ont. C.A.).	D, retailer, orders fridge from wholesaler to fill order for P. P gives D cheque for fridge which D cashes. Fridge comes one year later and P and D dispute as to size originally ordered by P. D sells fridge to another and is charged with theft.	D, *N.G.* of theft. Prosecution fails for not being able to establish special interest of P in fridge.	S. 1 SS. (1) and (4)	*Same.*

(7) THEFT BY PERSON REQUIRED TO ACCOUNT (Sec. 290)

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Wolfe, (1961) 132 C.C.C. 130 (Man. C.A.)	D, car dealer, sold P's car. D left cheques from sale with employee to pay P. D then went bankrupt and could not pay. — D charged with theft by conversion	*N.G.* of theft by conversion — although evidence shows carelessness — does not show fraudulent intent. Court says D should be charged with theft by failure to account.	S. 1 SS. (1) and (3)	D could be charged with theft since D converted money and failed to account. However, court would have to appreciate on the facts if D acted dishonestly.
R. v. O'Mahoney, 47 C.R. 22; 53 W.W.R. 698; (1966) 2 C.C.C. 264 (B.C.C.A.).	D, government clerk, received money for licence renewals and was responsible for shortages. Made up shortages by placing sums received in the wrong account, but later made up final deficiency from own money. Charged with theft.	*N.G.* — D did convert money but did not do so with criminal intent and did not do so fraudulently.	S. 1 SS. (1) and (3)	If charged under S. 1 (theft) and 1 (1) & (3) (converting) D could be convicted as he acted inconsistently with terms on which $ held — However the dishonesty requirement wouldn't be fulfilled.
R. v. Campbell, (1926) 1 W.W.R. 71; 45 C.C.C. 159 (C.A.).				

(7) THEFT BY PERSON REQUIRED TO ACCOUNT (Sec. 290)—*Cont'd*

Case	Facts	Decision	Draft Section	Draft Decision
R. v. McKenzie (1971) 4 C.C.C. (2d) 296 (S.C.C.)	D, cab driver gets fare worth $27. and reports to company P that fare was only worth $6.35. Company P entitled to 55% of fare. D is charged with theft without referral to specific sec. of criminal code.	*G.* of theft by person required to account because of sec. 510 C.C. which says charge sufficient if substantially correct and says charge is 'indictable'.	S. 1 SS. (1) and (3)	Same except charged through S. 1 (1) and (3)
R. v. Vroom, (1976) 23 C.C.C. (2d) 345 (Alta. S.C.)	D, judgment debtor, has goods seized by bailiff. D keeps goods on signed undertaking to deliver when so requested — does not deliver and is charged with theft	*N.G.* — seizure unlawfully made as bailiff was unsure whether D in fact required to account	S. 1 SS. (1) and (3)	Same except that outcome would probably be decided on whether facts constituted dishonesty by D.
R. v. Manley, (1940) 74 C.C.C. 22 (B.C.C.A.)	D. brokerage agent for P, hypothecates P's shares of mining co. to settle debts of D — shares liquidated by D's debtors and D unable to replace P's shares – D charged with theft by person required to account.	New trial ordered. Although facts constitute offence of theft by person required to account, trial judge did not inform jury that if jury saw terms of relationship between D and P as forming debtor-creditor account, there could be no fraudulent intent by D.	S. 1 SS. (1) and (3)	Theft by converting. Relationship between D & P could provide for honest belief.

R. v. Thomson, (1930) 54 C.C.C. 175 (Ont.)	D, insurance agent, used collected money for personal speculation — intended to replace money.	*G.* – willful misappropriation of money* — further intention irrelevant – no colour of right — conversion. *intent to deprive owner temporarily	S. 1 SS. (1) and (3)	Same — Theft by converting. In the circumstances D's intent to replace money does not negate his acting inconsistently with terms under which money held.
R. v. Williams & Gordon, (1942) 77 C.C.C. 380 (Ontario County Court Judges' Criminal Ct.)	P gives D^1 share certificates to sell and use proceeds to buy oil royalties in favour of P. D^1 has certificates sold by brokerage firm and proceeds went to D^2 who used proceeds for own use. — D^1 & D^2 working together. D^1 and D^2 charged with theft by person required to account.	— D^1 & D^2 G. of theft — D^1 was trustee, not merely agent for P — 5 steps involved in completed offence: 1) reception of valuable security 2) necessary direction under sec. 357 (now 290) 3) collection of the proceeds 4) conversion of the proceeds 5) misapplication of proceeds and omission to account.	S. 1 SS. (1) and (3)	Same Theft by converting.

(7) THEFT BY PERSON REQUIRED TO ACCOUNT (Sec. 290)—*Conc'd*

Case	Facts	Decision	Draft Section	Draft Decision
R. v. McLennan (McLellan), (1905) 2 W.L.R. 277; 7 Terr. L.R. 309; 10 C.C.C. 1 (C.A.)	D, railroad conductor, takes from passenger less than worth of ticket — no receipt or ticket given — transaction not reported to RR. Charged with theft by agent.	*G.* — whether bribe or fare immaterial — money received in course of employment.	S. 1 SS. (1) and (3)	Same — Theft by converting.
R. v. Campbell, (1926) 1 W.W.R. 671; 22 Alta. L.R. 219; 45 C.C.C. 159 (C.A.)	D directed by P to invest P's money in mortgages — D gives P promissory notes as security — D uses money otherwise than as directed by P. — D charged with theft.	*G.* — money not simply a loan — P not have to expressly direct D — understanding of P's intent.	S. 1 SS. (1) and (3)	Same — Theft by converting.

(8) MISAPPROPRIATION OF MONEY HELD UNDER DIRECTION (Sec. 292)

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Roy, (1922) 38 C.C.C. 141; 69 D.L.R. 305 (Que.)	D, branch manager of bank, gets money from bank to apply according to certain directions — D instead lends money to insolvent persons without security — does not report loan to head office as he was supposed to — D makes incorrect entries in book.	*G.* — D appropriated money in violation of good faith and contrary to directions for its use.	S. 1 SS. (1) and (3)	Theft by converting. D acted contrary to directions under which money held.
R. v. Potter, (1936) 67 C.C.C. 249 (B.C.C.A.)	Ds(2) induce P to invest in property (mill). P then asked by Ds to pay off $400. mortgage on property. P agrees and Ds take money for own use — Ds charged with misappropriation of money held under direction.	*N.G.* — Purpose of transaction was to put mill in operation which did happen. Direction by P not expressly to close mortgage.	S. 1 SS. (1) and (3)	Same. N.G. The court would have to determine conditions under which money held.

(9) JOYRIDING (Sec. 295)

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Wilkins, [1964] 2 O.R. 365; 44 C.R. 375; [1965] 2 C.C.C. 189 (C.A.) *See also *R. v. Mosier*, (1953) 17 C.R. 161; W.W.R. 615; 107 C.C.C. 267 (Alta).	D takes police motorcycle as 'joke' on policeman. — D charged with theft.	*N.G.* of theft but could be *G.* of joyriding — joyriding requires intention to drive vehicle without owner's consent. — theft requires intention to convert — no 'evil' intent.	S. 2	D would be guilty of dishonest taking if D acted dishonestly.
Re R.D., (1961) 35 C.R. 98, 130 C.C.C. 41 (Sub. nom. Re Day) (B.C.)	D helps others in taking car for ride — intends to return car but arrested before being able to do so — charged with theft.	*G.* – intent to return car did not alter intent to steal.	S. 2	Not Guilty of theft but G. of dishonest taking if judge finds D did not intend to appropriate car.
LaFrance v. The Queen, (1974) 13 C.C.C. (2d) 289 (S.C.C.)	D and others take car and return it — D then takes car alone and arrested in process of returning it.	*G.* of theft – intention to return car does not negative theft.	S. 2	If dishonest, D would be G. of dishonest taking.

(10) CRIMINAL BREACH OF TRUST (Sec. 296)

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Kratky, (1931) 55 C.C.C. 150 (Ont. S.C. App. Div.).	D given money by P, baker, to hold for P D spends money to buy car — D refuses to return money to P.	*N.G.* of criminal breach of trust — offence properly termed as theft by conversion — no legal relationship between P and D.	S. 1 SS. (1) and (3)	Same — D would be charged with and convicted of theft by converting.
R. v. Petricia, (1974) 17 C.C.C. 27 (B.C.C.A.)	D, solicitor, uses trust fund of P, client, to pay debts — charged on 2 counts: fraud and theft — D acquitted on fraud charge due to lack of intent — convicted of theft — D argues no requisite intent to defraud also means no requisite intent to steal.	*G.* of theft — narrow scope of intent for fraud wider for theft — no inconsistency in D having lack of intent for fraud and sufficient intent for charge of theft.	S. 1 SS. (1) and (3)	Same — D would be charged with and found G of theft by converting.
R. v. Foreman, (1955) 111 C.C.C. 297 (B.C. County Court).	D, real estate salesman, sells house to P — D offers to register deed and gets payment from P for that service — instead, D mortgages premises to X.	*G.* — D acted as trustee for P and violated trust by converting property for use and encumbering property with a mortgage.	S. 1 SS. (1) and (3)	Same — D would be charged with and found G of theft by converting.

(10) CRIMINAL BREACH OF TRUST (Sec. 296)—*Conc'd*

Case	Facts	Decision	Draft Section	Draft Decision
Belanger v. R., (1925) 39 Que. K.B. 352; 44 C.C.C. 129. *See also *R. v. Foreman*, (1955) 111 C.C.C. 297 (B.C.) *R. v. J.W.D.*, (1932) 38 R. de Jur. 481. *R. v. Kratky*, (1931) 55 C.C.C. 150 (Ont. C.A.)	D, estate executor, lends estate money to himself without security for land speculation — mortgaged and later discharged estate land — speculation fails, D and estate ruined.	*G.* of criminal breach of trust — D's intent to defraud can be deduced — D's position (unfettered discretion) not entitle him to use estate for own use.	S. 1 SS. (1) and (3)	Same — D would be charged with theft by converting.

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Shymkowich, 19 C.R. 401; [1954] S.C.R. 606; 110 C.C.C. 97 reversing 18 C.R. 331; 12 W.W.R. 49; 108 C.C.C. 194.	D, a beachcomber, salvages logs floating in P's booming area but outside boom.	*G.* – D's belief that he was entitled to take logs from booming grounds is a mistake of law not amounting to a colour of right.	S. 1 SS. (1) and (3)	Same — Whether or not D acted dishonestly would be assessed according to facts.
Watts and Gaunt v. R., 16 C.R. 290; [1953] 1 S.C.R. 505; 105 C.C.C. 193; [1953] 3 D.L.R. 152, reversing 15 C.R. 331; 7 W.W.R. 217; 104 C.C.C. 207; [1953] 1 D.L.R. 610.	D recovers drift logs — sells logs back to co. P for 40% value or buys logs for 60% value — D refuses to deliver logs to another as directed by co. P until salvage paid.	*N.G.* D did not act fraudulently as he had an honest belief in his right to keep logs until payment.	S. 1 SS. (1) and (3)	Same — whether or not D acted dishonestly would be assessed according to facts.

(12) EXTORTION (Sec. 305)

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Collins, (1896) 33 N.B.R. 429; 1 C.C.C. 48 (C.A.).	D demands $8. goods from P with meance to expose P's participation in a crime — D found G.	New trial ordered on appeal. Whether reasonable cause for demand or not is question of fact.	S. 4	D would be found G. only if threats amount to injury to reputation.
R. v. Choquette, (1947) 89 C.C.C. 207 (Que.)	D demands money from P — D says if no delivery, "ça va aller mal".	*N.G.* — D's words can't be construed as "dangerous and menacing".	S. 4	Same — Extortion requires threats with injury to person; property or reputation.
R. v. Gibbons, (1898) 12 Man. R. 154; 1 C.C.C. 340 (C.A.). *See also *R. v. Lyon*, (1898) 29 O.R. 497; 2 C.C.C. 242 (C.A.); and, *R. v. Lampham*, (1963) 24 O.W.N. 111; 21 C.C.C. 79; 10 D.L.R. 315.	D, not a peace officer, threatens P with prosecution unless P pays D $75.	*G.* — intent to steal coupled with threat or menace makes offence complete — circumstances of case important.	S. 4	D would be G. only if threat of criminal prosecution amounts to threat of injury to reputation i.e. no reasonable ground for prosecution.

R. v. Hatch, (1911) 18 C.C.C. 125 (B.C.) *See also *R. v. Steers*, (1918) 26 B.C.R. 334 (C.A.).	D sends unsigned letter to P saying D knows that P committed arson — D says two others know and will tell authorities — D asks for money from P to get two others out of country and so avoid prosecution.	*N.G.* of extortion — although D's scheme was fraudulent, it contained no threat or menace.	S. 4	Same — D, N.G. of blackmail in the absence of a threat — D could possibly be charged with obstructing justice.
R. v. McClure, (1957) 26 C.R. 230; 22 W.W.R. 167; 118 C.C.C. 192 (Man. C.A.). *See also *R. v. Cornell*, (1904) 6 Terr. L.R. 101; 8 C.C.C. 416 (C.A.).	D, police officer threatens to print story about P, convicted offender, unless P pays D $200. Extortion must include: 1. D threatens P to induce P to part with possession. 2. Threats made with intent to extort. 3. Threats made without "reasonable justification or excuse". — D says no offence if he intends that money should finally be returned to P.	*G.* — threat was made in that D's words would influence mind of reasonable man — no defence that D intended to return money. *G.* — D's intention concerning money irrelevant — offence complete when threats made with intent to extort.	S. 4	Same.

(12) EXTORTION (Sec. 305)—*Conc'd*

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Natarelli and Volpe, (1967) 1 C.R.N.S. 302 (S.C.C.)	D demands money or shares from P upon threat of bodily injury to P and his family — D claims right to demands.	*G.* — in a defence for extortion, D must not only have a reasonable justification for the demand but for the threats or menaces as well.	S. 4	Same. Although the new draft section makes no mention of reasonable justification or excuse, this is provided by the general principles of liability.
R. v. Bird, [1970] 3 C.C.C. 340 (B.C.C.A.)	D induces P to have intercourse with him by saying to P that he has photos of P's husband and another performing indecent acts.	*G.* — when the Code makes it an offence to extort "anything" it isn't restricted to tangible things but may include sexual intercourse as well.	S. 4	N.G. — D could not be found G. of blackmail because the object of extortion must be money, property or other economic advantage — such behaviour should be dealt with as a sexual offence.

R. v. Pacholko, (1941) 75 C.C.C. 172 (Sask. C.A.)	P, police officer, goes to home of D, accused offender, to inform D of date of trial — D not at home so P talks with D's wife — later, D and P meet — D gives P note by D's wife demanding money sufficient to cover fines incurred by D or D's wife would say P committed indecent assault on her — if money not paid, D's wife would demand $1,000. in damages.	*G.* — Demand by D's wife arose not from alleged indecent assault but from D's conviction and fine on another charge; no reasonable and probable cause for demand — usually threats must be shown as a menace — no proof of menace needed when threat is of nature that would produce injury to character of P — truth of D's accusation irrelevant.	S. 4	Same.

(13) THEFT FROM THE MAILS (Sec. 314)

Case	Facts	Decision	Draft Section	Draft Decision
Landry v. R., (1963) 40 C.R. 188 (Que. C.A.). *See also *R. v. Mills*, (1958) O.W.N. 443 (C.A.).	D steals liquor sent in mail — claims liquor is non-mailable substance.	*G.* — law makes no distinction between mailable substances — prohibition from sending liquor in mail does not prohibit application of Code provisions.	S. 1 SS. (1) and (3)	G. of theft but new draft does not provide for theft from mail as such.
R. v. Cummings, (1962) S.C.R. 507; 37 C.R. 219; 132 C.C.C. 281, reversing 1961 O.W.N. 175; 35 C.R. 163; 130 C.C.C. 107.	D, post office worker, steals contents of 3 letters planted in sorting room of post office.	*G.* — not ordinary theft — if Code specified 'post letter', letters would have to be posted — Code no longer specified 'post': intent of sender not a determining factor.	S. 1 SS. (1) and (3)	G. of theft but new draft does not provide for theft from mail as such.

II. FRAUD (sec. 338)

(1) Deceit

Case	Facts	Decision	Draft Section	Draft Decision
Beaudry v. R., (1956) 23 C.R. 328 (Que. C.A.).	D advertises ability to rent dwellings for anyone buying $300 of furniture from him — P deposits $50 and goes to rent dwellings — told must buy $900 furniture — P refused and deposit not returned.	*G.* — others complained of same deal — scheme shows fraudulent intent.	S. 5 SS. (1) (9) and S. 5 SS. (2)	*Same* D dishonestly by deceit induced P to part with property (money).
R. v. Charters, (1957) 119 C.C.C. 223; (Ont. C.A.).	D exchanges cars with P but doesn't tell P car might be subject to duty tax.	*N.G.* of fraud – moral duty to inform but no misrepresentation or fraud — no deception.	S. 5 SS. (1) (b) and S. 5 SS. (4)	*Same* — D had no duty to disclose. Therefore there is no unfair non-disclosure.
R. v. Kribbs, (1968) 1 C.C.C. 5 (Ont. C.A.).	D induces P, person of unsound mind, to transfer P's bank account to joint account with D — D then draws two sums totalling $2500 from joint account.	*G.* — offence complete if D procures money from P by putting P in position that allows D to take money that P would otherwise be entitled to.	S. 5 SS. (1) (c) and S. 5 SS. (5) (a)	*Same* Deceit by exploiting P's mental deficiency.

(1) Deceit—*Conc'd*

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Lemire, [1965] S.C.R. 174; 45 C.R. 16; [1965] 4 C.C.C. 11; 51 D.L.R. (2d) 312, reversing 43 C.R. 1.	D, police chief, refused pay raise by A.G. — A.G. tells D to raise personal expense account until raise 'could be arranged'.	*G.* — no excuse that superior had authorized increase in expense account.	S. 5 SS. (1) (a)	Dishonesty would be determined on facts of case.
McGary v. The Queen, (1972) 19 C.R.N.S. 82 (S.C.C.).	D, operator of milk bottle toss game, entices P to win prize by knocking down metallic bottles set up in pyramid fashion — 2 bottom bottles were much heavier than top bottle. D charged with fraud by cheating at play (Sec. 192 of present Code).	*G.* — different weights of bottles constitute fraud in that heavier bottles transformed game from one of skill to one of mixed skill and chance.	S. 5 SS. (1)	The circumstances would qualify as deceit under the draft.

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Dumont, [1968] 1 C.C.C. 360 (Que. Q.B.).	D, dredging contractor, sends bill for $135 to P, gov't department, for bulldozing services — bulldozing work was not performed but D claimed he had performed other services gratuitously.	*G.* — by deceit D obtained $135 of P's money.	S. 5 SS. (1)	Same.
R. v. Marquardt, (1972) 6 (2d) C.C.C. (B.C. C.A.).	D, owner and treasurer of company (with stockholders) uses funds procured by invoice for personal use — D claims money used for office at residence — one invoice for 'gear and rope' which were actually skis.	*G.* — fraudulently represented purchased articles to be for use of company — company could not be construed as 'alter ego' of D.	S. 5 SS. (1)	Same.

(3) Meaning of Defraud

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Stanley, (1957) 26 C.R. 180; 22 W.W.R. 71; 119 C.C.C. 220 (B.C. C.A.).	D agrees to buy car from P — D gives P down payment and I.O.U. for balance payable on title transfer — D, at time of title transfer, tells P that credit note to be used only for down payment on another car — several transactions like this.	*G.* of fraud — no false pretences — D had no intention of paying balance in cash.	S. 5 SS. (1)	Same. D obtained property by deceit.
R. v. Timar, [1969] 4 C.C.C. 185 (York County Crim. Ct.).	P, as a trap, asks D to issue him plumbing licence for $1,000 — licence not picked up and P admits not intending to obtain it.	*N.G.* of fraud — act inchoate so attempt only — for fraud, victim, through falsehood, must be induced to act otherwise than normally would.	S. 5 SS. (1)	Same. D would be G. of attempted fraud.
R. v. Dumont, [1968] 1 C.C.C. 360 (Que. Q.B.).	D, dredging contractor, sends bill for $135 to P, gov't department, for bulldozing services — bulldozing work had not been performed although D had offered gratuitous service to P.	*G.* — by deceit D obtained $135 of P's money. It is no defence for D to say that gratuitous services rendered to P compensated for the phoney claim.	S. 5 SS. (1)	Same.

R. v. Knelson and Baran, (1962) 133 C.C.C. 210 (B.C.C.A.).	D induces P to buy shares in company by saying (falsely) that oil was found on company's land and that major negotiations with another oil company were under way.	*G.* — value of thing purchased is irrelevant — P defrauded because shares purchased had not the attributes ascribed to it by D (D had said value of shares would soon escalate rapidly).	S. 5 SS. 1	D, by deceit, dishonestly induced P to part with property (money).
R. v. Renard, (1974) 17 C.C.C. (2d) 355 (Ont. C.A.).	D, employee of P, renders professional service to X through D's new company. D represents that P's company has changed its name. X makes cheque to order of new company. D charged with fraud and pleads that P never had property interest in cheque.	*G.* — fraud was complete when property or valuable security to which P is entitled was fraudulently withheld from him.	S. 5 SS. (1)	Same. D, by deceit, causes P economic loss.

(4) Fraudulent Scheme

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Gregg, (1965) 3 C.C.C. 203 (Sask. C.A.).	D buys grain from Ps and sells it to Xs — Xs pay D for grain and D fails to pay Ps.	*G.* — usual practice in grain transactions is to pay cash when produce weighed, cost is calculated and transfer made — previous conduct and conduct in this case showed no intent to pay.	S. 5 SS. (1)	Same. Dishonesty would be established on the facts of the case.
R. v. Bornes, (1976) 26 C.C.C. (2d) 112 (N.S. S.C.).	D, medical doctor, puts 9 false claims to medicare plan — claimed more expensive 'full examination' for 'office visits'.	*G.* of fraud but nine offences not sufficient to constitute 'scheme'.	S. 5 SS. (1)	Same. D obtained property by deceit.
R. v. McLean and Janko, 39 C.R. 404; [1963] 3 C.C.C. 118. Affirmed, 43 C.R. 41; 46 W.W.R. 384; [1964] 1 C.C.C. 393.	D, president of car dealership, and D2, sales manager, sell car to P for $320 — P was unable to get car or money back — D and D2 admit of trying to get more money from P after P signed offer to purchase. Charged with fraud.	*G.* — false promise by D that P would receive particular car in return for money — promise never meant to be kept.	S. 5 SS. (1)	Same.

(5) Property, Money or Valuable Security

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Vallillee, (1974) 24 C.R.N.S. 319 (Ont. C.A.).	D procures rental car by producing stolen identification. D did not gain any property interest in the car but possessory interest only.	*G.* — Canadian courts hold that conviction for fraud may be given although no property interest passes — P would not have been deprived of property if deceit had not been practiced.	S. 5 SS. (1)	Same.
R. v. Douglas, (1972) 8 C.C.C. (2d) 275 (N.B. S.C.)	D applies for credit at store — gave information — two wrong statements — obtained credit and did not default. Charged with obtaining goods by false pretences.	*N.G.* — false information did not induce granting of credit — store rely on investigation of D to determine credit rating.	S. 5 SS. (1)	Same. No causal relationship between deceit and granting of credit.
R. v. Littler, (1974) 13 C.C.C. (2d) 530 (Que. Sessions); (1976) 27 C.C.C. (2d) 234 (Que. C.A.).	D, major shareholder of company, sells his shares to X co. for $68 per share — shares usually sell for $22. each. D had prospective buyer for P's shares which he doesn't disclose. D buys additionsl 14% of shares from P, minority shareholder, for $32 per share — again sells to X co. for $68 per share.	*G.* of defrauding P — false representation by D in waiting until X co. agrees to buy at $68 before buying P's shares — defraud P of $36 per share.	S. 5 SS. (1)	Same.

(5) Property, Money or Valuable Security—*Conc'd*

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Falconi, (1976) 31 C.C.C. (2d) 144 (Peel County Court).	D charged with fraudulently obtaining property in the form of drug prescriptions from three doctors by misrepresenting the purpose for which the drug was needed (Sec. 338 (1)).	*N.G.* — A prescription, as a written communication, is not money, valuable security nor is it 'property' as defined by the Criminal Code.	S. 5 SS. (1)	Same — Property would not extend beyond *chose* in action and *chose* in possession.

(6) Stock Market

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Jay, [1966] 1 C.C.C. 70 (Ont. C.A.).	D buys, and has others buy for him, substantial shares in certain co. Charged with fraudulent manipulation of stock exchange transactions.	*N.G.* D would have been *G.* if purpose of buying stocks was to induce false belief in others that this stock was active in trading — intention of D was rather to get on board of directors of that co.	S. 5 SS. (1) and S. 5 SS. (4) (b)	Same.
R. v. Lampard, [1969] 3 C.C.C. 249 (S.C.C.).	D, broker, buys and sells stocks in certain co. without changing beneficial ownership of shares. D charged with fraudulent manipulation of stock exchange transactions.	*N.G.* — question of fact whether D has guilty intention . . this crown must prove beyond reasonable doubt and has not.	S. 5 SS. (1)	Same.

III. FALSE PRETENCE (Sec. 320)

(A) Obtaining Property by False Pretence (Sec. 320(1) (a))

(1) Meaning of Obtaining by False Pretence

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Stanley, (1957) 26 C.R. 180; 22 W.W.R. 71; 119 C.C.C. 220 (B.C. C.A.)	D agrees to buy car from P — D gives P down payment and I.O.U. for balance payable on title transfer — D, at time of title transfer, tells P that credit note to be used for down payment on another car — several transactions like this.	*G.* — of fraud — no false pretences — D had no intention of paying balance in cash.	S. 5 SS. (1)	Same.
R. v. Reid, (1940) 3 W.W.R. 96; 55 B.C.R. 321; 74 C.C.C. 156; (1940) 4 D.L.R. 25 (C.A.). See also *Re Staggs*, (1912) 20 C.C.C. 310; 8 D.L.R. 284 (Alta S.C.)	D obtains potatoes from P with promise to pay in future — D admits no intention to pay. D charged with obtaining credit by false pretences.	*N.G.* — false representations that amount to promises or professions of intention do not constitute false pretences.	S. 5 SS. (1)	*G.* of fraud — Deceit includes false representation as to future.
R. v. Broddy, 23 C.R. 276; [1956] O.W.N. 317; 114 C.C.C. 347 (C.A.)	Dishonest poker game where 2 Ds employ trick to get another's money.	*G.* of theft by trick and not of obtaining money by false pretences.	S. 5 SS. (1)	*G.* — fraud deceit and dishonesty.

R. v. Illsley, (1917) 29 C.C.C. 105 (N.S. C.A.).	D gives P cheque for wagon with false name — worthless cheque. D charged with theft.	*N.G.* of theft — *G.* of false pretences — P intended to part with property to D.	S. 5 SS. (1)	*G.* — fraud — deceit
R. v. Hall, (1930) 53 C.C.C. 312 (York County Court). *See also *R. v. Shaid* (alias Sheid), (1926) 2 W.W.R. 319; 36 Man. R. 64; 46 C.C.C. 209; (1926) 3 D.L.R. 553 (C.A.).	D contracts with hotel to have P arrange banquet for 1000 people — misrepresentation made to P by D about the stability of D's organization — 180 guests show up. P's preparation wasted. D charged with obtaining goods by false pretences and obtaining credit by false pretences.	*G.* of obtaining goods by false pretences. N.G. of obtaining credit by false pretences. D obtained food at special price by false pretences.	S. 5 SS. (1)	Fraud — by deceit, D dishonestly causes P a financial loss.
Hammond v. R., 56 Que. K.B. 416; 62 C.C.C. 1; (1934) 3 D.L.R. 722 (C.A.).	D leases apartment from P. P allows D to sublet to persons of good character. D, lying, claims to sublet to black family — tells P that lease can be broken for $. D charged with extortion and included lesser offence of obtaining property by false pretences.	*G.* of false pretences — if demand is supported by false statement of fact then offence is false pretence.	S. 5 SS. (1)	*G.* of fraud — deceit.

(1) Meaning of Obtaining by False Pretence—*Conc'd*

Case	Facts	Decision	Draft Section	Draft Decision
R. v. James, (1932) 59 C.C.C. 64 (Ont.). *See also *R. v. Reid*, [1940] 3. W.W.R. 96; 55 B.C.R. 321; 74 C.C.C. 156; [1940] 4 D.L.R. 25 (C.A.) and *R. v. Pollock*, (1920) 47 O.L.R. 616; 33 C.C.C. 155; 54 D.L.R. 155 (C.A.).	D opens dance hall and advertises for employee — employee to pay $400. to D for good performance in job. — D makes false statements about business and induces employee to sign contract loaning $400. to D. D charged with obtaining money by false pretences.	*G.* of obtaining by false pretences regardless of contract.	S. 5 SS. (1)	*G.* of fraud — deceit.
R. v. Hemingway, (1955) 112 C.C.C. 321 (S.C.C.) See also #12. False Pretences #17. *See also *R. v. Massicotte*, (1941) 79 Que. S.C. 427; 77 C.C.C. 389.	D buys furniture from P on conditional sales agreement (monthly payments) — P retains property interest until full payment made — D defaults and forges full payment receipt — D charged with obtaining property by false pretences. D says that he had no property interest in furniture so no crime of false pretences.	*G.* — Code provides that D must merely have possession and some property interest for conviction of false pretences – property interest arises from conditional sales contract.	S. 5 SS. (1)	Deceit and dishonesty - There need not be an obtaining for a conviction of fraud. Inducing or parting with property or causing financial loss is important part of offence.

R. v. McInnes, (1961) 131 C.C.C. 277 (B.C.). See also *R. v. McManus*, (1924) 42 C.C.C. 248; 3 D.L.R. 297 (C.A.); and, *R. v. Harty*, (1898) 31 N.S.R. 272; 2 C.C.C. 103 (C.A.).	D writes bad cheque for purchase of car — agreement not bind seller until conditions of sale met — cheque dishonoured — D takes possession of car and is charged with obtaining goods by false pretences.	*N.G.* — false representation gets D possession only and not property interest.	S. 5 SS. (1)	There need not be an obtaining. Parting with property sufficient.

(2) NSF Cheques

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Sector, (1921) 1 W.W.R. 337; 14 Sask. L.R. 83; 35 C.C.C. 15; 57 D.L.R. 343 (C.A.). *See also *Laurier v. R.*, (1930) 48 Que K.B. 332 (C.A.).	D has P fix D's car — D sends X with cheque to P and P releases car — cheque was post-dated 10 years and D orders "stop payment" at bank. D charged with obtaining goods by false pretences.	*G.* — false pretence by conduct — D led P to believe cheque would be cashed immediately.	S. 5 SS. (1)	G. of fraud. Deceit includes false representation as to past, present or future.
R. v. Druckman, (1975) 31 C.R.N.S. 177 (Ontario County Court).	D buys car and pays deposit with 2 postdated cheques — vendor agrees to keep cheque a few days until funds available. — D then makes several payments by cheques to different stores — all cheques come back N.S.F. — D relied on funds being owed to him to cover cheques — funds not come through. D charged with fraud and obtaining goods by false pretences.	*G.* of obtaining by false pretences goods from store — *N.G.* of defrauding car dealer — no indication that D did not intend to honour cheques on down payment.	S. 5 SS. (1)	Honesty here would be predominant factor.

R. v. Douglas (3), (1972) 19 C.R.N.S. 399 (N.B.S.C.). *See also *R. v. Douglas* (5), (1972) 19 C.R.N.S. 397 (N.B. S.C.).	D pays $125. for T.V. — claims he has 2 bank accounts and sufficient funds for cheque — cheque signed on Feb. 11 and dated Feb. 12 — D has only one account with $7.00. D charged with obtaining goods by false pretences.	*G.* — there was misrepresentation that D had 2 accounts and sufficient funds — intent to defraud due to 13 other NSF cheques on same account.	S. 5 SS. (1)	Same.

(B) Obtaining credit by false prétence or fraud (Sec. 320 (1) (*b*))

Case	Facts	Decision	Draft Section	Draft Decision
R. v. Hall, (1957) 27 C.R. 92, 40 M.P.R. 145; 119 C.C. C. 232 (N.S. C.A.).	D, using fictitious names obtains shaver on promise to pay if shaver meets his approval — D fails to return shaver when required. D charged with obtaining credit by false pretences.	*G.* of false pretences to obtain credit — all elements of offence present — "Obtaining credit means obtaining something on a promise to do something in the future".	S. 5 SS. (1)	D obtains property by deceit.
R. v. Cohen, (1915) 33 O.L.R. 340; 24 C.C.C. 238; 25 D.L.R. 510 (C.A.). See also *R. v. Parkes,* (1974) 4 C.R. 382; 90 C.C.C. 193 (B.C. C.A.).	D, company director, applies for company loan from bank and lies about personal liabilities. Charged with issuing false statement with intent to defraud and with false pretences to obtain credit.	*N.G.* of false pretences for credit — false representation only illegal if made about affairs of company.	S. 5 SS. (1)	D obtains property by deceit.
R. v. Campbell, (1912) 23 Que. K.B. 400; 18 R. de Jur. 317; 19 C.C.C. 407; 5 D.L.R. 370 (C.A.).	D, company president, signs false report which induced P to extend credit — charged with obtaining credit by false pretences.	*G.* — D benefited personally from false representation — G as principal.	S. 5 SS. (1)	D obtains property by deceit.

R. v. Reid, (1940) 3 W.W.R. 96; 55 B.C.R. 321; 74 C.C.C. 156.	D obtains potatoes from P with promise to pay in future — D admits no intention to pay. D charged with obtaining credit by false pretences.	*N.G.* — false representations that amount to promises or professions of intention do not constitute false pretences.	S. 5 SS. (1)	D obtains property by deceit.
R. v. Selkirk, [1965] 2 O.R. 168; 44 C.R. 170; [1965] 2 C.C.C. 353 (C.A.). *See also *R. v. Parkes,* (1947) 90 C.C.C. 193; 1 D.L.R. 752 (B.C. C.A.).	D fraudulently obtains a credit card which he later uses to obtain goods and services at various establishments. — D convicted on 2 counts: 1) by fraud obtaining credit 2) defrauding credit card company of a credit card.	Held: *G.* of obtaining credit by fraud — took place in Canada ... offence against Crim. Code *N.G.* of obtaining credit card by fraudulent means. With regard to the first count D, by deceit, caused the company to become indebted to the establishment. As regards to the second count, the offence being committed in a foreign country, D is *N.G.*	S. 5 SS. (1)	D could be charged with obtaining property by deceit from the establishment or with causing credit card company a financial loss. Deceit and dishonesty would be established on the facts.
R. v. Dvornek, (1962) 132 C.C.C. 231 (B.C.C.A.).	D buys tools from P and charges to X, D's employer — P gets OK from X — next day D buys more tools from P and D tells P he has authority from X. D charged with obtaining credit by false pretences.	*G.* — credit given to X, not to D — false representation for D to say he has credit. Credit obtained need not be that of accused — may be another's.	S. 5 SS. (1)	D could be charged with defrauding dealer by inducing him, by deceit, to part with property or by causing his employer a financial loss.