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June 15, 1962

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JUN 18 1962

Dear Mr. McQuillan:

As attorneys for The American Society for the Prevention of Cruelty to Animals we have been giving consideration to the suggestions accompanying your letter of April 18, 1962, as to relocation of those penal provisions of the Laws of the State of New York that relate to animals.

The provisions of Article 16 of the Penal Law relating to animals are strictly penal in their nature. They relate primarily to various forms of cruelty to animals and they embody those provisions of law that the Special Agents of the A.S.P.C.A. are most frequently called upon to enforce. Pursuant to Section 117-a of The Code of Criminal Procedure the provisions of Article 16 are enforcible by the agents and officers of societies for the prevention of cruelty to animals. The provisions of the Agriculture and Markets Law and other laws that relate to animals are more administrative and regulatory than penal in their nature.

The officers of the A.S.P.C.A. who are charged with the responsibility of law enforcement feel that penal provisions are much more effective a part of the Penal Law and should remain there. We

therefore strongly urge that Sections 180, 181, 182, 185 and 192-a of the Penal Law and Sections 117-a to 117-f of the Code of Criminal Procedure should not be transferred to the Agriculture and Markets Law but should remain where they are.

Section 185-a was designed to prohibit the sale of baby chicks as toys because of the cruelty involved, whereas the provisions of the Agriculture and Markets Law in Sections 175-m through 175-r govern the conduct of the business of selling baby chicks, and for that reason we believe Section 185-a is more effective as part of the Penal Law and that the provisions now in the Agriculture and Markets Law are appropriate exactly where they are.

Sections 331 and 332 of the Agriculture and Markets Law are distinctly not penal and were designed simply to afford a remedy to the custodian of an animal who cannot otherwise lawfully rid himself of possession of the animal when the owner fails or refuses to remove it at the appropriate time. Section 186 of the Penal Law, however, deals primarily with cruelty resulting from leaving a disabled animal without care, and it would be weakened by transfer to Article 25B of the Agriculture and Markets Law.

Section 119 of the Agriculture and Markets Law provides for the establishment and maintenance of a public pound. Section 187 of the Penal Law, however, deals with cruelty resulting from improper care of an animal that has been impounded or confined by any person whether in a public pound or otherwise. Section 187 would lose much of its force if transferred to the Agriculture and Markets Law.

Violation of Section 188 of the Penal Law relating to sale of an animal afflicted with diseases of glanders or farcy is a misdemeanor. The violation of Section 1764 of the Penal Law relating

to sale of tuberculous cattle is a felony. Both of these provisions may well be transferred to Article 5 of the Agriculture and Markets Law dealing with diseases of domestic animals. Some thought should be given, however, to whether these two statutes should be rewritten and combined in a single section when embodied in the Agriculture and Markets Law and whether the penalty for violation of these two statutes should be the same or whether the sale of tuberculous cattle is a sufficiently more serious offense to warrant characterization as a felony.

Section 188-a of the Penal Law regarding the sale of disabled horses at auction might also be combined with Sections 188 and 1764 of the Penal Law and transferred to the Agriculture and Markets Law. In any event it should not be repealed.

Section 189 of the Penal Law relating to the carrying of animals in a cruel manner, Section 190 regarding poisoning or attempted poisoning of an animal, and Section 190-a relating to wilful injury to an animal all involve acts of cruelty and we feel they would lose their effectiveness if embodied in the Agriculture and Markets Law.

On the other hand, Section 8002, Sub. 2(b) of the Unconsolidated Laws relating to harness racing seems appropriate where it is.

Section 1754 of the Penal Law regarding putting unwholesome substances on the highway covers other matters not included within Section 191 of the Penal Law and Section 1219(a) of the Vehicle and Traffic Law. Section 191 of the Penal Law covers public places whereas

the Vehicle and Traffic Law covers only the highway. Section 191 of the Penal Law should not be repealed or transferred.

Sections 192-a and 194-b of the Penal Law both relate to the stealing of dogs and might well be combined, but the subject should be retained in the Penal Law which covers other types of theft.

Section 194 of the Penal Law entitled "Running horses on highway" is used quite frequently by the Society in connection with injury to horses slipping and falling when running on hard pavement, and should not be repealed. It could well be strengthed to include a person riding a horse and modernized by referring to the "paved portion of a public thoroughfare" instead of "plank road, turnpike or public highway".

Section 194-a regarding clipping of ears of dogs is definitely an anti-cruelty provision and should not be confused with the regulatory provisions of the Agriculture and Markets Law pertaining to the licensing of dogs outside New York City. Since Section 194-a deals with an act of cruelty we believe it should remain within the Penal Law.

Section 195 of the Penal Law prohibits taking a dog outside the state to have its ears cropped and has been useful to the Society in its enforcement of Section 194-a and should not be repealed.

Section 195-a of the Penal Law relating to operating on tails of horses was declared unconstitutional by the New York City Court of Special Sessions on March 4, 1942 on the ground that the prohibition against showing a horse, the tail of which had been operated

upon outside the State of New York, was an interference with interstate commerce, violating Article I, Section 8, Clause 3 of the United States Constitution, the due process clause of the Fourteenth Amendment and the due process clause of the New York State Constitution (Article I, Section 6). This section should therefore be amended in such a way as to put an end to the cruelty involved in such an operation. When amended, however, it should be retained in the Penal Law as a part of the anti-cruelty laws of this state.

Criminal proceedings are now pending against the National Horse Show in New York City on the complaint of the Legion against Vivisection based on Section 195-a. These have resulted in a series of conferences between the American Horse Show Association, of which the National Horse Show is a member, the Legion against Vivisection and the A.S.P.C.A., out of which it is hoped will come a proposal to amend Section 195-a. We shall advise you of any such proposed amendment.

Section 196 of the Penal Law regarding interference with law enforcement officers is an essential part of the Penal Law and is distinguishable from Section 1824 which relates only to executive officers. It should not be repealed.

Section 197 of the Penal Law should not be repealed since it refers specifically to attacks by wild animals and reptiles while Section 1530 does not specifically mention animals.

Section 436-c, prohibiting the removal of an Agriculture and Markets Department ear tag, is administrative in its implications and might properly be transferred to the Agriculture and Markets Law.

Section 722-a prohibiting unmuzzled, ferocious or vicious dogs to be at large in the City of New York should not be repealed. It is a useful provision of the law, and as you state, not inconsistent with Section 161.05 of the New York City Health Code, requiring the licensing of dogs.

Section 933 of the Penal Law imposing a penalty for giving a false pedigree of an animal is regulatory or administrative in its scope and could be transferred to the Agriculture and Markets Law without losing its effectiveness.

We shall be glad to receive your further comments and would also welcome the opportunity for the writer and Col. Edmond M. Rowan, Director of Humane Work of the A.S.P.C.A. to confer with you and to work with your office on any revision that may be contemplated in the phraseology of laws relating to animals.

We are now working on an amendment to Section 331 of the Agriculture and Markets Law to make it apply to animals which in the first instance have been left with a society for the prevention of cruelty to animals or a humane society by the owner and we shall be glad to submit to you, if appropriate, our ideas for such an amendment.

Very truly yours,

THACHER, PROFFITT, PRIZER, CRAWLEY & WOOD,

By Howard B. Nichols

MEMORANDUM NO. 1

Penal Law Article 16, "Animals," contains twenty-one sections. Fourteen sections relate to cruelty to animals (§§180, 181, 182, 185, 186, 187, 189, 190 [misd.-felony], 190-a [felony], 192-a, 194-a, 194-b, 195-a, and 196.). Code of Criminal Procedure Part II, Title II, Chapter V is entitled "Duties of Public Officers in Enforcements of Laws Relating to Animals". This Chapter consists of six sections (§§117-a-117-f). These six sections were transferred from Penal Law Article 16 to the Code of Criminal Procedure by Laws 1940, Ch. 111, at the recommendation of the Law Revision Commission.

The staff recommends that these fourteen sections of the Penal Law be transferred to Agriculture and Markets Law under a new Article 25-C to be entitled "Cruelty to Animals," and that they be renumbered Agriculture and Markets Law §§334-347, respectively. It is also recommended that these six sections in the Code of Criminal Procedure be transferred to the same new Article and that they be renumbered Agriculture and Markets Law §§347-a-347-f.

Illinois: agriculture law
Wisconsin: Penal law: a new formulation (347.10)
(broader than the AL provision)

The Agriculture and Markets Law contains cognate subject matter, e.g., (a) Article 25-B, §§331-332 (added Laws 1961, Ch. 328) is entitled "Abandoned Animals;" (b) Article 7, §§106-127, relates to the licensing of dogs. Section 41 of this law reads, in part, that, except as otherwise provided by the Penal Law, a person who "violates any of the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, is guilty of a misdemeanor, and upon conviction shall, except as otherwise provided in this chapter, be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment for not less than one month, nor more than six months or by both such fine and imprisonment, for the first offense; and by not more than one year's imprisonment for the second offense." Sections 39 and 40 provide for civil penalties.

The Department of Agriculture and Markets approves the above staff recommendations. Counsel for the A. S. P. C. A. has the proposals under study. The following is a summary of the fourteen

Model Penal Code § 250.11 "Cruelty to Animals" (See Comments Draft 13, p40)
"The section does not... purport to be a substitute for multifarious specific regulations of the sale, transportation, exhibit... cock-fighting etc.
Note: § 6.01 "Degrees of Felonies": subd. 2 "Notwithstanding any other provision of law a felony defined by any statute of the State other than this Code

Penal Law Sections in Article 16 relating to cruelty to animals:

✓§180 defines "animal," "torture" and "cruelty".

✓§181 relates to the keeping of a place where animals are fought. (misd.)

✓§182 prohibits a person from instigating fights between animals. This misdemeanor section sets out the following punishment: "by fine not less than ten dollars, nor more than one thousand dollars, or by imprisonment of not less than ten days nor more than one year, or both." It is proposed that this penalty provision be deleted so that Agriculture and Markets Law §41 (a lesser penalty) would be applicable.

✓§185 prohibits, generally, cruelty to animals. It provides, in part, that "Nothing herein contained shall be construed to prohibit or interfere with any properly conducted scientific tests, experiments or investigations involving the use of living animals." (misd.)

✓§186 prohibits the abandonment of an animal. (misd.)

✓§187 relates to the failure to provide food and drink to impounded animals. (misd.)

✓§189 relates to the transportation of animals in a cruel manner (misd.)

✓§190 provides that a person who unjustifiably administers poison "to a horse, mule or domestic cattle" is guilty of a felony, punishable by imprisonment in a state prison for not more than five years. Unjustifiably administering poison to any other animal is a misdemeanor.

ASPCA opposes transfer

Question for Commission: shall this felony-misdemeanor distinction be eliminated? (Department of Agriculture and Markets took no position on this classification question.)

✓§190-a provides that a person who wilfully furthers any act "by which any horse, mule, dog or any other domestic animal used for the purposes of racing, breeding or competitive exhibition of skill, breed or stamina, is interfered with" is guilty of a felony, punishable by imprisonment in a state prison for not more than three years.

Question for Commission: shall this felony provision be transferred to Agriculture and Markets Law? (Department of Agriculture and Markets took no position on this classification question.)

§192-a provides that the unauthorized possession of a dog by a person not the true owner, for a period exceeding 10 days, without notifying the owner or the police of such possession, shall be presumptive evidence of larceny. This section was added to the Penal Law by Laws 1928, Ch. 610. (See §194-b, infra)

ASPCA: see comments under 194-b.

Question for Commission: shall this provision be transferred to Agriculture and Markets Law?

✓ §194-a relates to clipping or cutting the ears of dogs. The section requires, inter alia, that each application for a dog license state "whether any ear of the dog... has been cut off wholly or in part." (misd.)

ASPCA opposes: it is an anti-cruelty provision.

✓ §194-b prohibits the removal of the collar or license tag from any dog, without the owner's consent. This section also makes it unlawful for any person (a) to entice, seize or molest any dog, while it is being held or led by any person or while it is properly muzzled or wearing a collar with a license tag attached; and (b) to transport any dog, not lawfully in his possession for the purpose of killing or selling such dog. "Any person violating any of the provisions of this section, upon conviction thereof, shall be punished by a fine not to exceed ten dollars, or by imprisonment not to exceed ten days, or by both." The dog's economic value is an immaterial element of the offense.

p. 4 ASPCA: 192-a & 194-b might well be combined but subject should be retained in the P.L. which covers other types of theft. (Decs/L rule that a dog could not be the subject of larceny)

✓ §195-a relates generally to the cutting of the tissue or muscle of the tail of any horse, mare or gelding for the purpose of altering the natural carriage of the tail. (misd.)

ASPCA - pp 4 - 5: amend but retain in P.L.

§196 provides that any person "who shall interfere with or obstruct any constable or police officer or any officer or agent of any duly incorporated society for the prevention of cruelty to animals in the discharge of his duty to enforce the laws relating to animals shall be guilty of a misdemeanor." (misd.) (Cf. P. L. §1824, attempting to prevent an executive officer from performing any duty imposed upon such officer by law.)

ASPCA p. 5: opposes repeal.

Code of Criminal Procedure, Part II, Title II, Chapter V, "Duties of Public Officers in Enforcement of Laws Relating to Animals":

§117-a provides that a police officer or any agent of a society for the prevention of cruelty to animals may summon or arrest any person offending against any of the provisions of Article 16 of the Penal Law. (Conforming amendments will be made to references to specific sections, articles or chapters, where necessary.)

§117-b provides for the issuance of warrants upon complaint before a magistrate.

§117-c provides that an agent of a society for the prevention of cruelty to animals may lawfully take possession of any lost or abandoned animal found in any public place, or any animal which is improperly confined or unwanted.

§117-d sets out the procedure for the humane destruction or other disposition of animals lost, abandoned or improperly confined.

§117-e provides that an officer may take possession of animals or implements used in fights among animals.

§117-f sets out the procedure for the disposition of animals or implements used in fights among animals.

The following is a summary of the remaining seven Penal Law sections in Article 16, with staff recommendations as to disposition (Department of Agriculture and Markets approves these recommendations):

✓§185-a relates to the sale of baby chicks, (misd.) Recommendation: transfer to Agriculture and Markets Law Article 15-A, "Sales of Baby Chicks," §§175-m - 175-r, as new section 175-s.

ASPCA opposes transfer (see letter p.2)

✓§188 provides that any person who refuses upon demand to deprive of life an animal affected with certain diseases, is guilty of a misdemeanor. Agriculture and Markets Law Article 5, "Diseases of Domestic Animals, etc.," §§76-96, contains comprehensive legislation relating to the control and suppression of disease, examination and destruction of diseased animals, and the payment of indemnity to owners of such animals destroyed.

ASPCA opposes transfer p.2-3

Recommendation: transfer to Agriculture and Markets Law Article 5 as new section 90-i. See P. L. §1764, infra.

✓§188-a provides that it shall be unlawful for any person holding an auctioneer's license knowingly to receive or sell at public auction any disabled horse which could not be worked in this state without violating the law against cruelty to animals. A violation is punishable by a fine of not less than $5.00 nor more than $100.00, or imprisonment for 6 months or both.

p.3 ASPCA: should not be repealed. Transfer to Ag. & M.? Probably no objection to transfer to G.B.L.

Recommendation: transfer to General Business Law Article 3, "Auctions and Auctioneers," §§21-28, as new section 23. (G. B. L. §22 provides that "the common council of a city may designate such place within such city for the sale by auction of horses...as it deems expedient.")

✓§191 provides that a person who wilfully throws or places upon any road or public place, any glass, nails or other substance which might injure any animal is guilty of a misdemeanor. The provisions of this section are substantially similar to Penal Law §1434 (placing injurious substances on roads) which was repealed by Laws 1957, Ch. 698, §5. Vehicle and Traffic Law §1219 (a) prohibits putting glass and other injurious substances on a highway, likely to injure any person, animal or vehicle. Section 1219 (a) is substantially the same as former Penal Law §1434. However, Penal Law §1434 required (as does P. L. §191) wilfulness, while Vehicle and Traffic Law §1219 (a) "makes the act of throwing or depositing such substances illegal without any reference to the subjective state of mind of the thrower." Joint Legislative Committee on Motor Vehicle Problems. Leg. Doc. (1954) No. 36, at p. 110. And a violation of §1219 (a) constitutes a traffic infraction. See Vehicle and Traffic Law §1800.

ASPCA opposes repeal: pp. 3-4 Veh. & Traffic covers only "highway" whereas P.L. 191 covers any public place.

V & T §118 defines "highway": "The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular traffic."

Recommendation: repeal Penal Law §191

§194 reads as follows: " A person driving any vehicle upon any plank road, turnpike or public highway, who unjustifiably runs the horses drawing the same, or causes, or permits them to run, is guilty of a misdemeanor." The act proscribed by this section is covered in P. L. §185, supra, which provides that a person who overdrives any animal "or causes, procures or permits any animal to be overdriven" is guilty of a misdemeanor. In a report on Penal Law reform submitted in April, 1931, the City Club of New York wrote this comment on §194: "Running horses on a public highway or permitting them to run, constitutes a misdemeanor. Insofar as such practice might constitute cruelty to animals, it is amply covered in Section 185."

ASPCA appears p. 4 Section is used quite frequently & should not be repealed. ASPCA suggests amendments

Recommendation: repeal Penal Law §194.

§195 is similar to other sections scattered throughout the Penal Law, e.g., §§165, 712, 735, 1471, 1713, 2037 and 2096 (See also Penal Law §§1047, 1930(5) and Code Cr. Proc. §133). Penal Law §195 reads as follows: " A person who leaves this state with intent to elude any of the provisions of this article or to commit any act out of this state which is prohibited by them, or who, being a resident of this state, does any act without this state, pursuant to such intent, which would be punishable under such provisions, if committed within this state, is punishable in the same manner as if such act had been committed within this state."

ASPCA p 4: 195 has been useful in enforcement of 194-a: taking dogs out of state to have ears clipped.

See ALI §1.03 "Territorial Applicability" (p.4)

Recommendation: defer consideration of Penal Law §195 for discussion on jurisdiction of crimes (Code Cr. Proc. Part IV, Title I).

§197 provides that any person owning or possessing a wild animal or reptile capable of inflicting bodily harm upon a human being, who shall fail to exercise due care in safeguarding the public from attack by such wild animal or reptile is guilty of a misdemeanor. This provision was added to the Penal Law by Laws 1933 Ch. 251. The Association of the Bar of the City of New York, Committee on Criminal Law, made this observation on approving the legislation (Bulletin No. 6, March 15, 1933, Memo 31): "The bill seems to cover a real omission in the Penal Law. The only section on the subject is Section 1052, which includes in manslaughter in the second degree, the situation where an owner of a mischievous animal, knowing its propensities, wilfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large, and not confined, kills a human being, who has taken all the precautions, which the circumstances permitted, to avoid the animal. Where the injury inflicted is less than death the situation is not covered. The bill seems to be logical in eliminating lack of knowledge of the vicious propensities of the animal as a defense, since the fact that the animal is not of the ordinary domestic variety should be enough to put the owner or harborer on notice of the possibilities of injuries to persons."

Return in P.L.

See ALI § 211.2 "Recklessly Endangering Another Person". Comments, Tent Dr. 9 p. 86 cites §197 as one of several N.Y. statutes relating to reckless conduct.

Other sections cited:
194, 730-737 (dueling)
831 (exhibition)
1030 (hazing)
1276-1277 (snowballs)
1891-1892 steamboats
1904 (ice)
1904-a
1905
1909
1917
1919
1920

Note: the staff makes no recommendation to transfer Penal Law §197. The act proscribed by this section is essentially in the nature of a public nuisance.

The following is a summary of other Penal Law sections relating to animals, with staff recommendations as to disposition (Department of Agriculture and Markets approves these recommendations, except as indicated):

✓ §436-c provides that it shall be unlawful for any person to remove without authorization a New York State Department of Agriculture and Markets official ear tag in the ear of any living bovine animal or to insert or attach such a tag that has not been duly issued for that animal. (misd.)

ASPCA p.5: approves transfer

Recommendation: transfer to Agriculture and Markets Law Article 5, "Diseases of Domestic Animals; Calves and Veal; Pure Bred Stock; Certificates of Registry," §§72-96, as new section 95-a. See Penal Law §933, infra.

✓ §722-a reads as follows: "Any person who suffers any unmuzzled, ferocious or vicious dog to be at large in any thoroughfare or public place in the City of New York shall be guilty of disorderly conduct." This section was added by Laws 1939, Ch. 661. See New York City Health Code §161.05 (dogs to be restrained). A requirement to muzzle dogs under the former Sanitary Code provision was repealed August 11, 1942, in favor of the present mandatory requirement (in the Sanitary Code) for the use of a leash. However, the Penal Law provision (§722-a), enacted in 1939, continues to require a muzzle if a dog is "at large." Hence, if a dog is muzzled but not on a leash, there is a violation of the Sanitary Code, but not the Penal Law provision. This is not legally inconsistent. If an unmuzzled dog is not on a leash, then there is a violation of both sections.

ASPCA opposes repeal. (Query: transfer to N.Y.C. Adm. Code)

Recommendation: repeal Penal Law §722-a. (Department of Agriculture and Markets took no position on this proposal.)

✓ §933 provides that any person who by any false pretense obtains from any club or association for improving the breed of cattle, horses or other domestic animals, the registration of any animal in the herd register or other register, and every person who shall knowingly give a false pedigree of any animal, shall be guilty of a misdemeanor, and shall be imprisoned for a term not exceeding one year, or fined not more than $1,000.00 or both.

ASPCA approves transfer

Recommendation: transfer to Agriculture and Markets Law Article 5 as new section 95-b, but delete the specific penalty provision so that Agriculture and Markets Law §41 would be applicable. See Penal Law §436-c, supra.

✓ §1764 provides that a person who knowingly sells, except under the supervision of the Commissioner of Agriculture and Markets, any tuberculous bovine animal, is guilty of a felony.

ASPCA approves transfer

Recommendation: transfer to Agriculture and Markets Law Article 5, "Diseases of Domestic Animals, etc," §§72-96, as new section 73-a, but changing the grade of crime from felony to misdemeanor See Penal Law §188, supra.

The following is a summary of other Penal Law sections relating to agriculture and markets, with staff recommendations as to disposition (Department of Agriculture and Markets approves these recommendations):

Dead-letter Repeal

§432 provides that a person "who charges for elevating, receiving or discharging grain by means of floating or stationary elevators a greater sum than is allowed by law is guilty of a misdemeanor." This section was added to the Penal Code by Laws 1896, Ch. 551. The sum allowed by law was fixed by L. 1896, ch. 376, §32, as amended by L. 1903, ch. 366, L. 1918, ch. 335, L. 1947, ch. 655 (§396, General Business Law). This legislation was upheld by the Court of Appeals, and similar provisions were upheld in the leading case of Munn v. Illinois (1876) 94 U. S. 113. However, in 1949, §396 of the General Business Law was repealed. L. 1949, ch. 96.

Recommendation: repeal Penal Law §432.

Code treats this under "Deceptive Business Practices" §224.7 (p.179)

§434 provides that a person who, with intent to defraud, while putting up in a package, any article of merchandise, usually sold by weight in such packages, places or conceals therein any other substance or thing whatever, in a case where special provision for the punishment thereof is not otherwise made by statute, is guilty of a misdemeanor.

Recommendation: transfer to Agriculture and Markets Law Article 16, "Weights and Measures," §§176-197, as new section 194-e.

Code treats this under §224.7

§435, subdivisions 1 and 2, relate to the false description of any article of merchandise (see Penal Law §420, definition of "articles of merchandise"); subd. 3 relates to the false representation of goods sold in bulk. Subdivision 4 relates to the sale of Kosher food products. (misd.) In a study of New York trade mark legislation, Prof. Milton Handler wrote: "Section 435 provides that any person is guilty of a misdemeanor who, with intent to defraud: (1) puts on any article, or a label, container or wrapping, a false description or other indication of number, quantity, weight, or the place where the article was made or produced, or the quality or grade; (2) knowingly sells an article which is falsely described; or (3) sells goods in bulk without a trade mark, and represents 'orally or otherwise,' that they are the manufacture of someone other than the actual manufacturer--in cases where the punishment for such an offense is not specially provided for otherwise by statute. (subdivision 4 relates to sale of 'Kosher' meat.) Subdivisions 1 and 2 cover false labelling in general but would also cover some trade-mark offenses, since marks often indicate the place of manufacture. Subdivision 3, insofar as it covers misrepresentation through use of a label or mark, merely duplicates §2354. Prohibition of false labelling is a matter of business regulation rather than of trade-mark law." Leg. Doc. (1953) No. 65T, at 41. The Law Revision Commission, however, prepared no legislation to repeal or amend this section.

Recommendation: (a) transfer Penal Law §435, subdivisions 1, 2 and 3 to General Business Law, Article 26, "Miscellaneous," §§390-399-a, as new section 392. This Article 26 treats of cognate subject matter, e. g., §390 relates to the substitution of oil ordered by a distinctive trade name; §391 requires re-capped tires to be so labelled; and §393 relates to the sale of lime in barrels; the latter two sections are misdemeanors. The Department of Agriculture and Markets took no position on this proposal (See Penal Law §§435-d, 436 and 436-a, infra). (b) repeal Penal Law §435, subdivision 4. This provision, added in 1915, is duplicative of Penal Law §§435-a, 435-b, and 435-c, added in 1922, 1926, and 1938, respectively. These latter three sections are duplicative of provisions in Agriculture and Markets Law, discussed infra.

§§435-a, 435-b and 435-c relate to the sale and identification of Kosher food products. (misd.) They are duplicative of Agriculture and Markets Law §§201-a, 201-b and 201-c, added Laws 1942, Ch. 203; §201-d provides that any violation of these three sections shall be a misdemeanor punishable by imprisonment for not more than one year, or by a fine of not more than $500.00, or both.

Recommendation: repeal Penal Law §§435-a, 435-b and 435-c.

§435-d provides that it shall be unlawful to remove or conceal from or upon an article or merchandise the mark of origin. (misd.) Code speaks of "mislabeled"

Recommendation: transfer to General Business Law Article 26, as new section 392-a. See Penal Law §435, supra, recommendation (a).

§436 provides that it shall be unlawful to manufacture or sell any article which falsely identifies the manufacturer. Prof. Handler wrote this comment: "Section 436 makes it a misdemeanor to make or knowingly to sell, with intent to defraud or help another to defraud, any article marked with, or enclosed in a container marked with, a label or trade-mark, if the article is not made by the person denoted by such mark. This duplicates §2354." The Law Revision Commission, however, prepared no legislation to repeal or amend this section. (misd.)

Code §224.7

Recommendation: transfer to General Business Law Article 26, as new section 392-b. See Penal Law §435, supra, recommendation (a).

§436-a, subdivisions 1 and 2, provide that it shall be unlawful to wilfully remove or deface the manufacturer's serial number on any motor vehicle or on any mechanical device, or to knowingly buy, sell or receive or have in one's possession a vehicle or mechanical device from which such number has been removed or defaced. A violation constitutes a felony. A violation of subdivisions 3 and 4, relating to any machine or electrical or mechanical device not included in subdivisions 1 and 2, constitutes a misdemeanor.

Question for Commission: shall Penal Law §436-a be transferred to General Business Law Article 26 as new section 392-c? See Penal Law §435, supra, recommendation (a). The Department of Agriculture and Markets took no position on this proposal.

§438 provides that a person who sells milk from which the cream has been skimmed or removed, must disclose this fact on a label affixed to every can or vessel containing the same. (misd.) Agriculture and Markets Law Article 4, "Dairy Products," §§46-71, contains cognate subject matter, e. g., §46(8) defines skimmed milk; §64 sets out regulations in regard to skimmed milk.

Recommendation: transfer to Agriculture and Markets Law as new section 64-a.

§927 reads as follows: "A person who wrongfully and fraudulently enters any agricultural fair grounds, without paying the entrance fee is guilty of a misdemeanor." See Agriculture and Markets Law Article 2-A, Division of the State Fair §§31-31-c; and Article 24, Promotion of Agriculture and Domestic Arts; Agricultural Societies §§286-291. Also see Membership Corporation Law, Article XVII, Agricultural and Horticultural Corporations §§200-209; §205 of this latter law provides, in part, that a policeman "may arrest without a warrant, any person who he has reasonable cause to believe has unlawfully and fraudulently entered the exhibition grounds of such corporation without paying the entrance fee therefor." The section also provides that a policeman shall "eject all persons...who neglect or refuse to pay the entrance fee." Penal Law §927 and Membership Corporation Law §205 are both derived from L. 1859, ch. 36.

This is treated in Code §223.7 "Theft of Services"

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Recommendation: transfer to Agriculture and Markets Law Article 24 as new section 289.

§932-a, added Laws 1941, Ch. 420, relates to the unauthorized possession of food order stamps, and to the exchange of such stamps in violation of the regulations prescribed by the United States Secretary of Agriculture. (misd.)

Recommendation: transfer to Agriculture and Markets Law Article 3, "Investigations; Practice and Procedure; Violations; Penalties," §§32-45-a, as new section 45-b.

§1749 prohibits the sale of adulterated natural fruit juices. (misd.) A violation is punishable by a fine of not more than $250.00, or by imprisonment for not more than six months, or both. See Agriculture and Markets Law Article 17, "Adulteration, Packing, and Branding of Food and Food Products," §§198-214-c.

Code 224.7

Recommendation: transfer to Agriculture and Markets Law Article 17 as new section 204-d, but delete the specific penalty provisions so that Agriculture and Markets Law §41 would be applicable.

§1750 reads as follows: "A person who with intent that the same be used as food, drink, or medicine sells, or offers or exposes for sale, any article whatever which, to his knowledge, is tainted or spoiled, or for any cause unfit to be used as such food, drink, or medicine, is guilty of a misdemeanor."

Code 224.7

Recommendation: transfer to Agriculture and Markets Law Article 17 as new section 199-c. See Penal Law §1749, supra.

§1757 prohibits the spraying of poisons to fruit trees or any alfalfa and clovers grown as field crops while in blosson, but the Commissioner of Agriculture and Markets may permit the use of specific sprays. (misd.) A violation is punishable by a fine of not less than $10.00 nor more than $50.00. See Agriculture and Markets Law Article 14, "Prevention and Control of Disease in Trees and Plants; Insect Pests; Sale of Fruit-Bearing Trees," §§161-169.

Recommendation: transfer to Agriculture and Markets Law Article 14 as new section 169-a, but delete the specific penalty provisions so that Agriculture and Markets Law §41 would be applicable.

Penal Law Article 216, "Weights and Measures," §§2410-2416.

Penal Law Article 216 contains eight sections. Four sections are misdemeanors (§§2410, 2411, 2412 and 2416), and the remaining four contain procedural provisions (§§2413, 2414, 2414-a, and 2415). Six of these eight sections are derived from the Field Penal Code of 1864 (Title XV, Chapter X); and this Code adopted language from the Revised Statutes. The other two sections (§§2410 and 2414-a) were added in 1899 and 1911, respectively. Agriculture and Markets Law Article 16, "Weights and Measures," §§176-197, and Article 16-A, "Weighing and Selling of Coal, Coke and Charcoal," §§197-a-197-m, contain legislation on this subject more comprehensive in scope and more meaningful to present-day conditions than Penal Law Article 216. One initial objection to the repeal of Article 216 was that some city, county and state weights and measures officials occassionally draft a complaint under the Penal Law provisions, rather than the Agriculture and Markets Law because not all local magistrates have a copy of the Agriculture and Markets Law readily available. Nevertheless, the Department of Agriculture and Markets approves the staff recommendation to repeal in toto Penal Law Article 216.

The following is a comparison of the Penal Law sections and their counterparts in the Agriculture and Markets Law:

§2410 reads as follows: "Where potatoes, grains or other agricultural products are sold by the bushel, without agreement as to the weight, any person requiring a greater number of pounds for a bushel than as prescribed by section eight of the general business law is guilty of a misdemeanor." General Business Law §8 was repealed by Laws 1922, ch. 48. The subject

AL-1 § 224.7 "Deceptive Business Practices": use of false weights, sale of adulterated or mislabeled commodities

matter in §8 was transferred to Agriculture and Markets Law §190. This latter section was repealed by Laws 1939, ch. 739. Penal Law §2410 is presently a "dead-letter."

§2411 reads as follows: "A person who injures or defrauds another by using, with knowledge that the same is false, a false weight, measure, or other apparatus, for determining the quantity of any commodity, or article of merchandise, or by knowingly delivering less than the quantity he represents, is guilty of a misdemeanor."

Agriculture and Markets Law §188 reads as follows: " For the purpose of purchase, sale or service, no person shall use a false weight, measure, or other apparatus for determining the quantity of any commodity or article of merchandise.

If he be the seller, he shall not sell or deliver less of any such commodity or article of merchandise than the quantity represented to be sold; or, if he be the buyer, he shall not receive or accept more of any such commodity or article of merchandise than the quantity he represented to purchase.

No person shall determine a service charge on an amount in excess of the quantity of any such commodity or article of merchandise serviced. Nothing in this provision, however, shall prohibit the person or persons rendering the service from establishing a minimum charge therefor, such minimum charge to apply to all quantities up to and including a fixed limit, regardless of the actual weight or measure of the merchandise involved. In the event of the establishment of a minimum charge, the dispenser of the service shall inform the person receiving the service, by advertisement or otherwise, of the terms of such minimum charge." Section 188, a strict liability provision, does not require culpability as a prerequisite to conviction (Cf. Penal Law §2414-a, infra). A violation of any provision in the Agriculture and Markets Law constitutes a misdemeanor under §41.

§2412 reads as follows: "A person who retains in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it was so retained without intent to use it, or permit it to be used in violation of the last section, is guilty of a misdemeanor."

Agriculture and Markets Law §187 reads as follows: "No person shall retain in his possession any weighing or measuring device, knowing it to be false, unless it appears beyond reasonable doubt that it was so retained without intent to use it or permit it to be used for determining the quantity of any commodity or article of merchandise."

§2413 reads as follows: "A person who is authorized or enjoined by law to arrest another person for a violation of the last two sections, is equally authorized and enjoined to seize any false weights or measures found in the possession of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken."

Agruculture and Markets Law §186 reads as follows: "A city, county or state weights and measures official may condemn and seize any weighing or measuring device found by him to fail to conform to the standards in his possession and which is not caused by him to conform to such standards and cause the same to be destroyed or disposed of under such regulations as the commissioner may prescribe."

§2414 reads as follows: "The magistrate to whom any weight or measure is delivered pursuant to the last section, must, upon the examination of the defendant, or if the examination is delayed or prevented, without awaiting such examination, cause the same to be tested by comparison with standards conformable to law; and if he finds it to be false, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice in his judgment require."

Agriculture and Markets Law §185 reads, in part, as follows: "Whenever any city, county or state weights and measures official inspects any weighing or measuring device and finds that it does not correspond and does not cause it to correspond with the standards in his possession he shall condemn the same." Cf. Agriculture and Markets Law §186, supra.

§2414-a reads as follows: " The possession or use by any person of any false weight, measure or other apparatus for determining the quantity of any commodity or article of merchandise is presumptive evidence of knowledge by such person of the falsity of such weight, measure or other apparatus."

Agriculture and Markets Law §188, supra, does not require knowledge to establish liability.

§2415 reads as follows: "Upon the conviction of the defendant, the district attorney must cause any weight or measure in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney, to be destroyed."

See Agriculture and Markets Law §186, supra.

§2416 reads as follows: "A person who knowingly marks or stamps false or short weights, or false tare on any cask or package, or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor. "

Agriculture and Markets Law §189 reads as follows: " No person shall, with intent to defraud, put upon an article of merchandise or upon a cask, bottle, stopper, vessel, case, cover wrapper, package, ban., ticket, label or other thing, containing or covering such an article, or with which such an article is intended to be sold, or is sold, any false description or false indication of or respecting the number, quantity, weight or measure of such article or any part thereof; or sell or offer or expose for sale an article which to his knowledge is falsely described or indicated in any of the manners or in any of the particulars above specified. "

June 6, 1962
PJMcQ/pjc

MEMORANDUM NO. 2

Penal Law Article 26, "Banking," §§290-306.

Penal Law Article 26 contains fifteen sections. Ten sections are misdemeanors, two sections are felonies (§§304-305), one section is both a misdemeanor and a felony depending on the amount involved (§295), and one section relates to definitions and presumptions (§306). The most recent amendment to the Article was Laws 1961, Ch. 612, adding matter to §298.

The Banking Law contains a number of sections with misdemeanor provisions, e. g., :

§38. Failure to obey a Banking Department subpoena.

§41. Directors, trustees and officers participating in the management of a banking organization after removal from office.

§71. Any violation of Article II-A is a misdemeanor; and certain false statements and false entries are misdemeanor

§145. Any violation of Article III-A is a misdemeanor.

§180. A violation of any provision of this section is a misdemeanor.

§373. Any violation of Article IX-A is a misdemeanor.

§563. Any violation of Article XII-B is a misdemeanor.

Staff recommendation: transfer all 15 sections of Penal Law Article 26 to the Banking Law as new Article XIII-A, entitled * "Miscellaneous," and numbered as Banking Law §§640-654, respectively. The Banking Department wrote the following: "An entirely new Article in the Banking Law would seem an appropriate place to transfer such penal provisions, rather than scattering them throughout the statute.' (See attached letter.)

The following is a summary of the fifteen sections in Penal Law Article 26:

§290. relates to the misconduct of officers, directors, trustees, or employees of banking corporations, e. g., it prohibits a director from concurring in any vote or act of the board by which it is intended to make a loan or discount to any other director of the bank.(misd.)

§293. prohibits an officer or agent of the bank from making a guaranty or indorsement beyond the legal limits.(misd.)

* letter dated 7/21/62 from Bob Bentley: "You probably should think up something more descriptive than 'Miscellaneous' for new Article XIII-A of the banking law."

§294. relates to directors, officers or employees who
(a) knowingly overdraw their own account in the bank, or

(b) ask for or receive commissions or gratuities from persons procuring loans or making overdrafts of their accounts. (misd.)

ALI §224.8 "Commercial Bribery + Breach of Duty to Act Disinterestedly"

#

As to latter provision cf. Penal Law §439 (corrupt influencing of employees); as to the first provision, the act proscribed is essentially larceny.

§295. provides that an officer or employee of a bank who receives any deposit, knowing that such bank is insolvent is guilty of a misdemeanor if the amount of the deposit is less than $25.00, and of a felony if the amount is $25.00 or over.

ALI §224.12 "Receiving deposits in a Failing Financial Institution." (misd.)

#

Question for Commission: shall this section be transferred to the Banking Law with the felony provision?

§296. prohibits unauthorized investments of the funds of a savings bank. (misd.)

§297. provides that a director of a bank who, in case of the fraudulent insolvency of such corporation, shall have participated in such fraud is guilty of a misdemeanor. The section defines fraudulent insolvency, It also prohibits a director from doing any act as such director which is expressly forbidden by statute. (misd.) Cf. Penal Law §1197-a, similar provision relating to insurance corporations.

§298. relates generally to misconduct by banks and bankers, e. g., issuring as money within this state any bank bill in the similitude of a bank note issued by any corporation situated without the state. (misd.)

§299. prohibits a person from receiving any bank bill in the similitude of a bank note issued by any corporation situated without this state, at a greater rate of discount than is fixed by law. (misd.)

§301-a. prohibits the use by any person of a bank check that has printed thereon a reproduction of any public building or governmental insignia. (misd.)

§302. proscribes the unauthorized use of the term "bank" or "trust company." (misd.)

§302-a. prohibits any person from acting for a foreign banking corporation not authorized to do business in this state. (misd.)

§303. prohibits any person from wilfully and knowingly circulating any false statement or rumor which is derogatory to the financial condition of any bank. (misd.)

§304. relates to officers, directors, trustees, employees or agents of any corporation to which the banking law is applicable, or of any insurer to which the insurance law is applicable. (The provision relating to the insurance law was added to this section by Laws 1945, Ch. 91.) It provides further that any such person who makes a false entry in any book, report or statement of such corporation with intent to deceive any officer,

director or trustee thereof, or any examiner, public officer, office or board to which such corporation is required by law to report, or which has authority by law to examine into its affairs, or who, with like intent wilfully omits to make a true entry, is guilty of a felony. Subdivisions 2 and 3, relating to private bankers, contain similar prohibitions and likewise punish violations as a felony.

The Banking Department observed (see attached letter) that since subdivision 1 relates to insurers as well, "some action would seem desirable, possibly consisting of enactment of two new sections, one applicable to employees of banking corporations and the other to employees of insurance corporations, and their addition respectively to the Banking Law and the Insurance Law, in order not to bury in the Banking Law a penal provision applicable to employees of insurance companies." It should be noted that Banking Law §71 (7)(c) presently provides that it shall be a misdemeanor for any person to make a false entry in any book, record, report or statement required to be kept under Article II-A, with intent to deceive any one authorized to make examinations of such papers.

Question for Commission: shall the felony provisions of Penal Law §304 be transferred to the Banking and Insurance Laws?

§305 reads: " Any officer, director, trustee, employee or agent of any corporation to which the banking law is applicable, or any employee or agent of any private banker, who abstracts or wilfully misapplies any of the money, funds or property of such corporation or private banker, or wilfully misapplies its or his credit, is guilty of a felony. Nothing in this section shall be deemed or construed to repeal, amend or impair any existing provision of law prescribing a punishment for any such offense."

Question for Commission: shall this felony provision be transferred to the Banking Law?

§306. provides that it is no defense to a prosecution for a violation of the provisions of this article, that the corporation is a foreign corporation, if it carries on business in this state. The section, inter alia, defines the term "director," and provides that a director is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act or omission of its directors is a violation of this article.

Penal Law Article 39, "Budget Planning," §§410-412

This article, added by Laws 1956, Ch. 31, contains three sections. §410 defines "budget planning" as the making of a contract with a particular debtor whereby the debtor agrees to pay a sum of money periodically to the person engaged in the budget planning who shall distribute the money among certain specified creditors in accordance with a plan agreed upon, and the debtor agrees to pay this person a consideration for such services. An attorney is excluded from the operation of this article. §411 states that budget planning is prohibited. §412 states that a violation constitutes a misdemeanor punishable by a fine of not more than $500.00 or by imprisonment for not more than six months, or both. The staff earlier recommended that Penal Law Article 39 be transferred to Debtor and Creditor Law as a new Article 2-B immediately following Article 2, "General Assignment for Benefit of Creditors," §§2-24, and Article 2-A "Secured Creditors," §§30-38. However, the Banking Department wrote that "there is a minor objection to moving the provisions of Penal Law Article 39 ("Budget Planning") to the Debtor and Creditor Law. The appearance of such provisions in the latter statute may create an impression that they are intended as a restriction upon the administration of general assignments for the benefit of creditors. Perhaps the General Business Law would afford a more suitable place for a prohibition against engaging in the business of budget planning."

Recommendation: transfer Penal Law Article 39, §§410-412, to General Business Law as new Article 5-A, "Budget Planning," to be numbered as General Business Law §§55-57, respectively.

Penal Law Article 214, "Usury," §2400.

The single section in this article prohibits a person from taking security upon any household furniture, sewing machines, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelery, for a loan conditioned upon the

Dick Denzer suggests a broad usury provision in the P.L. Loan-sharks today are prosecuted under the Banking Law (Eso. limit)

payment of more than 6%, or who as security for such loan makes a pretended purchase of such property from any person, upon the like condition, and permits the pledgor to retain the possession thereof (misd.). See General Business Law Article 25, "Interest and Usury," §§370-382-b, and Banking Law §§108, 173, 235-b, 293-a, 453 (5) and 510-a relating to usury. Banking Law Article 9 "Licensed Lenders," §§340-365, regulates loans under $800.00; §358 provides that a violation of certain sections of this article constitutes a misdemeanor. The Banking Department made the following comment: "Penal Law Article 214 ("Usury"), consisting of one section (§2400) presents a somewhat different problem, in that the various usury provisions are found not only in the Banking Law, but also in Article 25 of the General Business Law. It would seem more appropriate to transfer Penal Law Article 214 to the General Business Law, since Article 214 does not relate exclusively to the taking of unlawful interest by institutions subject to the Banking Law, such transactions being more specifically covered in existing provisions of the Banking Law (see e. g., Banking Law §§108[6], 235-b, 293-a, 358)." (See attached letter)

<u>Recommendation</u>: transfer Penal Law §2400 to General Business Law Article 25 as new section 382-c.

COPY COPY COPY

State of New York

BANKING DEPARTMENT

100 Church Street
New York 7, N. Y.

OREN ROOT
Superintendent of Banks

May 8, 1962

The Honorable Richard J. Bartlett
Chairman, Temporary Commission on
Revision of the Penal Law and Criminal Code
Room 654, 155 Leonard Street
New York 13, N. Y.

Dear Mr. Bartlett:

Thank you for your letters of April 17 and April 23, addressed to Superintendent Root, of which we have previously acknowledged receipt.

Your April 17 letter requests this Department's views as to whether Penal Law Articles 26 ("Banking") and 214 ("Usury") and Penal Law §666 ("Unlawful use of certain titles in connection with corporate name") should be transferred to the Banking Law, and if so, where in the latter statute such provisions should be located.

The April 23 letter requests the Department's evaluation of a proposal to transfer (without substantive change) the provisions of Article 39 of the Penal Law ("Budget Planning") to Article 2-B of the Debtor and Creditor Law, renumbering Penal Law §§410-411 and 412 as Debtor and Creditor Law §§40, 41 and 42, respectively.

It may be useful to consider these proposals seriatim and in some detail.

It appears that the first proposal (your letter of April 17) is predicated on the approach of the Commission that a proper penal code should contain only the more fundamental offenses, while provisions essentially of a regulatory nature to which criminal sanctions are attached should be located within the chapter of the Consolidated Laws which relates most directly to the regulatory aspects.

Turning to the specific Penal Law provisions which are proposed to be transferred to the Banking Law, the following comments occur to us:

Penal Law Article 26 ("Banking") contains a number of sections directed to banking organizations within the supervisory jurisdiction of the Banking Department or to their officers, directors, agents and employees (Section 290, 293, 294, 295, 296, 297,298. 304, 305). Several other sections, while of a more general character, also relate to banking, or to transactions having a direct effect upon banking or upon banking institutions (Sections 299, 301-a, 302, 303). Finally, Section 306 provides certain presumptions which apply in prosecutions brought under the other sections.

It would seem appropriate, in this Department's opinion, for convenience and the other reasons noted by you, to move such sections from the Penal Law to the Banking Law. It should be noted, however, that Section 304(1), relating to falsification of books

reports or statements, covers not only such offenses committed by persons employed by banking corporations, but also by those employed by "any insurer to which the insurance law is applicable". Accordingly, some action would seem desirable, possibly consisting of enactment of two new sections, one applicable to employees of banking corporations and the other to employees of insurance corporations, and their addition respectively to the Banking Law and the Insurance Law, in order not to bury in the Banking Law a penal provision applicable to employees of insurance companies.

An entirely new Article in the Banking Law would seem an appropriate place to transfer such penal provisions, rather than scattering them throughout the statute.

Penal Law Article 214 ("Usury"), consisting of one section (§2400) presents a somewhat different problem, in that the various usury provisions are found not only in the Banking Law, but also in Article 25 of the General Business Law. It would seem more appropriate to transfer Penal Law Article 214 to the General Business Law, since Article 214 does not relate exclusively to the taking of unlawful interest by institutions subject to the Banking Law, such transactions being more specifically covered in existing provisions of the Banking Law (see e.g., Banking Law §§108[6], 235-b, 293-a, 358).

Penal Law §666 ("Unlawful use of certain titles in connection with corporate name") prohibits the use of titles which would give the misleading impression that the user is a "moneyed" corporation. Since insurance corporations, as well as banking corporations, are "moneyed corporations" (see definition in General Corporation Law §3[6]), it would seem that transfer of Penal Law §666 in its present form to the Banking Law would not serve the purposes of the proposed revision. Perhaps Section 666 should be carved into two new sections in the manner suggested above for Section 304(1). In this connection, Penal Law §663 presents a similar problem.

With respect to your letter of April 23, there is a minor objection to moving the provisions of Penal Law Article 39 ("Budget Planning") to the Debtor and Creditor Law. The appearance of such provisions in the latter statute may create an impression that they are intended as a restriction upon the administration of general assignments for the benefit of creditors. Perhaps the General Business Law would afford a more suitable place for a prohibition against engaging in the business of budget planning.

The Department appreciates very much your thoughtfulness in taking up these matters with us. Please do not hesitate to advise if we can be of any further assistance.

Sincerely yours,

s/ Boris S. Berkovitch
Deputy Superintendent and Counsel

PJMcQ/pjc
June 13, 1962

MEMORANDUM NO. 3

Penal Law Article 206, "Trade-Marks," §§2350-2357.

Prior to 1954, General Business Law Article 24, "Trade Marks," consisted of thirteen sections, §§360-369. Present General Business Law Article 17-A, added by Laws 1954, ch. 629, derives in part from former Article 24. Before being repealed by Laws 1954, ch. 629, Article 24 provided for permissive registration of marks used for enumerated products sold in specified types of containers; prohibited various acts in relation to such containers and imposed misdemeanor penalties for their misuse; created certain presumptions of illegality and provided a summary procedure for the recovery of such containers.

In 1952 Prof. Milton Handler made a study of the New York bottling and trade-mark laws at the direction of the Law Revision Commission. Leg. Doc. (1953) No. 65T, at 21. He noted (at 29-32) that some of the provisions of Penal Law Article 206 concern general trade-mark law (§§2350-2354), while some repeat part of the bottling legislation contained in (former) Article 24 of the General Business Law:

> "Section 2355 corresponds to §§360-362 of the General Business Law, but is much shorter; there are also numerous differences in phraseology. It provides that any person 'making, bottling,packing, selling or disposing of milk, ale, beer, cider, mineral water or other beverage, or...articles of pastry, may register his title as owner of a trade-mark' used in his business--except that a mark is not registrable if it 'is not and cannot become a lawful trade-mark, or ... is merely the name of a person, firm or corporation unaccompanied by a mark sufficient to distinguish it from the same name when used by another person.'
>
> Although the section is entitled,'Refilling or selling trade-mark bottles and vessels,' its registration provisions are not so limited. Under the strict wording of the statute it would appear possible for organizations such as A & P and other food chains, which are engaged in 'selling' the named

products, to register their marks.

Furthermore, since there is no restriction on the types of containers that may be used (cf. §§360 and 361 of the General Business Law), marks used on paper containers would appear registrable, which is not true under §360.

With these two exceptions, any mark registrable under §2355 is also registrable under §§360 or 361. The converse is not true, however, for the proviso restricting registration to marks which can be 'lawful trade-mark(s)' makes §2355 much more limited in scope than the other two sections.

The number of products enumerated in §2355 is only about one-fourth of those listed in §§360 and 361. However, this does not reduce its coverage proportionately in view of the apparent duplications in other sections. Nevertheless, the difference of language creates unresolved problems of coverage which are puzzling. For example, are ice cream, confectionery and jellies to be regarded as articles of pastry?

The registration procedure under §2355 consists of (1) filing a description of the mark with the secretary of state and the clerk of the county in which the registrant's principal place of business is located (same as under §§360 and 361, except that the latter sections also provide that if the principal place of business is outside the state, the description may be filed in any county), and (2) publishing the description once a week for three weeks in a newspaper in the county, except daily for three weeks 'in the city of New York or Brooklyn.' This latter provision ignores the merger of the cities of New York and Brooklyn; quaere whether the use of the words 'city of New York' will be held to cover all five boroughs? The publication requirement differs from §§360 and 361.

Section 2355 provides further, that:

> After such registration, the use without the consent of the owner of the trade-mark so described,

or the filling of any bottle, siphon, barrel, platter, vessel, or thing for the purpose of sale, or for the sale, therein, of any article of the same general nature and quality which said bottle, siphon, barrel, platter, vessel or other thing before contained, without the obliteration or defacement of the trade-mark upon it, when such trade-mark can be obliterated or defaced without substantial injury to the bottle, siphon, barrel, platter, vessel or other thing so as to prevent its wrongful use, shall be deemed a misdemeanor.

The prohibition against use is doubly ambiguous. It is not clear whether the language forbids use of the trade-mark, or use of the container without consent of the owner of the trade-mark. If it is use of the trade-mark, it is not clear whether any infringement is forbidden, or merely use of trade-marked containers. If the former, the section is of general application to all trade-marks and is not to be classified as a bottling act. If the latter, the relationship between use and refilling remains obscure. Is not refilling an improper use? If so, why the separate prohibition of use and refilling?

The provisions relating to refilling are quite different from those found in §§360 and 361 of the General Business Law. Under this section, it is a misdemeanor to fill a marked container with an 'article of the same general nature' as the original contents, without obliterating the mark if that can be done without substantial injury to the container.

The proviso concerning obliteration appears designed to protect the public against deception, i. e., is a trade-mark provision--as compared with the General Business Law which prohibits obliteration in order to protect the owner's property rights. However, the prohibition applies only if (a) the container is filled with a similar article (but not necessarily

the identical article), and (b) the mark can be obliterated but is not. The wording permits of the reading that if a different product is used, or if the mark cannot be obliterated without injuring the container, the container may be filled and sold with the mark on it. This manifestly cannot have been the legislative intent, as appears clearly enough from the words 'so as to prevent its wrongful use.'

Section 2356 is sufficiently short to warrant quotation in full.

> §2356. Keeping trade-marked bottles and vessels with intent to refill or sell them.
>
> Any person, engaged in the business of buying and selling bottles, siphons, barrels, platters, or other vessels, or things, who shall with intent to defraud the registered owner of the trade-mark, knowingly sell or offer for sale any bottle, siphon, barrel, platter, vessel, or other thing, to any person, who he has reason to believe wrongfully intends to use the trade-mark upon it, or to fill such bottle, siphon, barrel, platter, vessel or other thing in violation of section twenty-three hundred and fifty-five, shall be deemed guilty of a misdemeanor.

Under this section only a sale or offer for sale by a person engaged in the business of buying and selling containers is unlawful, and then only if (1) there is intent to defraud the registered owner, and (2) the sale is to a person the seller believes will violate §2355; proof of these two items will usually be quite difficult. The corresponding provisions of §362 are much broader; they flatly prohibit sale, gift or traffic in marked containers, and require no proof of fraudulent intent or of reason to believe in the illegal intent of the buyer. There is of course some overlap with §2355 which also deals with sales of marked containers.

Section 2357, which corresponds to §364, provides that

whenever a registered owner of a trade-mark or his agent makes oath before a magistrate that he has reason to and does believe, stating the grounds for his belief (not required under §364), that a container bearing his mark is being used, filled, sold, or offered for sale 'in violation of the preceding section,' [This is an erroneous reference, as it now reads, since the 'preceding section'--2356--says nothing about use or filling of containers. The statute should read 'preceding sections.'] the magistrate 'may' issue a search warrant to discover the container, and have the person possessing it brought before him; he may then inquire into the circumstances, and if he finds the person guilty, may hold him to bail for grand jury action; the offender is expressly declared liable, in addition, to a law action for damages for wrongful use of the trade-mark, or to an equity action for an injunction and damages.

This section differs in several respects from §364. First, and most important, it makes no provision for the awarding of the containers to the owner by the magistrate, and since this is expressly provided in §364, it does not seem likely that it will be held to be implied in §2356. Second, the jurisdiction of the magistrate appears discretionary-- he 'may' issue a search warrant--whereas under §364 it is mandatory. Third, the magistrate is not given power to try the offender, but only to hold him for the grand jury. On the other hand, the offender is here declared liable in a civil action for the damage caused to the owner by 'wrongful use of the trade-mark;' while §364 is silent on this point. It may be questioned, however, whether this provision of §2357 does more than restate the law, since wrongful use of a valid common law trade-mark--the only kind protected by §§2355-2357--will support a civil action without this provision. §364, on the other hand, covers marks which are not valid as trade-marks, and it would therefore be natural for it to omit the

provision in question.

Some reconciliation of the General Business Law and the Penal Law is possible. The General Business Law is concerned primarily with the protection of the owner's property rights in his containers and only incidently with the prevention of a fraud on the public. The Penal Law is most concerned with such misuse of containers as deceives the public, while affording some protection of the owner's property rights."

Prof. Handler commented as follows on Penal Law §§2350-2354, which deal with wilful and fraudulent infringement of trade-marks (Id at 40-41):

"Section 2350 defines 'trade-mark' as 'a mark used to indicate the maker, owner or seller of an article of merchandise'; it specifically includes, 'among other things,' 'any name...letter, word, device, emblem...diagram...wrapper... label or other mark, lawfully adopted...and usually affixed to an article of merchandise' to denote that the person using it imported, made, sold, bottled, packed or otherwise prepared the article; signatures on artists' works are also included.

The reference to 'usually affixed' leaves it unclear whether affixation is in all cases a prerequisite to protection. The words 'lawfully adopted,' also raise the question whether the statute is limited to marks which are valid at common law. Only marks used in the sale of tangible products (as distinguished from service marks) are covered.

Section 2351 provides that a trade-mark is deemed affixed to an article if it is placed 'in any manner' on the article or on a container in which it is packed or otherwise prepared for sale.

Section 2352 defines 'article of merchandise' to include goods, work of art, commodity or other thing which may lawfully be offered for sale.

Section 2353 defines 'imitation of a trade-mark' as that

which so far resembles a genuine mark as to be likely to induce by any means (including similarity of appearance or sound) the belief that it is genuine. This section should be contrasted with the definition of infringement in the federal trade-mark statute.

Section 2354 makes it a misdemeanor, punishable by fine or imprisonment, or both to:

1. Counterfeit a trade-mark, or

2. Knowingly affix to any article a false or counterfeit trade-mark, or a genuine or imitation mark, without the owner's consent; or

3. Knowingly sell an article to which is affixed a false or counterfeit mark, or a genuine or imitation mark, without the owner's consent; or

4. Knowingly possess a counterfeit mark or a die or plate for making one; or

5. Make, sell or possess with intent to sell, an article having a trade-mark or label which does not truly indicate the quantity, quality, character, or source it purports to indicate; or

6. Knowingly sell any goods represented 'in any manner, by word or deed' to be made or packaged by another, unless such goods are in their original package and bear the mark or label placed thereon by the person entitled to use it; or

7. Sell goods in bulk which do not have a label or trade-mark, and 'by representation, name or mark written or printed thereon' represent that the goods are manufactured or produced by a person who is not the manufacturer; or

8. Knowingly sell any article falsely represented 'in any manner whatsoever; 'as to its maker, processor, packager, etc., or falsely represented to be entitled to have any trade-mark attached to it or used in connection with it.

The wording of these eight prohibitions raises difficult problems of construction. Their particularity invites a strict reading. An important question of policy is whether infringement should be a penal offense. If civil remedies are deemed adequate, either no statutory definition is needed or the general and unqualified concept of the common law might be invoked. If infringement is to be prohibited criminally, quaere whether §2354 cannot be simplified and clarified. And quaere further whether all the offenses should require proof of an improper state of mind."

Martin Plastics Corp. v. Emenee Industries
A.D. 1st Dept. 5/29/62 N.Y.L.J. 6/25/62 p. 1
"It may possibly be, also, that the complaint pleads out a violation by deft. of P.L. §2354, subd. 2 or subd. 5; but this is an action for injunction based on a remediable harm to pl. & not a penal prosecution."

In 1953 the Law Revision Commission prepared legislation repealing Penal Law §§2355-2357, and transferring the provisions of Article 24 of the General Business Law, with amendments, to a new Article 17-A of the General Business Law. A new Article 24 was added to the General Business Law by these bills, containing a single comprehensive provision for registering trade-marks. No legislation was prepared to amend or repeal Penal Law §§2350-2354. At the 1953 session of the Legislature the Law Revision Commission bills were passed. However, at the same session, similar bills, sponsored by another group (which did not recommend repeal or amendment of any Penal Law sections) also passed. In vetoing these bills, the Governor wrote:

> "These bills represent a constructive effort to recodify the New York law of trademarks. Two of the bills are sponsored by the Law Revision Commission. The other bills are sponsored by the Joint Legislative Committee on Interstate Cooperation on the recommendation of the National Association of Secretaries of State and the United States Trademark Association. While the provisions of both proposals conform in most respects, they vary in significant details. Each contains sufficient commendable features to warrant disapproval of the measures at this time so that the sponsors may jointly work out an agreed bill incorporating the best features of both proposals for introduction at the next session of the Legislature." (New York State Legislative Annual, 1953, at 373.)

In the fall of 1953, "the subject of trade-marks was included on the agenda at the annual conference of the Joint Legislative Committee on Interstate Cooperation....At all times the Law Revision Commission was kept apprised of developments and word was received that they did not intend to submit any recommendation on the subject of trade-marks at the 1954 Session." (New York State Legislative Annual, 1954, at 42.) The bills prepared by this Joint Legislative Committee were passed at the 1954 Session. Laws 1954, chs. 628, 629. Again, no effort was made to amend the Penal Law Article on trade-marks.

Counsel for the Milk Bottlers Federation submitted a memorandum in support of this 1954 legislation, and noted that the Penal Law provisions "are intended to cover situations where criminal intent and fraud are involved. Some suggestion was made to counsel

herein to the effect that all of the provisions relating to containers found in the General Business Law, the Penal Law and the Agriculture and Markets Law should be made into one uniform law. On first impression such sounds desirable. However, as a practical matter, each law serves the separate requirements of several fields. Such simplification would have the false appearance of attempting to make all of our many laws as simple as the 'Ten Commandments.' The Agriculture and Markets Law provisions (§§69-71; §71j; §131; §§143-4; §156h and §191) were formulated principally to assist in grading, labeling, and marketing certain commodities which are specifically named. The provisions were inserted in the law to enable the Agriculture Department to assist the farmers and small operators to protect their goods and containers without becoming involved in the technicalities found in the present Trademark Law provisions in the General Business Law and the Penal Laws. Counsel herein has found no one who is familiar with the practical problems involved in policing the container field who would recommend that all of these laws be combined and consolidated into one chapter. If there is any such merit it could be better considered and evaluated after the enactment of [the bills] presently under consideration. Since most states are interested in a Uniform Trade Mark Act, but have limited interest in a container Act, it is desirable that these two fields be separated now by the approval of the two bills here presented." (New York State Legislative Annual, 1954, at 45-46.)

In summary, General Business Law Article 17-A, §§275-279-i, presently deals exclusively with that phase of trade-marks as applies to marks and devices on containers, bottles, etc. General Business Law Article 24, §§360-368-e, conforms with the Model Trade-Mark Act, approved by the Council of State Governments. This Act provides for the registration only of trade-marks, i. e., marks used to identify and distinguish the origin of goods. In 1961, General Business Law Article 24 was amended (Laws 1961, ch. 583) to provide for the registration of service marks, as well, i. e., marks

used to identify and distinguish the origin of services. See New York State Legislative Annual, 1961, 62-66. And Laws 1962, ch. 662, eff. April 19, 1962, amended G. B. L. Article 24 by making technical changes of a non-substantive nature.

The Secretary of State has suggested to the staff that Penal Law §§2350-2357 "could be transferred to the appropriate provisions of Articles 24 and 17-A of the General Business Law, and the references in the Penal Law to trade-marks could be made applicable to service-marks which are now contained in Article 24." However, it is significant that the 1953-54 studies did not result in the repeal, amendment or transfer of any of these Penal Law provisions. The staff is awaiting comments from (1) counsel to the Milk Bottlers Federation, (2) United States Trade-Mark Association, and (3) Committee on Trade-Marks and Unfair Competition of the Association of the Bar of the City of New York.

Reply by 9/1/62

In Sept. this will be first matter on the calendar. The Committee considers it a major project. Sidney Diamond.

Bob Bentley letter 7/21/62: "I feel this should be considered further by the Commission."

Questions for Commission: (1) shall Penal Law Article 206 be transferred in toto without any substantive changes to the General Business Law as a new article to be entitled "Offenses Against Trade-Marks"? This is the staff recommendation. (2) shall Penal Law §§2350-2357 be transferred to the General Business Law and distributed between Articles 17-A and 24, deleting duplicative provisions and amending the Penal Law provisions to include "service marks"? This is the recommendation of the Secretary of State.

#

① Trading Stamp Institute agrees
② Saw counsel agrees

Penal Law Article 208, "Trading Stamps," §§2360-2361

- See 1962 Bill introduced in the Legislature

Penal Law Article 208 contains two sections. §2360 is the same as former §384-p of the Penal Code, which was added by Laws 1900, ch. 768. This law was declared unconstitutional in 1902 by the Appellate Division, Third Department, in People ex rel Madden v. Dycker 72 App. Div. 308, on the authority of People v. Gillson (1888) 109 N. Y. 389, which held a similar statute (Penal Code §335-a) unconstitutional. In 1904 §384-q was added to the Penal Code by Laws 1904, ch. 657, leaving Penal Code §§335-a and 384-p unrepealed. Penal Code §384-q is similar to the present Penal Law §2361, except that the present subdivision 4 was added by Laws 1908, ch. 428, and the original subdivisions 4 and 5 were renumbered as

5 and 6. This section requires, inter alia, that the stamp have legibly printed upon its face its redeemable value in money, and requiring the stamp, upon presentation to be redeemable in goods or money, at the option of the holder, if presented in quantity aggregating not less than five cents in each lot. "This statute, was, in effect, prohibitory of the trading stamp business, since the rock, it was said, upon which the system is built, is the redemption of the stamps in merchandise." 26 A. L. R. 707, 719-720 (Annotation: Constitutionality of trading stamp legislation.) In People ex rel Appel v. Zimmerman (4th Dept. 1905) 102 App. Div. 103, §384-q was held void both as class legislation and as being an undue infringement of liberty of contract. The Board of Consolidators in 1909, nevertheless, carried Penal Code §§384-p-384-q over into the Penal Law as §§2360-2361. Penal Code §335-a was repealed.

Reason: Court of appeals did not rule on it.

The Attorney General of the State of New York submitted an opinion, dated October 15, 1915, with respect to Penal Law §§2360-2361. Ops. Atty. Gen. 1915, Vol. II, 379; same opinion in 5 State Department Reports 530; and same opinion, dated October 14, 1916 [sic] in Ops. Atty. Gen., 1916, 285. The opinion reads, in part: "After a careful study of sections 2360 and 2361 of the Penal Law (formerly sections 384-p and 384-q of the Penal Code), which relate to the 'Issue and redemption of trading stamps and similar devices,' I am satisfied that the proposed plan of the Moulton Company does not violate either of such enactments as they have been construed or condemned as unconstitutional by various courts of the State... The decision in the different States, where similar questions have been before the State courts and also in the Federal courts, are not uniform or harmonious, but the weight of opinion is against the constitutionality of such statutes, and in the light of the cases in our State I think it is quite clear that the plan proposed by the Moulton Company is not violative of any of the provisions of the Penal Law which are constitutional."

On March 6, 1916, the United States Supreme Court, upheld in

three separate cases, against a challenge based on the Fourteenth Amendment, legislation licensing or prohibiting the use of trading stamps, Rast v. Van Deman & Lewis, 240 U. S. 342 (imposing special license taxes on merchants using trading stamps), Tanner v. Little, 240 U. S. 369 (same), and Pitney v. State of Washington 240 U. S. 387 (a statute similar to Penal Law §2361). However, a majority of state court opinions since 1916 have not followed the reasoning of these federal cases. N. A. Clapp, Trading Stamps, 23 Ohio St. L. J. 35, 37 (1962). It would appear that these Supreme Court decisions are not binding on New York. One year after the decisions were announced, Massachusetts adhered to its former holding that such legislation is invalid, noting that "the question whether a statute is in conflict with the provisions of the Constitution of this commwealth is a question upon which the decision of the Supreme Judicial Court of this commonwealth is final." In re Opinion of the Justices (1917) 115 N. E. 978, 979. In 1958 this view was reaffirmed again in Colgate-Palmolive Company v. Elm Farm Food Co. 148 N. E. 2d 861, which restricted the issuance of trading stamps on fair traded items (Cf. Bristol-Myers Co. v. Picker, 302 N. Y. 61, and Ramo v. Excel Pharmacy, 186 N. Y. S. 2d 548.)

The California Trading Stamp Act of 1960 (Business and Professions Code §17750 et seq.) regulates through a licensing and bonding scheme the sale of trading stamps and the conditions for their redemption. In discussing this Act, the court in Blue & Gold Stamps-U-Save Premium Co. v. Sobieski (S. D. Calif. 1961) 190 F. Supp. 133, 135, observed that the Supreme Court of the United States "has held it within the power of the State legislatures to make regulations and classifications of the type here involved," citing Rast, Tanner and Pitney, supra.

In 1958, in Safeway Stores v. Oklahoma Grocers, 360 U. S. 334, 338, Justice Frankfurter remarked that trading stamps "have had a checkered career in the United States, but since World War II their popularity has grown until now it is a reasonable estimate that these multi-colored scraps of paper may be found in almost

STATE OF NEW YORK

Print. 3914 Intro. 3785

IN ASSEMBLY

February 6, 1962

Introduced by Mr. WORLOCK—read once and referred to the Committee on Judiciary

AN ACT

To amend the personal property law, in relation to the ownership and negotiability of trading stamps

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

1 Section 1. The personal property law is hereby amended by
2 inserting therein a new section, to be section one hundred one-a,
3 to read as follows:
4 *§ 101-a. Ownership and negotiability of trading stamps. 1. Upon*
5 *payment of the charges therefor, the title to and ownership of*
6 *trading stamps shall pass from the person, firm, association or*
7 *corporation issuing the same to the person, firm, association or*
8 *corporation purchasing the same, and the possession of the same*
9 *by such person, firm, association or corporation shall be the indicia*
10 *and evidence of such ownership.*
11 *2. Upon payment for merchandise purchased by any person, or*
12 *for services rendered to any person, the title to and ownership of*

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

1 *trading stamps given to such person in connection with or as an*
2 *incident to the sale of such merchandise or the rendition of such*
3 *services shall pass from the person, firm, association or corporation*
4 *making such sale or rendering such service to the person to whom*
5 *such sale was made or for whom such service was rendered, and*
6 *the possession of the same by such person shall be the indicia and*
7 *evidence of such ownership.*

8 *3. Every covenant, agreement or understanding in or connec-*
9 *tion with or collateral to any purchase of, or any subscription*
10 *to any arrangement for the use of, any trading stamps destined for*
11 *delivery and use in connection with the sale of merchandise at*
12 *retail in this state or the performance of any service in this state,*
13 *whereby the title to or ownership of such stamps is reserved by*
14 *the person, firm, association or corporation issuing the same, or*
15 *whereby the right to sell, mortgage, lease, exchange or otherwise*
16 *dispose of such stamps is prohibited, regulated or restricted, shall*
17 *be deemed to be void as against public policy and wholly unen-*
18 *forceable; but nothing contained in this section shall be deemed*
19 *or construed to prohibit or prevent the person, firm, association*
20 *or corporation issuing such stamps from making and enforcing*
21 *rules and regulations for the redemption of such stamps by such*
22 *person, firm, association or corporation provided only that such*
23 *redemption shall be made uniformly and, upon the same terms*
24 *and conditions, to all persons, firms, associations or corporations*
25 *surrendering such stamps for redemption, regardless of the source*
26 *thereof.*

27 § 2. This act shall take effect July first, nineteen hundred
28 sixty-two.

STATE OF NEW YORK

Print. 3047 Intro. 2981

IN ASSEMBLY

January 24, 1962

Introduced by Mr. PLUMADORE—read once and referred to the Committee on Judiciary

AN ACT

To amend the general business law, in relation to the regulation of trading stamps

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

1 Section 1. The general business law is hereby amended by adding
2 thereto a new article, to be article twenty-nine-c, to read as follows:

3 *ARTICLE 29-C*

4 *TRADING STAMP COMPANIES*

5 *Section 550. Purpose of article.*

6 *551. Definitions.*

7 *552. Trading stamp; exclusion of redeemable device.*

8 *553. Trading stamp; exclusion of certain coupons.*

9 *554. Imprint required; contents.*

10 *555. Redemption of stamps upon presentation.*

11 *556. Issuance or redemption without consent of trading*
12 *stamp company.*

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

557. Giving of stamps upon request of purchaser required; exceptions.

558. Giving of cash value of stamps upon request of purchaser required; exceptions.

559. Giving of stamps when prohibited by statute or rule not required.

560. Necessity of license.

561. Application for license; contents; filing; submission of samples.

562. Issuance of license; expiration; nontransferability.

563. Licensed copartnerships; continuance of business by survivor; notice.

564. Bond.

565. Amount of bond.

566. Time for filing application and bond; renewals; license fee.

567. Termination of liability upon bonds previously filed upon issuance of new bonds; prosecution of claims.

568. Failure to redeem stamps.

569. Suspension or revocation of license; grounds.

570. Disposition of fees and penalties.

571. Powers and duties of the secretary of state.

572. Discontinuation of issuance of stamps by merchants; notice; contents; posting; violations.

573. Cessation of issuance of stamps by company; notice.

574. Redemption of stamps issued before December thirty-first, nineteen hundred sixty-two.

575. Judicial review.

1 § 550. *Purpose of article. The use of trading stamps in retail*
2 *trade has grown tremendously over the past several years. The*
3 *volume of trading stamps being issued and the increasing numbers*
4 *of different kinds of trading stamps and the fact that under the*
5 *present statutes of the state of New York there is no regulation of*
6 *trading stamp companies and no reference to trading stamps in any*
7 *of the laws of the state of New York, it is the purpose of the legisla-*
8 *ture, in enacting this article, to safeguard and protect the people of*
9 *this state. It is not the intent of this article to prohibit the giving*
10 *of trading stamps, it is the purpose of this article to protect the*
11 *people of the state from improper practices of irresponsible trading*
12 *stamp companies.*
13 § 551. *Definitions. (a) "Trading stamp" means any stamp or*
14 *similar device issued in connection with the retail sale of merchan-*
15 *dise or service, as a cash discount or for any other marketing pur-*
16 *pose, which entitles the rightful holder, on its due presentation for*
17 *redemption, to receive merchandise, service or cash.*
18 *(b) "Trading stamp company" means any person engaged in*
19 *any manner in distributing trading stamps for retail issuance by*
20 *others or in redeeming trading stamps for retailers.*
21 *(c) "Person" means any individual, partnership, corporation,*
22 *association, or other organization.*
23 *(d) "Issue" includes use, distribute, give away, sell, furnish, and*
24 *license such use, distribution, gift, sale or furnishing.*
25 *(e) "Merchant" includes retailer, person dealing in services,*
26 *or person in a similar capacity.*
27 *(f) "Department" means the department of state.*

1 § 552. *Trading stamp; exclusion of redeemable device. "Trading*
2 *stamp" does not include any redeemable device used by the manu-*
3 *facturer or packer of an article, in advertising or selling it, or any*
4 *redeemable device issued and redeemed by a newspaper, magazine,*
5 *or other publication.*

6 § 553. *Trading stamp; exclusion of certain coupons. "Trading*
7 *stamp" does not include any coupon, caused to be prepared by the*
8 *merchant using the same and distributed by him to his customers,*
9 *which coupon, ticket, certificate, card or other similar device is*
10 *redeemable only by such merchant for or in connection with the*
11 *purchase of specific articles of merchandise carried in his stock.*

12 § 554. *Imprint required; contents. It is unlawful for any person*
13 *to issue any trading stamp unless such stamp shall have imprinted*
14 *thereon:*

15 *(a) The name of the trading stamp company licensed under the*
16 *provisions of this article, which is responsible for the redemption*
17 *of the stamp.*

18 *(b) The redeemable value thereof in cents, mills, or fraction of*
19 *cents.*

20 *(c) The month and year of issue of the stamp.*

21 § 555. *Redemption of stamps upon presentation. Any trading*
22 *stamp company shall redeem upon presentation, any trading stamp*
23 *which it has issued either in goods, wares, or merchandise, or in*
24 *cash, good and lawful money of the United States, at the option of*
25 *the holder thereof. If such holder thereof wishes to redeem such*
26 *stamps for merchandise the place of the redemption must be*
27 *within fifty miles from the merchant giving such stamps.*

1 § 556. *Issuance or redemption without consent of trading stamp*
2 *company. It is unlawful for any person to willfully issue or*
3 *redeem any trading stamp without the consent of the trading*
4 *stamp company which issued such stamps.*

5 § 557. *Giving of stamps upon request of purchaser required;*
6 *exceptions. Any person who advertises the giving of trading*
7 *stamps, or who gives trading stamps, with the sale of any merchan-*
8 *dise shall give such stamps, if the purchaser requests them, with*
9 *the sale of all items of merchandise offered for sale at his place of*
10 *business, unless such person advertises that he does not give trading*
11 *stamps on certain items of merchandise and designates such items*
12 *in the advertisement or posts a list of such items in a conpsicuous*
13 *place in his place of business.*

14 § 558. *Giving of cash value of stamps upon request of purchaser*
15 *required; exceptions. Any person who advertises the giving of*
16 *trading stamps, or who gives trading stamps, with the sale of any*
17 *merchandise shall give the purchaser the option of taking the trad-*
18 *ing stamps with the purchase or receiving a cash discount from the*
19 *amount of the purchase equal to the cost of the stamps to the person*
20 *issuing them with the merchandise. In determining the cash dis-*
21 *count under this section all fractions of a cent shall be computed to*
22 *the nearest cent. If such person advertises that he does not give*
23 *trading stamps on certain items of merchandise and designates*
24 *such items in the advertisements or posts a list of such items in a*
25 *conspicuous place in his place of business, he is not required to give*
26 *cash discount on such items of merchandise.*

1 § *559. Giving of stamps when prohibited by statute or rule not*
2 *required. Nothing contained in this article shall be construed as*
3 *requiring the giving of trading stamps with any article when the*
4 *giving of such stamps or any premium with the particular article*
5 *is specifically prohibited by statute of this state or rule or regula-*
6 *tion adopted pursuant thereto.*

7 § *560. Necessity of license. It is unlawful for any person to*
8 *engage in the business or act in the capacity of a trading stamp*
9 *company without having a license obtained under the provisions of*
10 *this article. Nothing contained in this article shall prohibit any*
11 *person who was licensed as a trading stamp company under the*
12 *provisions of this article, but who ceased to possess such a license,*
13 *from redeeming the trading stamps issued pursuant to such license.*

14 § *561. Application for license; contents; filing; submission of*
15 *samples. An applicant for a license to engage in the business of a*
16 *trading stamp company under this article shall file with the depart-*
17 *ment an application for a license accompanied by representative*
18 *samples of its stamps, stamp collection books, stamp redemption*
19 *catalogues, and stamp distribution and redemption agreement*
20 *forms, currently used in this state. Each such application shall pro-*
21 *vide the following information:*

22 *(a) The name and principal address of the company.*

23 *(b) The state of its incorporation or origin.*

24 *(c) The names and addresses of its principal officers, partners,*
25 *or proprietors.*

26 *(d) The address of its principal office in this state.*

1 *(e) The name and address of its principal officer, employee, or*
2 *agent in this state.*
3 *(f) The addresses of its stamp redemption stores or places in*
4 *this state.*
5 *(g) A short form of its balance sheet, as of the end of its last*
6 *fiscal year prior to such filing, certified by an independent certified*
7 *public accountant or an independent public accountant.*
8 *(h) Unless the principal sum of the bond hereinafter required*
9 *to be filed by the company is the maximum amount, a statement of*
10 *its gross income from its business in this state as a trading stamp*
11 *company during such last fiscal year, certified by an independent*
12 *certified public accountant or an independent public accountant.*
13 *§ 562. Issuance of license; expiration; nontransferability. The*
14 *department shall issue a license to any applicant who complies with*
15 *the provisions of this article. All licenses shall expire annually on*
16 *December thirty-first. Licenses shall be nontransferable.*
17 *§ 563. Licensed copartnerships; continuance of business by sur-*
18 *vivor; notice. A surviving member or members of a licensed copart-*
19 *nership by reason of death shall be entitled to continue in business*
20 *under such license, until the expiration date thereof, if the surviv-*
21 *ing member or members shall continue to comply with the provisions*
22 *of this article and if notice is given to the department within thirty*
23 *days after death of the member.*
24 *§ 564. Bond. The application for license shall be accompanied*
25 *by a bond payable to this state and duly executed by the trading*
26 *stamp company and a corporate surety qualified to do business in*
27 *this state, which is conditioned upon the performance of the com-*

1 *pany of its obligations to redeem trading stamps issued by retailers*
2 *in this state when they are duly presented for redemption by the*
3 *rightful holders.*

4 *In the event that any trading stamp company should cease to*
5 *comply with the provisions of this section, the license and all rights,*
6 *powers, and privileges conferred by it to the company shall be*
7 *automatically suspended.*

8 *§ 565. Amount of bond. The principal sum of the bond required*
9 *by this article shall be as follows:*

10 *If the company has not previously done business as a trading*
11 *stamp company in this state, or if the company's gross income from*
12 *such business in this state during its last fiscal year was not in*
13 *excess of one hundred thousand dollars, the principal sum shall be*
14 *ten thousand dollars; for each additional one hundred thousand*
15 *dollars, or fraction thereof, of gross income from such business in*
16 *this state, an additional ten thousand dollars; but such bond shall*
17 *not exceed one hundred thousand dollars.*

18 *§ 566. Time for filing application and bond; renewals; license*
19 *fee. The application for license and the bond required by this*
20 *article shall be filed with the department on or before January first*
21 *following the effective date of this article and the application for a*
22 *renewal of such license and the bond therefor shall be filed annually*
23 *thereafter on or before January first of each year. The trading*
24 *stamp company shall pay a license fee to the department at the time*
25 *of filing each such application for license equal to one percent of*
26 *the amount of the bond required to be filed by the trading stamp*
27 *company under the provisions of this article.*

1 *§ 567. Termination of liability upon bonds previously filed upon*
2 *issuance of new bonds; prosecution of claims. On the effective date*
3 *of each new bond, any and all liability on all bonds previously filed*
4 *hereunder shall terminate, and all rightful holders of trading*
5 *stamps who shall prosecute their claims hereunder shall prosecute*
6 *such claims solely against the new bond and only by filing proofs of*
7 *claim with the department in the manner provided in this article.*
8 *§ 568. Failure to redeem stamps. 1. Complaint. If a company*
9 *fails to redeem any of its trading stamps, any rightful holder of*
10 *such trading stamps may file a complaint with the department*
11 *within three months after such failure to redeem. The complaint*
12 *shall be accompanied by the unredeemed stamps.*
13 *2. Request for redemption of stamps by the department. Upon*
14 *the filing of any complaint or complaints involving the alleged*
15 *failure of a trading stamp company to redeem trading stamps, the*
16 *department shall request the trading stamp company in writing by*
17 *certified mail, mailed to the company's last address of record with*
18 *the department, to redeem the trading stamps in cash on or before*
19 *ten days from the date on which the request is mailed.*
20 *3. Equitable distribution. If the amount demanded is paid, the*
21 *department shall make an equitable distribution of the amount to*
22 *the persons who filed pursuant to this section, and shall forthwith*
23 *forward the redeemed stamps to the trading stamp company.*
24 *4. Notice of failure to redeem stamps; publication; claims of*
25 *retailers; time for filing claims. If the trading stamp company fails*
26 *to redeem the trading stamps within the specified time, the depart-*
27 *ment shall publish notice of such fact in three consecutive publica-*

1 *tions of one or more newspapers of general circulation published*
2 *in the state of New York, and therein advise that any additional*
3 *claim may be filed with him, together with the trading stamps upon*
4 *which the claim is based, within three months after the date of the*
5 *first such publication. Retailers in possession of trading stamps*
6 *for issuance to their customers shall also be deemed rightful holders*
7 *entitled to make such claims. If any person fails to file a claim*
8 *with the department within such three months period, the depart-*
9 *ment shall thereupon be relieved of further duty or action here-*
10 *under on behalf of such person until such time as complaints involv-*
11 *ing the alleged default of the trading stamp company to redeem*
12 *trading stamps have been again filed with the department.*
13 *5. Notice of time and place of hearing. The publication shall also*
14 *give notice of the time and place that the department will hold a*
15 *hearing to consider any evidence concerning the alleged default of*
16 *the trading stamp company.*
17 *6. Notice to appear at hearing. Within thirty days after the*
18 *expiration of the claim period prescribed in this section, the depart-*
19 *ment shall notify the trading stamp company in writing by certified*
20 *mail, mailed to the company's last address of record with the depart-*
21 *ment, and the surety on company's bond in writing by certified mail,*
22 *mailed to the address shown on the bond inviting it to appear at a*
23 *hearing before the department to present any relevant evidence*
24 *concerning the trading stamp company's alleged failure to redeem*
25 *the trading stamps.*
26 *7. Finding of default; demand for cash payment. If at any such*
27 *hearing, which may be held at any time after twenty days from the*

date notification is mailed, the department finds that the trading stamp company has defaulted in the redemption of its trading stamps, the department shall demand cash payment from the company in an amount sufficient to satisfy all valid claims filed with it.

8. Equitable distribution. If the amount demanded is paid within ten days of the making of the demand, the department shall make an equitable distribution of the amount to persons who filed pursuant to this section and shall forthwith forward the redeemed stamps to the trading stamp company.

9. Action to recover value of unredeemed stamps. If the amount demanded is not paid within ten days of the making of the demand, the department may bring an action in a court of competent jurisdiction against the trading stamp company and its surety to recover, on behalf of the complainants, the value of the unredeemed stamps.

10. Costs. The costs incurred by the department in performing the duties set forth in this section shall constitute a proper charge against the trading stamp company which has defaulted, or, in the event of the trading stamp company's failure to pay, against the bond filed by that company, and shall constitute a prior claim against such company or such bond, except that in no event shall the surety be liable for such charge and all other valid claims as an aggregate in excess of the principal sum of the bond.

§ 569. Suspension or revocation of license; grounds. The department may, after a hearing, suspend or revoke any license, if it finds that the licensee, or any of its partners, officers, or directors:

(a) Has violated any provision of this article.

(b) Has been convicted of a felony.

(c) Made any false statement in his application for a license.

1 *§ 570. Disposition of fees and penalties. All moneys derived*
2 *from the operation of this article shall on or before the tenth day of*
3 *each month be paid into the general fund of the state treasury, to*
4 *the credit of the state purposes fund therein.*

5 *§ 571. Powers and duties of the secretary of state. In addition to*
6 *the powers and duties elsewhere prescribed in this article, the secre-*
7 *tary of state shall have power:*

8 *1. To appoint an adequate number of assistants, and other*
9 *employees as may be necessary to carry out the provisions of this*
10 *article, to prescribe their duties, and to fix their compensation*
11 *within the amount appropriated therefor.*

12 *2. To examine into the qualifications and fitness of applicants for*
13 *licenses under this article.*

14 *3. To keep records of all licenses issued, suspended or revoked.*

15 *4. To adopt such rules and regulations not inconsistent with the*
16 *provisions of this article, as may be necessary with respect to the*
17 *form and content of applications for licenses, the reception thereof,*
18 *the investigation and examination of applications for licenses, and*
19 *the other matters incidental or appropriate to his powers and duties*
20 *as prescribed by this article and for the proper administration and*
21 *enforcement of the provisions of this article.*

22 *§ 572. Discontinuance of issuance of stamps by merchants;*
23 *notice; contents; posting; violations. Any merchant who has*
24 *issued to his customers or other persons the trading stamps of any*
25 *licensee under this section, and who proposes to discontinue or does*
26 *discontinue the issuance of the stamps of such licensee for any*
27 *reason whatsoever, shall post a notice at every place in his estab-*

1 *lishment at which such stamps were or are issued, in letters equal at*
2 *least in size to eighteen-point type, containing at least the following*
3 *information:*
4 *(a) The fact that such stamps will no longer be issued by the*
5 *merchant and the date of discontinuance of issuance.*
6 *(b) The name and address in this state, of the licensee under*
7 *this article, who is responsible for the redemption of such stamps.*
8 *(c) The fact that the licensee is licensed by the secretary of state*
9 *of the state of New York and has posted a bond with the department*
10 *to assure the redemption of such stamps upon presentation to the*
11 *licensee.*
12 *(d) The fact that the stamps are redeemable either in goods,*
13 *wares, merchandise, or in cash, good and lawful money of the*
14 *United States, at the option of the stamp holder, and stating the*
15 *cash redemption value of each stamp and that it is necessary for the*
16 *holder to present trading stamps for redemption in cash or goods,*
17 *wares or merchandise.*
18 *The notice required by this section shall be posted within at least*
19 *seven days from the date on which the issuance of such stamps is*
20 *discontinued and shall remain posted for thirty days.*
21 *Any person who violates this section is guilty of a misdemeanor.*
22 *§ 573. Cessation of issuance of stamps by company; notice. No*
23 *trading stamp company shall cease the issuance of trading stamps*
24 *unless it notifies the department in writing at least ninety days*
25 *prior to such cessation, and gives written notice at such time to each*
26 *merchant in the state which has at any time within one year issued*
27 *trading stamps which the company is obligated to redeem.*

1 § *574. Redemption of stamps issued before December thirty-first,*
2 *nineteen hundred sixty-two. Nothing in this article shall prevent*
3 *any person from redeeming, either for goods, wares, or merchandise,*
4 *or for cash, pursuant to contract, any trading stamps issued on or*
5 *before December thirty-first, nineteen hundred sixty-two.*
6 § *575. Judicial review. The action of the secretary of state is*
7 *suspending, revoking or refusing to issue or renew a license or cer-*
8 *tificate may be reviewed by a proceeding brought under and pursu-*
9 *ant to article seventy-eight of the civil practice act.*
10 § 2. This act shall take effect January first, nineteen hundred
11 sixty-three.

half of America's homes." In footnote 2, he quoted "the latest chapter in trading stamp history" from The Economist for May 30, 1959, at p. 850: "In Colorado a proposal to tax the stamps brought battalions of housewives to the state capital. One of the original sponsors changed his mind when his own mother threatened to campaign against his re-election if he did not alter his stand."

In an opinion (Ops. Atty. Gen. 1959, p. 96) to the New York Department of State dated November 5, 1959, the Attorney General, after citing Gillson, Madden & Appel, supra, stated: "Research does not disclose any other reported cases treating with the constitutionality of §§2360 and 2361. While in [Rast, Tanner and Pitney, supra] the Supreme Court held that State statutes regulating the use of trading stamps, coupons and similar devices did not contravene the provisions of the Fourteenth Amendment of the Federal Constitution, nevertheless the cited decisions of the Courts of this State are final and conclusive as to the unconstitutionality of these sections under the State Constitution (Merchants Bank v. Pennsylvania, 167 U. S. 461; People v. Gillson, supra, p. 407; see also State v. Lathrop-Farnham Co., 84 N. H. 322, 150 A. 551)."

Recommendation: repeal Penal Law §§2360-2361.

Bob Bentley letter 7/21/62: "With reference to trading stamps, I would suggest you seek the opinion of Senator Van Wiggeren's Commerce and Economic Development Committee, which has made quite a study of this sensitive field."

7/31/62: letter to Sen. Walter Van Wiggeren

PJMcQ/pjc
June 18, 1962

MEMORANDUM NO. 4

Penal Law Article 28, "Barratry," §§320-323.

#

This Article consists of four short sections:

§320 "Common barratry is the practice of exciting groundless judicial proceedings."

§321 "Common barratry is a misdemeanor."

§322 "No person can be convicted of common barratry, except upon proof that he has excited actions or legal proceedings, in at least three instances, and with a corrupt or malicious intent to vex and annoy."

§323 "Upon a prosecution for common barratry, the fact that the defendant was himself a party in interest or upon the record to any action or legal proceeding complained of, is not a defense."

The essence of the crime of barratry is the use of the courts for the purpose of harassment. "The offense does not consist in promoting either private suits or public prosecutions when the sole object is the attainment of public justice or private right, but in the prostitution of these remedies to mean and selfish purposes... Generally, by statute, common barratry is the practice of exciting groundless judicial proceedings. The institution of a number of actions by one in his own right is barratry where such actions are merely groundless and vexatious, and without any manner of color, and brought only with a design to harass and oppress defendant." 9 C. J. S. Barratry, §2, p. 1547.

Recent authority dealing with this common law crime is scarce. In People v. Budner (1st Dept. 1961) 215 N. Y. S. 2d 791, the defendant brought fourteen civil suits against the same parties during the years 1957-1959. The Appellate Division, one Justice dissenting, reversed a conviction of common barratry on the ground that the proof did not satisfy the requirements of the statute that defendant had adopted the practice of exciting groundless actions. The court commented as follows on this crime, which appellant in his brief called "obsolete" and a "dead letter":

> "It appears that the crime is seldom prosecuted in any jurisdiction and our statute enacted by Chapter 676 of the Laws of 1881 has never received judicial construction. The crime, however, is of ancient origin. Coke explained 'why this busybody is called barretor' and defined the term as 'a common mover or stirrer up or maintainer of suits, quarrels or parties.' (Case of Barratry, 8 Coke 36 b, 77 Reprint, 528.)" 215 N. Y. S. 2d at 793.

Small claims court; dep. counterclaims forever too & moved case to General Calendar.

Judge Bruder: Every lawsuit to constitute degree constitutes harassment.

The following item appeared in The New York Times, Jan. 7, 1962: "Torquay, England. Every week for seven years Thelma Gush has traveled to London to fight one court case or another. She has brought thirteen actions against various people and made dozens of court applications. Now an order of the Lord Chief Justice bans her from bringing legal actions without permission of the High Court." (Presumably a violation of such order would be punishable as a contempt. Query: whether this is a more efficacious method to thwart "barretors" than a criminal prosecution, assuming its constitutionality?)

In the recent Illinois penal law revision, the crime of barratry was transferred from the old Criminal Code (§§65-66) to Chapter 13 ("Attorneys and Counselors") of the Illinois Revised Statutes of 1961 (§§21-22), and not included in the new Criminal Code of 1961.

Recommendation: transfer Penal Law Article 28 to the Judiciary Law as new Article 19-A (following Article 19, "Contempt," §§750-781) to be numbered as §§785-788, respectively.

Bob Bentley letter 7/21/62: "With reference to the transfer of barratry to the judiciary law, both the Albert Committee and the Finance Committee have the judiciary law under recodification. You better check with the Albert Committee to get your chapter number and style"

Penal Law Article 31, "Billiard and Pocket Billiard Rooms," §§344-355.

7/31/62 letter to Sen Albert
8/3 A. Holdberg called (see memo)

This Article, added by Laws 1922, ch. 671, regulates public billiard rooms. It does not apply to any city having a population of 400,000 or more (§344). Licenses are issued by the Secretary of State (§345). §§345-a-346 relate to license fees. §347 requires that the license be posted in a prescribed manner. §348 prohibits a licensee to suffer or permit gambling, disorderliness, and the sale of liquor and habit forming drugs on the licensed premises. §349 prohibits any thing in the window which prevents a full, clear and unobstructed view of the premises; an inclosed box or stall or private room or partition is prohibited. Penal Law §835, added by Laws 1919, ch. 412, applicable to "any incorporated village or town," contains similar language.

§350 relates to certain persons who are ineligible for employment by a licensee. §351 provides that a violation of any provision of this article is a misdemeanor. §352 prohibits the use of the word "pool" as a descriptive word referring to a billiard room. §353 relates to the duties of public officers under this article. §354 requires the Secretary of State to maintain a directory of all licensees, and §355 is a savings clause.

Recommendation: repeal Penal Law §835, and transfer Article 31 to General Business Law as a new Article. The Secretary of State approves this staff recommendation: "It is my opinion that Article 31 of the Penal Law could be transferred to the General Business Law. Essentially, this is a regulatory law. It would serve the salutary purpose sought to be achieved by the Temporary Commission on Penal Law Revision."

Penal Law Article 32, "Bills of Lading, Receipts and Vouchers," §§360-367.

14 new sections added in 1962

See Revision's memo p. 5 363, 364, 365 may be felonies!

Prior to 1962, Penal Law Article 32, consisted of eight sections (all misdemeanors), and related generally to offenses in connection with bills of lading, receipts and vouchers. In 1934, Prof. John W. MacDonald observed that these provisions date to 1858 and are much older than the Uniform Bills of Lading Act, Personal Property Law Article 7, §§187-241. Leg. Doc. (1934) No. 50Q, p. 18. He noted that "the Penal Law applies in terms to all bills of lading because no distinction as to negotiability and non-negotiability was recognized at its drafting."

In 1956 the Law Revision Commission submitted a report to the Legislature relating to the Uniform Commercial Code, and a study of repeals and amendments that would be required in connection with enactment of the Code. (See Penal Law Article 146, "Negotiable Instruments," infra.) The following analysis was made of Penal Law Article 32 (Leg. Doc. [1956] No. 65K, at p. 99):

> "This Article defines, and provides for punishment of certain offenses in connection with bills of lading, receipts and vouchers. It does not appear that any provision of this

Article is inconsistent with the Code or would require repeal in the event that the Code is enacted. However, the penal provisions of General Business Law, Article 9 (entitled 'Warehousemen') and of Personal Property Law, Article 7 (entitled 'Uniform Bills of Lading Law') are not carried forward into the Uniform Commercial Code. If the Code is enacted and if General Business Law, Article 9 and Personal Property Law, Article 7 are thereupon repealed in their entirety, it will be desirable to re-enact the criminal provisions of those articles in some form. Article 32 of the Penal Law appears to be a logical place in which to insert penal provisions comparable to those now contained in Sections 134-139 of the General Business Law and Sections 230-236 of the Personal Property Law. If such provisions are included in Article 32 of the Penal Law, further study should be made to insure that they are properly integrated with the existing provisions of that Article. Such study should also take into account Penal Law §§460, 1508, 1509, 1522 and 2481, relating to preparation of false manifests and other crimes connected with bills of lading, and General City Law, §161, providing penalties against persons who fraudulently alter bills of lading covering shipments of coal to certain classes of cities." Emphasis added.

The report analysed General Business Law §§134-139 as follows (Id. at p. 50):

"These sections make criminal certain activities in connection with the issuance or negotiation of warehouse receipts and provide penalties therefor. The Code does not include any penal provisions. Although Sections 360-367 of the Penal Law contain various provisions relating to 'receipts', those sections actually apply only to representatives of carriers or pipeline corporations and not to warehousemen. (The title of Penal Law, §365 refers to 'receipt issued by warehouseman', but warehousemen are not actually within the purview of the section itself. Sections 360-367 of the Penal Law are derived from Article XIII of the old Penal Code (L. 1881, c.676, as amended by L. 1892, c. 692, §1).) Section 629 of the old Penal Code, as amended, contained a subdivision (2) applicable to warehousemen. That subdivision was specifically repealed when the Uniform Warehouse Receipts Act was enacted (L. 1907, c. 732, §62), with the result that the remainder of Article XIII and the present Penal Law §§360-367 no longer have any application to warehousemen).

In the event of enactment of the Code and repeal of Gen. Bus. Law, Article 9, it would probably be desirable to re-enact Gen. Bus. Law §§134-139, with appropriate revision of language, as provisions of the Penal Law. It should be noted that there is no provision in the Uniform Warehouse Receipts Act comparable to §50 of the Uniform Bills of Lading Act (Pers. Prop. Law, §236) making it a criminal offense to issue non-negotiable bills of lading without the words 'not negotiable' placed plainly on the face thereof. See note, above, to §94.

Further study may suggest that it would be desirable to enact a new article of the Penal Law dealing systematically with offenses related to various commercial transactions and to instruments and documents associated therewith."

The report analyzed Personal Property Law §§230-236 as follows: (Id. at p. 139):

"These sections make criminal certain activities in connection with the issuance and negotiation of bills of lading and provide penalties therefor. The Penal Law does not expressly cover all those activities although it does cover some of them (Penal Law §§360-367). In the event of enactment of the Code and repeal of Pers. Prop. Law, Article 7, it would probably be desirable to re-enact Pers. Prop. Law, §§230-236, possibly with some revision of language, as provisions of the Penal Law. See, also, General City Law, §161, providing penalties for fraudulently altering bills of lading covering shipments of coal to certain classes of cities, and Penal Law, §§1508, 1509, 1522 and 2481, relating to preparation of false manifests and other crimes connected with bills of lading."

STATE OF NEW YORK

AUG 20 1962

COPY

HENRY S. FRASER
CHAIRMAN
UNIVERSITY BUILDING
SYRACUSE 2, N.Y.

ALFRED A. BUERGER
MARINE TRUST BUILDING
BUFFALO 3, N.Y.

COMMISSION ON UNIFORM STATE LAWS

August 16, 1962

Richard J. Bartlett, Esquire, Chairman
State of New York Temporary Commission
on Revision of the Penal Law and Criminal Code
Room 654, 155 Leonard Street
New York, New York

letter Bob Bentley 7/21/62: re Article 32 + 146; check with Joint Legislative Committee on Interstate Cooperation (Sen. Barrett)

See reply (attached) from this Joint Committee

STATE OF NEW YORK

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August 16, 1962

Richard J. Bartlett, Esquire, Chairman
State of New York Temporary Commission
on Revision of the Penal Law and Criminal Code
Room 654, 155 Leonard Street
New York, New York

Dear Mr. Bartlett:

Senator Barrett has referred to me for reply your letter to him of August 1, 1962 with respect to the provisions of Penal Law Article 32, relating to Bills of Lading, Warehouse Receipts, Other Receipts and Vouchers, and Article 146 relative to Negotiable Instruments.

As your accompanying Memorandum No. 4 notes, L. 1962, c. 552, effective September 27, 1964, transferred to Article 32 of the Penal Law the penal provisions of the Personal Property Law relating to bills of lading, and the penal provisions of the General Business Law relating to warehouse receipts.

The bill, which became L. 1962, c. 552, was drafted under the auspices of our Commission. We made no attempt to reconcile the discrepancy between the penal provisions of the New York versions of the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act, making some violations in relation to bills of lading felonies and all violations in relation to warehouse receipts misdemeanors.

It should be noted that the provisions of the Uniform Warehouse Receipts Act corresponding to Penal Law §§369, 369-b and 369-f, as added in 1962, prescribed penalties of five years' imprisonment, or a $5,000 fine, or both. Apparently when the Uniform Warehouse Receipts Act was enacted in New York the penalty provisions of the corresponding sections were changed to one year's imprisonment, or a fine of $1,000, or both.

We are unable to see any reason for the disparate treatment of these two types of similar crimes, nor would our Commission have any objection to the transfer of these penal provisions to the General Business Law as proposed in the recommendation on Page 5 of your Memorandum No. 4.

I also note your recommendation on Page 14 of your Memorandum No. 4 to transfer to the General Business Law Penal Law §§1520 and

1521, as added by L. 1962, c. 552, to replace the corresponding sections of the Negotiable Instruments Law. Our Commission has no objection to such a transfer.

Very truly yours,

AAB:ef

Alfred A. Buerger

cc: Peter J. McQuillan, Esquire, Assistant Counsel
New York State Temporary Commission on Revision
of the Penal Law and Criminal Code

Robert Bentley, Esquire
Arcade, New York

Hon. Elisha T. Barrett, Chairman
Joint Legislative Committee on Interstate Cooperation
36 West 44th Street
New York 36, New York

Henry S. Fraser, Esquire, Chairman
New York State Commission on Uniform State Laws
University Building
Syracuse 2, New York

In accordance with this study by the Law Revision Commission, Laws 1962, ch. 552, §33, eff. Sept. 27, 1964, amended the article heading of Penal Law Article 32 to read "Bills of Lading, Warehouse Receipts, Other Receipts and Vouchers"; and §34 of the bill amended Article 32 by inserting therein fourteen new sections (from the General Business Law and Personal Property Law), numbered §§368, 368-a-368-f, 369, 369-a-369-f. Laws 1962, ch. 595, §1, amended new section 369-f (a misdemeanor) by reducing the punishment from five years to one year. Cf. new section 368-f (fraudulent issuance of a non-negotiable bill of lading is a felony punishable by imprisonment for five years, or by a fine not exceeding $5,000., or both) and new section 369-f (fraudulent issuance of a non-negotiable warehouse receipt is a misdemeanor punishable by imprisonment for one year, or by a fine not exceeding $1,000., or both). New sections 368-368-f (relating to bills of lading) are derived from Personal Property Law §§230-236. Five of these seven new sections are felonies and the remaining two (368-a, 368-c) are misdemeanors. New sections 369-369-f (relating to warehouse receipts) are derived from General Business Law §§134-139. All of these seven new sections are misdemeanors. The rationale for the felony-misdemeanor distinction between bills of lading violations and warehouse receipts violations is not readily apparent.

Recommendation: transfer Penal Law Article 32, as amended by Laws 1962, to the General Business Law, as Article 9. However, the Law Revision Commission should be requested to reconsider the need or desirability for retaining felony sanctions for violations of those provisions relating to bills of lading.

UNIFORM COMMERCIAL CODE

A complete revision of the commercial law of New York will be effected by the enactment of the Uniform Commercial Code. (See discussion in Circular No. 155, February 5, 1962.) The Code will replace the prior uniform acts in the fields of sales, negotiable instruments, warehouse receipts, bills of lading, stock transfers, conditional sales and trust receipts. It also replaces the non-uniform acts regulating bank collections, bulk sales, chattel mortgages and factors' liens. In addition, the Code provides statutory rules for letters of credit and accounts receivable financing. This law is not operative until September 27, 1964. (L. 1962, c. 552, 553. S. Int. 1929, 1928.)

Penal Law Article 42, "Canals," §§460-466

This Article consists of seven sections (five misdemeanors and two felonies):

§460 A person whose duty it is to deliver to any collector of tolls upon any of the canals belonging to this state, a bill of lading of any property transported upon such canal, who delivers a false bill of lading as true, or makes or signs a false bill of lading, intending it to be delivered as true, knowing such bill to be false, is punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding three times the value of the property omitted in such bill, or both.

§461 A weighmaster upon any of the canals belonging to this state, and a clerk of such weighmaster, who makes a false entry of the weight of any boat, or cargo of any boat, navigating such canal, or who makes a false certificate of the light weight of any boat, knowing such entry or certificate to be false, is guilty of a misdemeanor.

§462 A public officer or agent employed by the people of this state in relation to the canals belonging to this state who knows, or has good reason to believe that any fraud upon the revenues of the canals has been committed or attempted, and who omits to disclose the same, and enforce the penalties therefor, if within his power, is guilty of a misdemeanor.

misprision

§463 A person who, without authority of law, wilfully inflicts an injury upon any of the canals belonging to this state, or any sidecut, feeder, reservoir or other works connected with the canal system, or distrubs or injures any of the boats, locks, lights, light-houses, beacons, buoys, bridges, buildings or machinery or other works or erections connected with such canal system and in which the people of the state have an interest or without authority, operates or attempts to operate the machinery or apparatus on or connected with any lock, bridge or dam, or opens or attempts to open any gate for the passage of water through or from any such canal, side-cut, feeder or reservoir, is guilty of a felony.

malicious

§464 A person who draws water from any canal in this state, or from a feeder or reservoir of any canal, during the season of navigation of the canal, and to the detriment or injury of the navigation thereof, without authority of law, is punishable by imprisonment in a county jail not less than one year, and by a fine not less than one thousand dollars.

§465 A public officer or agent employed by the people of this state in relation to the canals belonging to the state, or a contractor for canal repairs, or person having charge of any canal, or any part thereof, or of any lock, waste weir, feeder or other work belonging thereto, or being employed thereon, who asks, or accepts or promises to accept any bribe as an inducement to permit water to be drawn from a canal, feeder or reservoir in violation of the last section; and a person who gives, or offers or promises to give to any officer or person above mentioned, any bribe as an inducement to him to permit water to be drawn from any canal, feeder or reservoir in violation of this section, is guilty of a misdemeanor.

§466 A person who, without authority, cuts, removes, causes to be removed or aids in removing from any lands belonging to this state for canal purposes, any tree, timber or growing hay, or removes or causes to be removed from such lands, any rock, stone, sand or gravel or any materials found in natural deposit, or who, without authority, erects, or enters upon such land for the purpose of erecting, any house, shed, building or structures of any kind or nature on such canal lands, is guilty of a misdemeanor.

All of these sections are illustrative of the unnecessary itemization in the Penal Law, i. e., the conduct proscribed by this Article relates essentially to bribery, forgery, larceny and malicious mischief. The Canal Law contains no criminal sanctions. The Superintendent of Public Works, who has general supervision of the canal system and is charged with the enforcement of the Canal Law, favors the transfer of Penal Law Article 42 to the Canal Law.

Question for Commission: shall Penal Law Article 42 be transferred to the Canal Law?

Penal Law Article 82, "Ferries," §§870-872. #

This article consists of three sections. §870 provides that a person who (1) maintains a ferry for profit or hire upon any of the waters of this state without authority of law, or (2) having entered into a recognizance to keep or maintain a ferry, violates the condition of such recognizance, is guilty of a misdemeanor. §871 provides that a person operating any ferry from or to a city of five hundred thousand inhabitants or over, who posts a false schedule of ferry rates, or neglects to post in a conspicuous and accessible place, in plain view of the passengers, a schedule, plainly printed in the English language, of the rates of ferriage charged, is guilty of a misdemeanor.

Navigation Law Article 8, "Ferries," §§110-113, provides for the licensing and regulation of ferry operations in this state. §113 provides that a licensee operating any ferry from or to a city of fifty thousand inhabitants or over, shall post in four conspicuous and accessible places, a schedule plainly printed in the English language of the rates of ferriage charged: failure to comply, or the posting of a false schedule, subjects the

offender to a penalty of $50.00 for each day's neglect, to be recovered by any person who shall sue therefor in any court. Transportation Corporation Law Article 6, "Ferry Corporations," §§70-72, requires every corporation operating a ferry to post a schedule of its rates.

Penal Law §872, added Laws 1917, ch. 173, provides that an operator of a motor vehicle who leaves it unattended at any time when it is being carried on any ferryboat operating in this state, or between this state and another state, and from or to a city of five hundred thousand inhabitants or over, is guilty of a misdemeanor.

Recommendation: transfer Penal Law §§870, 871 and 872 to Navigation Law Article 8, as new sections 114, 115 and 116, respectively.

Penal Law Article 36, "Bucket Shops," §§390-395. # felony

This Article, added by Laws 1908, ch. 458, consists of six sections. §390 proscribes, inter alia, the making of a contract respecting the purchase or sale, either upon credit or margin, of any securities, intending that such contract shall be terminated or settled upon the basis of the public market quotations of or prices made on any board of exchange upon which such securities are dealt in, and without intending a bona fide purchase or sale of the same. A violation of any provision of §390 constitutes a felony. §391 provides that any person receiving or communicating any statement of quotations of prices of any such securities with an intent to make any contract prohibited in this article shall be guilty of a felony. §392 requires every person to furnish upon demand to any customer for whom such person has executed an order for the actual purchase or sale of any such securities, a written statement containing the names of the persons from whom such property was bought, and other data; failure to furnish such statement within 48 hours is prima facie evidence that such purchase or sale was made in violation of this article. §393 provides that if a

domestic corporation shall be convicted of a second offense under this article, the attorney general may bring an action to dissolve such corporation. §394 defines a "bucket shop" as a place where any contract prohibited by this article is made. §395 provides that "in any criminal proceeding for a violation of this article, the court or grand jury may confer immunity in accordance with the provisions of Penal Law §2447.

Question for Commission: shall Penal Law Article 36 (with felony provisions) be transferred to the General Business Law as a new Article. (The Attorney General has this staff recommendation under study.)

Penal Law Article 100, "Ice," §1100

The single section in this Article, added Laws 1893, ch. 692, reads as follows:

> " 1. A person who takes possession of or cuts ice in front of the lands of another on any water except lakes, ponds, the Hudson and Mohawk rivers and the tide waters of Rondout and Catskill creeks, between the center of such body of water and such lands, after the owner or occupant has posted in a conspicuous manner upon such lands, near the banks of such waters a written or printed notice of his desire to cut ice in front of such lands; or,
> 2. Trespasses upon or takes such ice or any part thereof for commercial purposes; or,
> 3. Wilfully removes any such notice,
> Is guilty of a misdemeanor. "

General Business Law Article 16, "Ice," §§260-264, provides that the owner or lessee of lands bordering upon the Hudson or Mohawk Rivers, or upon the navigable tide water of the Catskill Creek shall have the exclusive privilege of cutting and harvesting all the ice in the said waters adjacent to his lands, provided he shall have indicated his intention of exercising such privilege. The Article further provides that it shall be unlawful for any person other than the owner or lessee to take possession of or cut the ice so staked out. General Business Law §261 provides that any person trespassing upon or taking the ice for commercial purposes or otherwise shall be liable to such owner or lessee for the value of the ice so taken and for any damage, and an action may

be maintained for an injunction. Hence, this Article of the General Business Law adequately protects the rights of an owner or lessee, without the necessity of continuing the criminal sanction in Penal Law Article 100.

Recommendation: repeal Penal Law §1100. The New York State Department of Public Works agrees with this recommendation.

Penal Law §1904 provides that a person cutting ice for the purpose of removing it for sale or use, must surround the cuttings and openings with fences. Failure to comply with this provision is a misdemeanor. (G. B. L. §260 reads in part: "such owner or lessee shall surround the cuttings and openings made with fences of bushes or other safeguards to warn all persons of such cuttings and openings." Hence, a non-penal statutory duty is placed upon the owner or lessee.) §1904 also provides that a person who loosens or detaches from any island shore of the Saint Lawrence River, within the jurisdiction of this state, any field of ice which when so loosened or detached forms a bridge or passage way, is guilty of a misdemeanor. The section further provides that the Sheriff of Saint Lawrence County may appoint deputies to patrol the river and to arrest persons engaged in a violation of this section. The Sheriff of Saint Lawrence County, in April, 1962, commented on §1904: "In my opinion the section is obsolete and unnecessary because ice cutting is an almost extinct business due to the more modern means of refrigeration. We have in the past few years eliminated the appointing of deputies to patrol the St. Lawrence River." The New York State Superintendent of Public Works submitted the following comment: "Ice is harvested on many lakes in the State The sport of ice boating is growing in the State and especially on many of the lakes from which ice is taken. Ice boating and ice harvesting are not compatible since ice harvesting is a hazard to ice boating. We believe therefore, that some control on ice harvesting should remain by either leaving the provision under the present section of the Penal Law or, as recommended, transferring them to

Article 16 of the General Business Law."

Recommendation: transfer Penal Law §1904 to General Business Law Article 16 as new section 265.

Penal Law Article 108, "Indians," §§1160-1161.

This Article consists of two sections. §1160 provides that a person who cuts or removes from the Alleghany, Cattaraugus, Tonawanda or Onondaga reservations any wood, trees, timber, bark or poles, except as authorized by law, is guilty of a misdemeanor. §1161 provides that a person, other than an Onondaga Indian, who cuts or removes from the Onondaga reservation any tree, timber, wood, bark, or poles; or an Indian who cuts for the purpose of sale or removal from such reservation any such property, except on the written permission of a majority of the chiefs of the Onondaga tribe, is guilty of a misdemeanor. Note: the Indian Law contains some criminal provisions: §5-a (misd.), §28 (misd.), §57 (felony), and §58 (misd.).

Indian Law §56 provides that no unauthorized person shall cut or remove from the Alleghany, Cattaraugus or Tonawanda reservations any wood, trees or timber. (Unlike Penal Law §1160 it does not include the Onondaga reservation.) A person violating the provisions of this section shall be liable to a penalty of twice the value of such property, recoverable for the benefit of the nation occupying the reservation. There are no specific penal sanctions. Indian Law §22 is identical with Penal Law §1161, except that §22 contains no specific penal sanctions. Indian Law §23 provides that the receiver of such property unlawfully cut or removed shall be liable to a penalty of five times the value of such property, recoverable by the agent of such tribe.

Indian Law §§98, 105 and 122 contain similar non-penal provisions relating to unlawful removal of wood or timber, respecting the Tuscarora Nation, the Saint Regis Tribe and the Shinnecock Tribe.

The staff communicated with the New York State Interdepartmen-

tal Committee on Indian Affairs, concerning the transfer of Penal Law §§1160-1162 to the Indian Law as new sections 56-a and 22-a. The following comments were received: (1) Chairman of the Interdepartmental Committee: "I feel that removing Sections 1160 and 1161 of the Penal Law seems reasonable. To place these sections in the Indian Law verbatim would, however, prove to be confusing and in my opinion these penal law sections should be combined with the two similar sections in the Indian Law." (2) Supervisor of Indian Affairs, New York State Department of Social Welfare: "In my opinion, Sections 1160 and 1161 of the Penal Law should be repealed. Section 1160 seems to be covered by section 56 of the Indian Law and section 1161 by section 22 of the Indian Law. The insertion of these would be more confusing to the Indian." (3) New York State Department of Commerce: "we see no objection if the present sections of the Penal Law are to be transferred without change. Otherwise we would want to look at the Committee's suggested changes."(4) New York State Police: "we feel that the transferring of the provisions in question would be placing the present sections with other related subject matters in the proper law." (5) New York State Department of Mental Hygiene: "we find no objection to the proposed transfer of Article 108 of the Penal Law to the proposed new sections in the Indian Law." (6) New York State Department of Health: "I disagree with and am opposed to the recommendation to transfer Section 1160 of the Penal Law to a new Section 56-a of the Indian Law for the reason that Section 1160 of the Penal Law refers to both Onondaga and Seneca Indian Reservations whereas Article 4 of theIndian Law, which would include the proposed new section, is entitled and refers to 'The Seneca Indians'. [This objection could be overcome by deleting "Onondaga," since this group is covered in Penal Law §1161.] I see no objections to or particular virtue in transferring Section 1161 of the Penal Law to a new Section 22-a of the Indian Law." The staff is awaiting comments from the Joint Legislative Committee on Indian Affairs.

Recommendation: (a) transfer Penal Law §1160 (deleting "Onondaga") to the Indian Law as new section 56-a; (b) transfer Penal Law §1161 to the Indian Law as new section 22-a.

Penal Law Article 146, "Negotiable Instruments," §§1520-1522

In 1953 the Law Revision Commission began a survey of the entire body of the New York Consolidated Laws to identify provisions which would require amendment or repeal in the event of enactment of the Uniform Commercial Code. (See Penal Law Article 32, supra.) The following comments were made concerning Penal Law §§1520, 1521 (Leg. Doc. [1955] No. 65K, at 100):

upon the same subject or matter

> "Section 1520. This section provides for punishment of persons who knowingly deal with negotiable instruments given for a patent right, which are not properly identified as such on the face of the instrument. This section is in pari materia with Negotiable Instrument Law §330. While there is no inconsistency between Penal Law, §1520 and the Code, the repeal of Negotiable Instruments Law §330 would render section 1520 rather pointless inasmuch as the marking of such an instrument with the words 'given for a patent right' would not, after repeal of Negotiable Instruments Law, §330 have the effect of automatically preventing a taker from becoming a holder in due course. The type of fraudulent activity envisaged by Penal Law, §1520 could be appropriated [sic] dealt with under Penal Law, §932, penalizing the obtaining of property by false pretenses.
>
> Section 1521. This section provides for punishment of persons who knowingly deal with negotiable instruments given for certain types of speculative consideration, which are not properly identified as such on the face of the instrument. This section is in para materia with Negotiable Instruments Law, §331. While Penal Law §1521 is not inconsistent with the Code, the repeal of Negotiable Instruments Law, §331 would render the section rather pointless inasmuch as the marking of such an instrument with the words 'given for a speculative consideration' would not, after repeal of Negotiable Instruments Law, §331 have the effect of automatically preventing a taker from becoming a holder in due course. The sort of fraudulent activity envisaged by Penal Law §1521 could be appropriately dealt with under Penal Law, §932, penalizing the obtaining of property by false pretenses."

§§1520, 1521 were amended by Laws 1962, ch. 552, §36, eff. Sept. 27, 1964, by deleting the word "instrument," and substituting "negotiable promissory note within article three of the uniform commercial code" for "promissory note." (Penal Law §1520 was held valid in Herdic v. Roessler (1888) 109 N. Y. 127.)

The General Business Law was amended by Laws 1962, ch. 552, §21, eff. Sept. 27, 1964, by inserting therein a new Article 29-C, "Notes Given for Patent Rights and for a Speculative Consideration," §§550-551. This new article and the two sections are similar to Negotiable Instruments Law Article 19, "Notes Given for Patent Rights and for a Speculative Consideration," §§330-331. The Negotiable Instruments Law was repealed in toto by Laws 1962, ch. 553, eff. Sept. 27, 1964. (See schedule following U. C. C. §10-105.)

§1522, a procedural provision, provides that any bank, transfer agent, railroad, etc. may retain forged, counterfeit or spurious documents or negotiable instruments. The section provides further that such instruments shall be delivered to a district attorney within fourteen days.

Recommendation: (a) transfer Penal Law §1520 and §1521 to General Business Law Article 29-C, as added by Laws 1962, ch. 552; (b) transfer Penal Law §1522 to General Business Law Article 26, "Miscellaneous." See Bob Bentley's letter 7/21 suggesting letter to Joint Legislative Committee on Interstate Cooperation (Sen. Barrett). See reply to the Committee attached to Article 32 (Bills of Lading)

Penal Law Article 150, "Oysters," §§1550-1551.

This Article, derived from the Penal Code of 1881, consists of two sections. §1550 prohibits, inter alia, a non-resident from planting oysters in the waters of this state without the consent of the owner (misd.). §1551 prohibits a person from using a dredge or drag operated by steam or weighing over thirty pounds for the purpose of catching, or taking oysters or other shell fish from beds of natural growth in the waters of this state (misd.).

The New York State Conservation Commissioner submitted the following opinion concerning the present-day need for Penal Law §§1550-1551:

> "In reply to your request, we have evaluated the need to retain the provisions of Section 1550 and 1551 of the Penal Law, relating to oysters. We have concluded that these provisions are either covered by other existing laws or regulations or are outdated and that there is no need to retain them.
>
> Section 1550 pertains to a nonresident taking or

planting oysters. Under the provisions of sections 302, 307, 308 and 312 of the Conservation Law residence in this State is required as a prerequisite for obtaining a lease of state-owned lands under water for shellfish cultivation and for obtaining a digger's permit, a grower's permit, or a permit to transplant shellfish. Most towns also have a residence requirement in their regulations pertaining to the planting and taking of shellfish on lands owned by the towns.

Section 1551 prohibits the use of steam dredges and dredges weighing over thirty pounds in the taking of shellfish. Steam dredges are not in use today. Section 306 of the Conservation Law sets forth the conditions under which dredges may be used on public and unleased lands. Again most towns have regulations pertaining to the use of dredges on lands owned by the towns.

If for any unforseen reason a need should arise in the future to recapture any part of the provisions of sections 1550 and 1551 of the Penal Law, we believe this could be best handled by appropriate amendment of the Conservation Law or in the case of town lands of the town regulations. "

Recommendation: repeal Penal Law Article 150, §§1550-1551.

Penal Law Article 154, "Pawnbrokers," §§1590-1593.

§1590 could be repealed GBL is broad enough.

This Article contains four sections. §1590 provides that a person who carries on the business of a pawnbroker, by receiving goods in pledge for loans at a rate of interest above that allowed by law, except by virtue of a license from a municipal corporation or other authority empowered to grant licenses to pawnbrokers, is guilty of a misdemeanor. §1591 provides that a pawnbroker or a junk dealer, who having received any goods which have been stolen, refuses to exhibit them upon demand to the owner, is guilty of a misdemeanor. §1592 prohibits, inter alia, a pawnbroker from selling any article received by him in pledge before the time to redeem the same has expired (misd.) §1593 prohibits a pawnbroker from accepting in pawn any pistol or concealed weapon.

General Business Law Article 5, "Pawnbrokers," §§40-55, regulates the pawnbrokerage business; §54 (added Laws 1960, ch. 981) provides that any person who wilfully violates any of the provisions of this article shall be guilty of a misdemeanor punishable by a fine of not more than $500., or imprisonment for not more than one year, or both.

N.Y.C. Department of Licenses agrees with this proposal: see letter of 8/29/62

Recommendation: transfer Penal Law §§1590, 1591, 1592 and 1593 to General Business Law Article 5 as §§41-a, 45-a, 48-a and 47-a, respectively.

Letter to N.Y.C. Dept of Licenses: reply: peddlers does not come within their jurisdiction &∴ was not considered.

Penal Law Article 156, "Peddlers," §1610.

The single section in this Article provides that "A person who is found trading as a peddler without a license, or contrary to the terms of his license, or who refuses to produce his license on demand of any officer or citizen, is guilty of a misdemeanor." This provision was added to the Penal Code by Laws 1896, ch. 551. At the same session of the Legislature, what later became General Business Law Article 4, "Peddlers," §§30-36, was also enacted. Laws 1896, ch. 371, §1 and ch. 376, §§60-65.

General Business Law §§30-31, which related to the application for and issuance of peddlers' licenses, were repealed by Laws 1956, ch. 318. The draftsman's note to this bill reads as follows:

> "Sections 30 and 31 of the General Business Law, proposed to be repealed by this bill, provide for the licensing by the Secretary of State of persons engaged in the sale of goods, wares and merchandise as peddlers. These provisions are obsolete and to some extent in conflict with the powers conferred upon municipalities to issue similar licenses. The repeal of these provisions is recommended by the Division of the Budget."

General Business Law §33 presently provides that every person found traveling and trading within this state contrary to the provisions of this article, or contrary to the terms of any license that may have been granted to him under this article, shall, for each offense, forfeit to the town in which the offense was committed the sum of $25. And §34 provides that any citizen may arrest a person trading as a peddler who neglects or refuses to produce his license on demand. Neither section appears to have received judicial construction. Town Law §§135-137 and Village Law §§89-93 authorize a town or village to provide by ordinance for the licensing of peddlers, and to provide that a violation shall constitute a misdemeanor or offense. A city has power to enact an ordinance regulating and licensing peddlers under General City Law §20 (13). It would appear that Penal Law §1610 was meaningful

before the obsolescence and repeal of General Business Law §§30-31.

Recommendation: repeal Penal Law §1610.

Penal Law Article 159, "Platinum Stamping," §§1635-1643.

This Article, added by Laws 1927, ch. 244, contains nine sections. §1635 relates to definitions. §§1636-1640 relate to quality marks, trade marks and abbreviations. §1641 is concerned with evidence. §1642 provides that a violation of this article is a misdemeanor. §1643 is a savings clause.

Recommendation: transfer Penal Law Article 159 to General Business Law as new Article 2, entitled "Platinum Stamping," to be numbered as §§2-10.

Penal Law §§422-429, added Laws 1894, ch. 474, and Laws 1898, ch. 330, relate generally to silver. A violation of each section constitutes a misdemeanor. §422 provides that no article of merchandise shall be marked with the words "sterling" or "sterling silver" unless 925/1000 of the component parts of the metal is pure silver. §423 relates to "coin" or "coin silver". §§424-425 relate to silver soldered metal. §§426-427 relate to the marking of silver metal placed on leather or other substances. §§428-429 relate to the marking of watch cases as silver or sterling silver.

Penal Law §431, added Laws 1905, ch. 287, and amended Laws 1959, ch. 704, relates generally to the marking of articles made of gold, e. g., no person may sell any article of merchandise, made in whole or in part of gold, having stamped thereon any mark indicating that the gold in such article is of a greater degree or karat of fineness by more than one-half of one karat than the actual quality or fineness of such gold. A violation of any provision of this section constitutes a misdemeanor.

Penal Law §452, added by Laws 1962, ch. 872, eff. Sept. 1, 1962, provides that any person who shall knowingly sell "any diamond which shall have been artificially colored or tinted by coating, irradiating, heating, nuclear bombardment or by other

means," without disclosing this to the purchaser, is guilty of a misdemeanor.

Recommendation: transfer Penal Law §§422-429 (silver), §431 (gold) and §452 (diamonds) to General Business Law as new Article 2-A, entitled "Silver, Gold and Diamonds," to be numbered as §§11-20.

Penal Law Article 160, "Poor Persons," §1650.

The single section in this Article, added Laws 1896, ch. 550, reads as follows:

> "Any person who shall send, remove or entice to remove, or bring, or cause to be sent, removed or brought, any poor or indigent person, from any city, town or county, to any other city, town or county without legal authority, and there leave such person for the purpose of avoiding the charge of such poor or indigent person upon the city, town or county, from which he is so sent, removed or brought or enticed to remove, shall be guilty of a misdemeanor, and on conviction, shall be imprisoned not exceeding six months, or fined not exceeding one hundred dollars, or both."

The New York State Department of Social Welfare wrote the following comment: "We would join you in recommending repeal of [§1650], since the substance appears to be covered in section 148 of the Social Welfare Law, though limited in its application to public welfare districts instead of counties, cities and towns." Social Welfare Law §148 reads as follows:

> "No person shall, without legal authority, send or bring, or cause to be sent or brought, any needy person into a public welfare district with the purpose of making him a charge on such public welfare district, or for the purpose of avoiding the responsibility of assistance or care in the public welfare district from which he is brought or sent. Any person found guilty of such an act shall be guilty of a misdemeanor and liable to a fine of fifty dollars, recoverable in the name of the public welfare district."

Recommendation: repeal Penal Law §1650.

Penal Law Article 161, "Portable Kerosene Heaters," §§1670-1674.

The provisions of this Article were first enacted as Article 43 of the Public Health Law, §§4300-4304, by Laws 1958, ch. 883. Laws 1960, ch. 733 transferred these provisions from the Public Health Law to the Penal Law as Article 161. The note to the latter

bill reads as follows:

> "The provisions of article forty-three of the public health law, proposed to be repealed by this bill, are the same in substance as those of new article one hundred sixty-one of the penal law, proposed to be added by this bill, except that the provisions respecting portable kerosene heaters in multiple dwellings are here excluded, it being intended that they be provided for in a separate amendment to the multiple residence law."

Laws 1960, ch. 732, amended the Multiple Residence Law by adding thereto a new section 14.

At the recent session of the Legislature, a bill was passed amending Penal Law §1674 and adding a new section 1672-a to Penal Law Article 161. This bill was vetoed by the Governor on April 29, 1962.

The staff recommended to the New York State Department of Health that the provisions of Penal Law Article 161 be re-transferred to the Public Health Law. The following comment was recently received: "This recommendation is illogical. The sections referred to were first placed in the Public Health Law in 1958 and were removed therefrom by Chap. 733 in 1960 because of departmental and Governor's Office's agreement that these provisions had no concern with the administration of public health in this State. The original text of §§4300-4304 of the Public Health Law are now contained in the above specified sections of the Penal Law and in §14 of the Multiple Residence Law,--where they properly belong--and should remain."

The following is a summary of Penal Law Article 161: §1670 contains legislative findings, declaring, inter alia, that the use of defective portable kerosene heaters in certain structures constitutes a fire hazard and a threat to the lives, health and safety of the occupants of such structures. §1671 defines "structure," "multiple dwelling," "owner," "person," and "approved portable kerosene heater." §1672 provides that unapproved portable kerosene heaters are prohibited in structures. §1673 provides that a violation of this article constitutes a misdemeanor punishable by a fine of not more than $100., or by imprisonment not exceeding 90 days. §1674 provides that this article is not applicable to any city

having a population in excess of five hundred thousand.

The Multiple Residence Law (§3) is applicable to all cities of less than five hundred thousand population and to all towns and villages. Penal Law Article 161, inapplicable to any city having a population in excess of five hundred thousand, includes not only dwellings but "any structure used for business, commercial or industrial purposes." And the Multiple Dwelling Law (§3) is applicable to all cities with a population of five hundred thousand or more. Hence, transferring Penal Law Article 161 to the Multiple Residence Law or Multiple Dwelling Law would be inappropriate. Nor do the provisions of this Article properly belong in the Real Property Law, General City Law or General Municipal Law.

The Public Health Law contains several provisions which only indirectly concern "the administration of public health in this State," e. g., §§1346-1347 provide that every hotel shall furnish each guest with clean sheets which "shall be ninety-one inches long, minimum length after being hemmed and laundered, and of sufficient width to completely cover the mattress and springs": a violation of this provision constitutes a misdemeanor. Public Health Law Article 23, Title II, contains fifteen sections relating to injunctions against houses of prostitution. §1335 provides that it shall be a misdemeanor to manufacture fertilizer within the corporate limits of any city. And Article 13, Title VI contains detailed safety requirements to be observed at bathing places.

Question for Commission: shall Penal Law Article 161 be re-transferred to the Public Health Law?

Bob Bentley letter 7/21/62 "I do not believe I would want to transfer Article 161 on kerosene heaters. The Migrant Labor Committee (Assemblyman Waters) and the Fire Laws Committee have worried about these too long now."

Penal Law Article 166, "Public Health," §§1740-1764.

This Article of the Penal Law contains 32 sections. The staff makes no recommendation to transfer (a) narcotic drug provisions (§§1747-b - 1747-e, 1751-1753); and (b) provisions relating to poisons and intoxicated physicians endangering life (§§1760, 1760-a, 1761). §§1749, 1750, 1757 and 1764 are discussed in Memorandum No. 1 at pps. 6, 9, 10. The remaining 16 sections in

this Article are reviewed herein:

§1740 provides that a person who wilfully violates any provision of the health laws or any lawful order or regulation made by a health officer is guilty of a misdemeanor. Public health Law §229 provides that the provisions of the Sanitary Code shall have the force and effect of law, and a violation thereof shall constitute a misdemeanor; §12 provides that a violation of any order or regulation or any provision of the Public Health Law or Sanitary Code, subjects the offender to a civil penalty of $250.

Recommendation: transfer Penal Law §1740 to Public Health Law as new section 12-b. Department of Health has no objection to this proposal.

§1741 provides that a person who wilfully opposes or obstructs a health officer or physician charged with the enforcement of the health laws, in performing any legal duty, is guilty of a misdemeanor. State Sanitary Code, Chapter I, Reg. 3, provides that no person shall interfere with or obstruct the entrance to any house, building or vessel, or other premises, or the inspection or examination of any occupant therein, by the state commissioner of health or local health officer, or the authorized representative of either. Chapter I, Reg. 4, provides that any violation of the Sanitary Code constitutes a misdemeanor. The staff initially recommended the repeal of Penal Law §1741. The Department of Health commented as follows: "I disagree that this section should be repealed since it refers to obstruction generally, where Regulation 3 of Chapter 1 of the Sanitary Code does not. Moreover, there is no good reason why the dignity of specific statutory protection should be removed from the performance of a health officer's duties. If §1741 must be excised from the Penal Law, it is suggested that it become a new §12-c of the Public Health Law."

Recommendation: transfer Penal Law §1741 to the Public Health Law as new section 12-c.

§1742 provides that any person, "who, in putting up any drug, medicine, or food or preparation used in medical practice, or making up any prescription, or filling any order for drugs, medicines, food or preparation puts any untrue label, stamp or other designation of contents upon any box, bottle or other package containing a drug, medicine, food or preparation used in medical practice... is guilty of a misdemeanor." The section refers at length to apothecary practice e. g., Laws 1961, ch. 742, amended this section to provide that under certain circumstances its provisions shall not apply to a hospital pharmacy. Education Law Article 137, §§6801-6828, is entitled "Pharmacy"; §6808 relates generally to the adulterating, misbranding and substituting of drugs; §6804 (3) (k) provides that it is a misdemeanor for any person to adulterate, misbrand or substitute any drug.

The staff initially recommended transferring Penal Law §1742 to the Education Law as new section 6808-a. The Department of Health commented as follows on this proposal:

"This section [P. L. §1742] deals with the mislabeling or failure to label drugs or food. While the Education Law, §6808, relates to adulteration, misbranding and substitution of drugs, it has no jurisdiction over food. Therefore, §1742 should not be transferred to the Education Law. It might be more appropriate to transfer it to the Public Health Law."

However, §1742 refers not to "food," but to "food or preparation used in medical practice." Education Law §6801 (14) defines drugs broadly enough to include "food or preparation used in medical practice." The staff has requested Department of Health to reconsider their position.

Recommendation: transfer Penal Law §1742 to Education Law as new §6808-a.

§1743 provides that it shall be unlawful for any person to sell any of the poisons named in the schedules set forth in this section without affixing a label containing the name of the article and the word "poison." The section also includes "such other poisons as the state board of pharmacy, under the authority given to it by article one-hundred thirty-seven of the education law, may from time to time add to either of said schedules."

Education Law §6813 is somewhat similar to Penal Law §1743. There are a few minor differences, e. g., §1743 was amended by Laws 1957, ch. 766, to require that an antidote be shown on the label. This requirement is not in §6813.

Recommendation: repeal Penal Law §1743, but conform Education Law §6813 to the provisions of Penal Law §1743. The Department of Health has no objection to this proposal.

§1744 provides that any person who violates any provision of Article 137 of the Education Law for which no other penalty is imposed, is guilty of a misdemeanor.

Education Law §6823 provides that any person who violates any of the provisions of Article 137 is guilty of a misdemeanor.

example #

Recommendation: repeal Penal Law §1744. The Department of Health has no objection to this proposal.

§1745 relates to the sale and manufacture of bichloride of mercury, mercuric chloride or corrosive sublimate.

Recommendation: transfer Penal Law §1745 to Education Law as new section 6813-a. Department of Health has no objection to this proposal.

§1747 provides that any person who distributes free samples of any medicine, drug or chemical, by leaving the same exposed upon the ground or in any other manner, that children may become possessed of the same, shall be guilty of a misdemeanor.

Education Law §6804 (3) contains 17 subdivisions relating generally to drugs (all misdemeanors).

Recommendation: transfer §1747 to Education Law as new subdivision 3(r) of section 6804. The Department of Health has no objection to this proposal.

§1747-a provides that no appliances, drugs or medicinal preparations having special utility for the prevention of venereal disease shall be sold or otherwise disposed of except in places duly registered by the state Board of Pharmacy. This section was added by Laws, 1935, ch. 685.

Recommendation: transfer §1747-a to Education Law as new subdivision 3(s) of section 6804. The Department of Health has no objection to this proposal.

§1748 contains three subdivisions. The first two relate to adulterated or diluted drugs; the provisions of these two subdivisions are essentially similar to Education Law §§6804 (3) (k) and 6808. The third subdivision prohibits the sale of ice cut from any canal or from the wide waters or basins of any canal, unless such ice is contained in a building, cart, sleigh or receptacle upon which is plainly marked in roman letters, not less than eight inches square, the words "canal ice."

The Department of Health has no objection to the staff recommendation to repeal subdivisions 1 and 2. As to the recommendation to repeal subdivision 3, the Department commented as follows:

> "This appears to be a health hazard and unless we know that the old practice of utilizing canal water for manufacture of ice has been discontinued, this subdivision should not be repealed, but it might be appropriate to transfer it to the Public Health Law."

Recommendation: (a) repeal subdivisions 1 and 2 of Penal Law §1748; (b) repeal subdivision 3, provided the Superintendent of Public Works is satisfied that the provision has no present-day application; otherwise, transfer subd. 3 to the Public Health Law.

See reply from Dept of Public Works dated July 9, 1962.

§1754 relates to the putting of noisome or unwholesome substances and the maintaining of a noisome business on or near a highway.

Public Health Law Article 13, Title I, §§1300-1308, relates

generally to the control and abatement of nuisances.

Recommendation: transfer Penal Law §1754 to Public Health Law as new section 1300-a. The Department of Health has no objection to this proposal.

§1755 reads as follows:" A person, who wilfully stops or obstructs the passage of any ambulance or vehicle used for the transportation of sick or wounded persons or animals upon any public street, highway or place, or who wilfully injures the same, or wilfully drives any vehicle into collision therewith, is guilty of a misdemeanor. All sheriffs, constables and police officers must, when called upon by the person in charge of such ambulance or vehicle, aid in placing sick or wounded persons or animals therein, and enforcing the provisions of this section."

The provisions of this section, derived from Penal Code §432 and Laws 1879, ch. 186, are adequately covered in Vehicle and Traffic Law §§101, 1144. The Department of Health submitted the following comment in reply to the staff's recommendation to repeal Penal Law §1755: "The recommendation would abrogate the right and authority of the person in charge of an ambulance to commandeer assistance from police officers. There is no reason to believe that this right and authority is less necessary now than it was when this statute was first enacted."

The Department of Motor Vehicles submitted the following comment:

> "It is noted that your Commission proposes to recommend repeal of section 1755 of the Penal Law, relating to obstruction of passage of an ambulance, a misdemeanor. This subject is covered by the provisions of sections 101, 1104 and 1144 of the Vehicle and Traffic Law, which are explicit as to the exemptions of authorized emergency vehicles and as to the correlative duties of the operators of other vehicles upon the approach of an ambulance or other authorized emergency vehicle.
>
> It is doubtful whether the provisions of section 1755 relating to the obstruction of passage of a vehicle used for the transporting of sick or wounded persons or animals has application in modern conditions. In view of the provisions relating to regulation of traffic, traffic control devices, the rules of the road and authorized emergency vehicles this portion of 1755 seems inconsistent and contradictory and a possible source of confusion to orderly movement of traffic.
>
> It would seem that enforcement of this provision would present difficulties, especially in view of the provisions of the Vehicle and Traffic Law which by its section 1100 is made exclusively controlling as to vehicles on the highways.

In view of the penalties provided in section 1800 of the Vehicle and Traffic Law this Department feels that the criminal sanctions of section 1755 of the Penal Law are not necessary and it has no objection to the proposed repeal of section 1755."

Recommendation: repeal Penal Law §1755. (However, if the Commission agrees with the observation of the Department of Health, then the "aid" provision of §1755 could be transferred to the Vehicle and Traffic Law.)

§1756 provides that a person "who wilfully exposes himself or another, affected with any contagious or infectious disease, in any public place or thoroughfare, except upon his necessary removal in a manner not dangerous to the public health, is guilty of a misdemeanor."

State Sanitary Code, Chapter II, and Public Health Law Article 21, §§2100-2163, deal at great length with communicable diseases. In agreeing with the staff's recommendation to repeal Penal Law §1756, the Department of Health commented as follows:

"This section is poorly drawn, badly worded, unworkable and generally useless. Section 2120 P. H. L. provides a more workable solution to the problem. It is also suggested that the latter section might be improved by the deletion of the words 'with whom he may be associated' in subdivision (1) thereof."

Recommendation: repeal Penal Law §1756.

§1758 provides that a person who wilfully places into any spring or body of water which is used in the manufacture of salt, or into any salt well or salt mine, any impure or deleterious substance which is liable to pollute the waters thereof, is punishable by imprisonment for not more than five years, or by a fine of not more than $2,000., or both. This section was added by Laws 1901, ch. 528.

felony

Public Health Law Article 11, §§1100-1169, is entitled "Public Water Supplies; Sewerage and Sewerage Control"; Article 12, §§1200-1263, is entitled "Water Pollution Control." The staff initially recommended repeal of Penal Law §1758. The Department of Health commented as follows:

"An intelligent opinion depends upon knowledge of extrinsic facts. From the heavy penalty provided in this section it is apparent that it must have been designed to counter actual or threatened malicious damage to salt industry installations or operations. The Superintendent of State Police and the District Attorney of Onondaga County would probably know whether or not this section is obsolete."

The Department of Commerce advised the staff that in 1960, New York tied with Michigan for second place as a salt producer, with 16%

of the national output. The Department advised that salt is manufactured at Myers, Silver Springs, Watkins Glen, LeRoy and Union Springs; one company extracts large quantities of salt as brine from wells south of Syracuse, but uses it exclusively in its own processes.

Recommendation: transfer Penal Law §1758 to Public Health Law Article 11, as new section 1150-a.

Question for Commission: shall the felony provision in §1758 be changed to a misdemeanor.

§1759 provides that a person who throws or deposits any noxious, offensive or poisonous substance into any public waters, or into any sewer or stream running or entering into such public waters, is guilty of a misdemeanor.

The Department of Health commented as follows on the initial staff recommendation to repeal Penal Law §1759:

> "I emphatically disagree. Criminal prosecutions under Article 12 [of the Public Health Law] can be conducted only by the Attorney General and only after disposition of an appeal or review or expiration of a statutory extension of time. Section 1759 is potentially a very useful section and it should be used more often. If it must go out of the Penal Law it could well become §1150-a or §1300-b of the Public Health Law."

Recommendation: transfer Penal Law §1759 to Public Health Law Article 13, "Nuisances and Sanitation" as new section 1300-b. (See §1754, supra.)

§1762 provides that a person who presents to a county clerk for registration as a practitioner of veterinary medicine or surgery any diploma or certificate fraudulently obtained or practices veterinary medicine and surgery without complying with or contrary to law, is guilty of a misdemeanor.

This section was added by Laws 1893, ch. 692. The practice of veterinary medicine is now regulated by Education Law Article 135, §§6701-6714. §6711 (1) provides that the unlawful practice of veterinary medicine constitutes a misdemeanor. §6711 (2) provides that any person who shall practice veterinary medicine under a false or assumed name shall be guilty of a felony.

Recommendation: repeal Penal Law §1762 (The staff is awaiting comment from the Board of Veterinary Medical Examiners.)

Penal Law Article 182, "Real Property," §§2030-2042

This Article contains eleven sections: eight are misdemeanors, one an offense (§2040), and two are procedural (§§2037-2038).

§2030 reads as follows: "A person who without the authority and consent of the legislature, in any manner or for or on any terms, purchases any lands within the state of any Indian residing therein, or makes any contract with any Indian for or concerning the sale of any lands within this state, or gives, sells, demises, conveys or otherwise disposes of any such lands, or any interest therein, or offers so to do, or enters upon or takes possesion of or settles upon any such lands, by pretext or color of any right or interest in the same, in consequence of any such purchase, or contract made or to be made, since October fourteenth, seventeen hundred and seventy-five, is guilty of a misdemeanor."

Laws, 1962, ch. 568, eff. Jan. 1, 1963, amended the Indian Law by adding a new Section 7-a which reads as follows:

"No purchase or contract for the sale of lands in this state, made since the fourteenth day of October, one thousand seven hundred seventy-five; or which may hereafter be made of, or with the Indians, shall be valid unless made under the authority, and with the consent of the legislature."

The Chairman of the Interdepartmental Committee on Indian Affairs is of the opinion that Penal Law §2030 should be combined with new Indian Law §7-a. The New York State Department of Social Welfare is of the opinion that Penal Law §2030 could be transferred to the Indian Law as new section 7-b. The Departments of Commerce, Mental Hygiene and State Police are of the same opinion. The Department of Health has no objection to the transfer, but submitted this comment:

"if Section 2030 is to receive any legislative attention, it is suggested that it be amended to be in specific reference to tribal lands or reservation lands and thereby become reconcilable with Section 2 of the Indian Law."

Indian Law §7-a, however, contains no such reference.

Recommendation: transfer Penal Law §2030 to Indian Law as new section 7-b.

Code discusses this under "Use of Force for the Protection of Property" §3.06

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§2034 relates to forcible entry and detainer. The section provides that a person guilty of using any force or violence in entering upon or detaining any lands or other possession of another, except in the cases and the manner allowed by law is guilty of a misdemeanor.

Forcible entry (all states have this type statute)

Real Property Law Article 16, §§520-539, is entitled "Action for Waste; Other Actions." §535 relates to an action for forcible

Letter Bob Bentley 7/21/62: I feel that any transfer to the real property law should be co-ordinated with the Law Revision Commission. As you know, part of the real property law went to the real property actions + proceedings law, and they contemplate further re-arrangement.

Note: 2035, as well as 2036, can be handled under a new "Criminal Trespass" provision e.g., §221.2 e.g., subd. 2 "Defiant trespass"

entry or detainer and provides for treble damages. A recovery under §535 for forcible entry or detainer can only be had where the entry is so forcible as to amount to a breach of the peace. Drinkhouse v. Parka Corp. (1957) 3 N. Y. 2d 82, 91-92.

Recommendation: transfer Penal Law §2034 to Real Property Law as new section 535-a.

§2035 reads as follows: "A person, who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal or officer, and who afterwards, without authority of law, returns to settle or reside upon or take possession of such lands, is guilty of a misdemeanor."

Recommendation: transfer to Real Property Law as new section 535-b.

§2036 reads as follows: "A person, who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects, or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor."

The staff makes no recommendation to transfer this section since the act proscribed will be dealt with under the burglary provisions. e.g., "Criminal trespass", §221.2

§2036-a prohibits the unauthorized posting of advertisements on the real property of another without permission.

Real Property Law §539 authorizes an action for the removal of encroaching structures.

Recommendation: transfer Penal Law §2036-a to Real Property Law as new section 539-a.

§2037 refers to a person "who leaves the state with intent to elude any provision of the last three sections."

Originally, the reference was to §§2034-2036. However, §2036-a was added by Laws 1939, ch. 270. It would appear that §2037 is obsolete. (See §195, Memorandum No. 1)

Recommendation: repeal Penal Law §2037.

§2038 refers to witnesses' immunity in any criminal proceeding for the offenses specified in §§2034-2036.

No useful purpose can be served by continuing this provision.

Recommendation: repeal Penal Law §2038.

L.R.C. Leg Doc (1949) No. 65-G p. 9, noting that §2039 "has been held unconstitutional & should be repealed."

§2039 reads as follows: "In cities of the first and second class, any person who shall make application to any other person, or to any corporation, for a loan upon any real property without the written authority of the owner of such real property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor."

This section was held unconstitutional in Keller v. Jamaica Motor Service (App. Term 2d Dept., 1925), 125 Misc. 825, 826, 211 N. Y. Supp. 578:

> "Section 2039 of the Penal Law, which makes it a misdemeanor for any one to apply for a loan upon real property without the written authority of the owner, is unconstitutional. (See Fisher Company v. Woods, 187 N. Y. 90) This was the only point raised on the trial."

Fisher (1907) held unconstitutional Penal Code §640-d. Penal Law §2039 is derived from Penal Code §640-e. Both of these sections were added to the Penal Code by Laws 1901, ch. 128, and contain somewhat similar provisions. The 1909 Penal Law consolidation repealed Penal Code §640-d (because of Fisher), but carried §640-e over to the Penal Law as §2039.

Recommendation: repeal Penal Law §2039.

§2040 provides that any lessor, agent or janitor of any building, the lease or rental agreement whereof by its terms requires the furnishing of hot or cold water, heat, light, power, elevator service or any other service or facility to any occupant of said building, who wilfully or intentionally fails to furnish such service, or who interferes with the quiet enjoyment of the leased premises by such occupant, is guilty of an offense.

Laws 1954, ch. 733, classified this violation as an offense, rather than a misdemeanor. The section is frequently used in the city of New York. Real Property Law Article 7, §§220-235, is entitled "Landlord and Tenant."

Recommendation: transfer Penal Law §2040 to Real Property Law Article 7 as new section 236.

§2041 reads as follows: "Any person, firm or corporation in any city owning or having in charge any apartment house, tenement house or other building used for dwelling purposes who shall refuse to rent any or part of any such building to any person or family solely on the ground that such person or family has or have a child or children shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense.

This section was added by Laws 1921, ch. 298. The following news

item appeared in The New York Times, March 7, 1962, page 1, col. 3:

"Albany, March 6-- The Republicans had a field day in the Capitol today at the expense of Mayor Wagner, on the ground that he had called for the adoption of legislation that had been on the books since 1921.

Governor Rockefeller said at a news conference that the Mayor had made 'a very irresponsible statement' and had attempted 'to hoodwink the public.'

Elsewhere in Republican ranks the reaction ran more to jubilant amusement. The Mayor had called yesterday for city and state legislation to prohibit landlords from discriminating against families with children in renting apartments. He said he would work for a city law and proposed that the Governor do the same thing on the state level.

Section 2041 of the Penal Law, however already provides that a landlord who refuses to rent an apartment to a family on the ground that there are children in the family is guilty of a misdemeanor and subject to a fine of $50 to $100. The section was introduced in the Legislature in 1921, was passed and was signed by Gov. Nathan Miller.

As Mr. Rockefeller took some pains to point out at his news conference, the law read that way when Mr. Wagner was a member of the Assembly, from 1938 to 1942, and when he was New York City's Housing Commissioner, in 1947.

The matter was brought up in the Assembly by Paul R. Taylor, Republican of Yates County, who was apparently undeterred by the fact that he was once a Democrat himself. He read the Mayor's statement and then the appropriate section of the Penal Law, and concluded:

'I don't want anyone to accuse me of trying to make the Mayor of the City of New York look foolish. It's too late for that.'

Mr. Rockefeller took a sterner posture. He said Mr. Wagner had made 'the most irresponsible statement I've seen coming from City Hall so far' and insisted that the Mayor must have known the 1921 statute was on the books.

Mayor Defends Statement

At City Hall, Mayor Wagner replied to what he termed 'Governor Rockefeller's rather intemperate press statement.'

The Mayor said he was 'well aware' that state law prohibited landlords from discriminating against would-be tenants with children.

'However, as the Governor's legal researchers should have told him,' the Mayor asserted, 'this is a dead-letter law. It is practically unenforceable. There are no court decisions of record under it. District Attorneys will not bring cases under it.'

Penal Laws, Mr. Wagner declared, are much more difficult to enforce than civil laws. His intention in proposing a new 'effective' state law, the Mayor said, was 'to help families with children.' "

Recommendation: transfer Penal Law §2041 to Real Property Law Article 7, as new section 237.

§2042 reads as follows: "Any person, firm or corporation in any city owning or having in charge any apartment house, tenement house or other building used for dwelling purposes who shall, in any lease of any or part of any such building, have a clause therein providing that during the term thereof the tenants shall remain childless or shall not bear children, shall be guilty of a misdemeanor.

This section was added by Laws 1946, ch. 846.

Recommendation: transfer Penal Law §2042 to Real Property Law Article 7, as new section 238. (Note: another §2042, relating to defense plants, added by Laws 1941, ch. 869, amended by Laws 1942, ch. 53, terminated July 1, 1943.)

Penal Law Article 194, "Salt Works," §2170.

The single section in this Article reads as follows:

"A person who wilfully burns, destroys, or injures any salt manufactory connected with the Onondage salt springs, or any building appurtenant to such manufactory or any part of such manufactory, or any of the buildings, reservoirs, pumps, conductors or water conduits, belonging to this state, used in the raising of salt water for the manufacture of salt, without authority of law, is punishable by imprisonment in a state prison not exceeding five years."

In 1932 and 1933 Assemblyman Pack introduced a series of bills to repeal obsolete provisions of the Penal Law (In 1933, he introduced a bill--A. Intro. 1493--to create a Temporary State Commission to make a survey of obsolete laws on the statute books.) Among the bills Mr. Pack drafted was one repealing Penal Law Article 194. In recommending approval of this bill, the Committee on Criminal Courts of the Association of the Bar of the City of New York commented as follows (Memo No. 82--1932):

"The unlawful acts with which the above Article deals appear to be adequately covered by Section 1433 of the Penal Law which provides that any person who unlawfully and wilfully destroys any real or personal property of another, in a case where the punishment is not specially prescribed by statute, is punishable by imprisonment for not more than four years, if the value of the property destroyed is, or its value is diminished by, more than $250, and in any other case by imprisonment for not more than six months, or by a fine not exceeding $250, or both; and in addition such person shall be liable in a civil action in treble damages for the injury done.

The repeal of Article 194, therefore, will not affect

the prosecution and punishment of persons who unlawfully and wilfully commit any of the acts mentioned in Article 194. Moreover, because of the provision in Section 1433 making it applicable only in cases where no other punishment is specially prescribed by statute [see also People v. Knatt, 156 N. Y. 305; Von Hoffman v. Kendall, 17 N. Y. S. 713], if the injury to such property is the result of burning or the use of explosives, the offender would be subject to prosecution under Article 18 of the Penal Law [arson] or under Article 1420 of the Penal Law [damaging building by explosion], entailing more severe punishment.

We think it desirable, so far as possible, that duplication in criminal statutes should be avoided. The bill in question is a step in this direction."

In 1952 the Law Revision Commission made a study of the Salt Springs Law and recommended repeal of Penal Law §2170. Leg. Doc. (1953) No. 65F, 11-12:

"Penal Law section 2170, which provides that any person who wilfully damages state-owned property in the Onondage Salt Springs is punishable by imprisonment, is obsolete. Section 2170 applies only to damage done to State buildings, reservoirs, pumps, etc., which are 'used in the raising of salt water for the manufacture of salt.' Since the State has ceased all salt manufacturing operations at Onondaga there is no longer any need for a provision penalizing interference with such operations."

The New York State Department of Commerce recently confirmed that salt is no longer manufactured at Onondaga.

Recommendation: repeal Penal Law §2170.

Penal Law Article 198, "Sepulture," §§2213-2221

This Article contains seven sections. Three sections (§§2216-2218) are felonies, and four (§§2214, 2219-2221) are misdemeanors.

> "These sections of the Penal Law of the State were enacted in the interests of decency, and to protect the sentiments of sorrowing relatives from outrage." Danahy v. Kellog (S. Ct. Erie Co., 1910) 70 Misc. 25, 28.

In 1955, former sections 2210, 2211, 2212, 2213 and 2215 were transferred to Public Health Law Article 42 "Cadavers," §§4200-4215, in accordance with a revision of that law which rearranged subject matter so that it would be more readily accessible and usuable. Laws 1955, Ch. 355. The Departmental Committee on Recodification wrote the following comment:

> "The autopsy and dissection laws are located in the Penal Law and the Public Health Law. They should be placed together to facilitate research by persons who have daily reference to these problems, to wit: registrars of vital statistics, local health departments, funeral directors, medical examiners and hospitals. The strictly criminal provisions pertaining to this subject will be retained in the Penal Law."

However, the New York State Department of Health presently has no objection to the staff recommendation to transfer the remaining sections in Penal Law Article 198 to Public Health Law Article 42.

These remaining Penal Law sections are:

§2214 "A person who makes, or causes or procures to be made, any dissection of the body of a human being, except by authority of law, or in pursuance of a permission given by the deceased, is guilty of a misdemeanor."

AL 1§250.10 "Abuse of Corpse" #

§2216 "A person, who removes the dead body of a human being, or any part thereof from a grave, vault, or other place, where the same has been buried, or from a place where the same has been deposited while awaiting burial, without authority of law, with intent to sell the same, or for the purpose of dissection, or for the purpose of procuring a reward for the return of the same, or from malice or wantonness, is punishable by imprisonment for not more than five years or by a fine not exceeding one thousand dollars, or both."

felony

§2217 "A person who purchases, or receives except for the purpose of burial, the dead body of a human being, or any part thereof, knowing that

the same has been removed contrary to the last section, is punishable by imprisonment for not more than three years."

§2218 "A person who opens a grave or other place of interment, temporary or otherwise, or a building wherein the dead body of a human being is deposited while awaiting burial, without authority of law, with intent to remove the body, or any part thereof, for the purpose of selling it or demanding money for the same, or for the purpose of dissection, or from malice or wantonness, or with intent to steal or remove the coffin or any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the dead body, is punishable by imprisonment for not more than two years, or by a fine of not more than two hundred and fifty dollars, or by both."

§2219 "A person who arrests or attaches the dead body of a human being upon any debt or demand whatever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor."

§2220 "A person who, without authority of law, obstructs or detains any persons engaged in carrying or accompanying the dead body of a human being to a place of burial, is guilty of a misdemeanor."

Code 250.8 "Disrupting Meetings & Processions"

§2221 "The burial or interment of a human body or human remains or any portion or portions thereof within the blue line of any existing canals of this state, or of the improved canals of the state, is hereby forbidden, and any person or persons violating this section is guilty of a misdemeanor."

The New York State Department of Public Works wrote the following comment on §2221, added by Laws 1910, Ch. 144:

"The Department feels that Section 2221 of the Penal Law is obsolete and should be repealed."

<u>Recommendation</u>: (a) repeal Penal Law §2221; (b) transfer Penal Law §§2214, 2216-2220 to Public Health Law Article 42 as new sections 4210-a, 4216-4220, respectively.

June 22, 1962
PJMcQ/pjc

New York State Commission on Revision of

Penal Law and Criminal Code

STAFF MEMORANDUM

Penal Law Article 112, "Insurance," §§1190-1204.

§1190: "Any applicant, officer, agent, solicitor, examining physician, surgeon or other person, who knowingly or wilfully makes any false or fraudulent statements or representations in or with reference to any application for membership or reinstatement or any other documentary or other proof for the purpose of obtaining or reinstating membership in or benefit from any fraternal beneficiary society, order or association, any corporation, association or society transacting the business of life or casualty insurance or both, upon the co-operative or assessment plan, or a corporation for the insurance of domestic animals, is guilty of a misdemeanor."

Note: Insurance Law §149 relates generally to representations by the insured, e.g., subdivision 2 reads: "No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." Penal Law §1190 does not require materiality.

Recommendation: transfer Penal Law §1190 to Insurance Law as new section 149-a.

§1191: "Any life insurance corporation or corporation transacting the business of life insurance on the co-operative or assessment plan doing business in this state, or any officer or agent thereof, who:

1. Makes any discrimination in favor of individuals of the same class or of the same expectation of life either in the amount of the premium charged or in any return of premiums, dividends or other advantages; or,

2. Makes any contract for insurance or agreement as to such contract other than that which is plainly expressed in the policy issued; or,

3. Pays or allows, or offers to pay or allow as an inducement to any person to insure, any rebate or premium, or any special favor or advantage whatever, in the dividends to accrue thereon or any inducement whatever not specified in the policy; or,

4. Makes any distinction or discrimination between white persons and colored persons, wholly or partially of African descent, as to the premiums or rates charged for policies upon the lives of such persons,

or in any other manner whatever; or demands or requires a greater premium from such colored persons than is at that time required by such company from white persons of the same age, sex, general condition of health and prospect of longevity; or makes or requires any rebate, diminution or discount upon the amount to be paid on such policy in case of the death of such colored persons insured, or inserts in the policy any condition, or makes any stipulation whereby such person insured shall bind himself, or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon white persons in similar cases, is guilty of a misdemeanor. Nothing in this section shall be construed to require any corporation doing business under articles nine-b or fourteen of the insurance law, which limits and confines its business or membership to the members of a secret or fraternal order or body, to insure or accept any individual who is not a member of such secret or fraternal order or body. (Subd. 4 am. L. 1940 ch. 435, in effect April 13.)"

Note: Discriminative practices in the sale of insurance because of race, creed or religion are covered in Insurance Law §40(10). And Insurance Law §5 provides that a violation of any provision of this chapter, unless the same constitutes a felony, shall be a misdemeanor. Discrimination and rebating prohibitions are contained in Insurance Law §§188 and 209.

Recommendation: transfer Penal Law §1191 to Insurance Law as new section 40-a.

§1192: "Any person acting as agent, sub-agent or broker of a life insurance corporation doing business in this state, except as agent soliciting or procuring applications for industrial life insurance solely, who solicits or procures applications for insurance without first procuring a certificate of authority from the superintendent of insurance, is guilty of a misdemeanor."

Note: Insurance Law §§110-111 prohibit any person from acting as an insurance agent or broker without a license. Both sections carry misdemeanor sanctions for a violation, and both set forth detailed exceptions.

Recommendation: repeal Penal Law §1192. (See Penal Law §1198, infra.)

§1194: "Any agent, shipper or other person, representing or acting for a marine

insurance corporation doing business in this state who:

1. Charges or receives, directly or indirectly from any person for insurance of any property in transit upon the canals of the state, any greater sum than the regular rates of premium fixed by the corporation for the insurance of such property; or,

2. Demands or receives upon any policy of insurance issued upon any such property, for the business of obtaining such insurance, a sum of money, as compensation or remuneration by way of salary, commission or in any other capacity, which includes any case, over fifteen per centum of the premium,

Is guilty of a misdemeanor."

Note: Insurance Law §128 relates generally to marine insurance. Section 129 requires that an insurance broker's right to compensation, other than commissions deductible from premiums, be in writing. The historical note in McKinney's Insurance Law indicates that §129 is based upon former §169(2), which was restricted to marine insurance contracts.

Recommendation: transfer Penal Law §1194 to Insurance Law as new section 129-a.

§1195: "Any officer or agent of a corporation organized for the insurance of domestic animals who:

1. Refuses to make any report or perform any duty required by law; or,

2. Intentionally makes any false or fraudulent statement or report,

Is guilty of a misdemeanor punishable by a fine of not less than one hundred or more than five hundred dollars."

Note: Insurance Law §46(11) lists animal insurance as among the kinds of insurance which may be authorized in this state, and §§311(1) (a), 316(1) provide that stock and mutual casualty insurance and surety companies may do this kind of insurance business.

Recommendation: transfer Penal Law §1195 to Insurance Law as new section 316-a.

§1196: "Any officer, manager, director or agent of a casualty insurance corporation upon the co-operative or assessment plan, organized under the laws of this state, who transfers its risks or assets or any

part thereof to or reinsures its risks or any part thereof, in any insurance corporation or association of another state or country which is not, at the time of such transfer or reinsurance authorized by law to do insurance business in this state, is guilty of a misdemeanor."

Note: Insurance Law §77 provides when an insurer is authorized to do an insurance business in this state, it may reinsure its risks and policy liabilities in another insurer.

Recommendation: transfer Penal Law §1196 to Insurance Law as new section 77-a.

§1196-a: "Any officer or director of a life or casualty insurance corporation upon the co-operative or assessment plan or of a fraternal beneficiary society, order or association, who shall sell his position as such officer or director for any money or valuable consideration, or who shall accept or receive, directly or indirectly, any money or valuable consideration for his resignation as such officer or director, shall be guilty of a felony if the money or valuable consideration accepted or received for the sale or resignation of such position as officer or director shall be more than five hundred dollars, and, if a less amount, shall be guilty of a misdemeanor. (Renumbered from §670 and transferred by L. 1940 ch. 112, in effect Mar. 7; cf. §661.)"

Note: Insurance Law §78 relates generally to directors and officers, e.g., it provides, inter alia, that no director or officer of an insurer doing business in this state shall receive, in addition to his fixed salary or compensation, any money or valuable thing for negotiating or aiding in any purchase or sale of property or loan, made by such insurer.

Recommendation: transfer Penal Law §1196-a to Insurance Law as new section 78-a.

§1197: "Any officer, agent or representative of a corporation, association, or society doing a life or casualty insurance business or both, upon the co-operative or assessment plan, who:

1. Neglects or refuses to perform any duty required of him by law; or
2. Intentionally makes any false or fraudulent statement or report; or,

3. Refuses to permit the superintendent of insurance or any examiner duly authorized by him for the purpose, to make an examination of the condition and business, books, papers and vouchers of any such corporation, association or society; or,

4. Thirty days after any such corporation has been notified by the superintendent of insurance to designate some person residing in the same city, village or town where the principal business office within the state of such corporation is located, as a person upon whom service of legal process and papers may be made, as provided by law, collects any money or issues any certificate in carrying on such business, during the failure of such corporation to designate such person; or,

5. Being within this state the agent or representative of any such corporation, association or society, which has neglected or refused to comply with any duty imposed upon it by law, or which has failed or neglected to procure from the superintendent of insurance the certificate of authority to transact business within this state, as provided by law, acts as such agent, during such period of default,

Is guilty of a misdemeanor."

Note: The organization, licensing and corporate procedure of insurers are set forth in Article IV of the Insurance Law. Some of the powers of the Superintendent of Insurance are set forth in Article III. Subdivisions 1 and 2 of Penal Law §1197 are perhaps duplicated by Insurance Law §5 ("Every violation of any provision of this chapter shall...be a misdemeanor"). Subdivision 3 is duplicated somewhat by Insurance Law §24(3) (failure to produce any books, papers or records is a misdemeanor). Subdivision 4 concerns service of process. Insurance Law §§59, 59-a contain a comprehensive plan for the service of process on the Superintendent. Subdivision 5 relates to agents and representatives. This subject is dealt with at length in Insurance Law Article VI, "Agents, Brokers and Adjusters."

Recommendation: transfer Penal Law §1197 to Insurance Law as new section 68.

§1197-a: "Every director of an insurance corporation who:

1. In case of the fraudulent insolvency of such corporation, shall have participated in such fraud; or,

2. Wilfully does any act as such director which is expressly forbidden by statute, or wilfully omits to perform any duty imposed upon him as such director by statute,

Is guilty of a misdemeanor, if no other punishment is prescribed therefor by law.

The insolvency of an insurance corporation is deemed fraudulent unless its affairs appear upon investigation to have been administered fairly, legally and with the same care and diligence that agents receiving a compensation for their services are bound, by law, to observe. (Added L. 1939 ch. 185, in effect April 1.)"

Note: This section was added by Laws 1939, Ch. 185, §7, and is patterned after Penal Law §297.

Recommendation: transfer Penal Law §1197-a to Insurance Law as new section 69.

§1198: "Any agent of a fire or marine insurance corporation, incorporated by or existing under the government or laws of another country than the United States, and doing business in this state, who issues any new policy of insurance after having been notified by the superintendent of insurance that the certificate of such corporation to do business within this state has been revoked, is guilty of a misdemeanor."

Note: Insurance Law §112 prohibits a person from acting for or aiding unlicensed or unauthorized insurers. A violation of this section constitutes a misdemeanor under Insurance Law §5.

Recommendation: repeal Penal Law §1198. (See Penal Law §1192, supra.)

§1199: "Any person acting for himself or for others, who solicits or procures, or aids in the solicitation or procurement of policies or certificates of insurance from, or adjusts losses or in any manner aids the transaction of any business for, any foreign insurance corporation, which has not executed and filed in the office of the superintendent of insurance, a written appointment of the superintendent to be the true and lawful attorney of such

corporation in and for this state, upon whom all lawful process in any action or proceeding against the corporation may be served, is guilty of a misdemeanor."

Note: Insurance Law §59 provides that no insurer shall be authorized to do insurance business in this state unless there is filed a power of attorney appointing the Superintendent to receive process. And §112 prohibits a person from acting for or aiding unauthorized insurers. (See Insurance Law §5, supra.)

Recommendation: repeal Penal Law §1199.

§1200: "Any person knowingly receiving any rebate or allowance or deduction from any premium, or any valuable thing, special favor or advantage whatever, as an inducement to take any policy of life insurance, not specified in the policy is guilty of a misdemeanor. In any criminal proceeding before any court, magistrate or grand jury for a violation of any of the provisions of this section, the court, magistrate or grand jury may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

Note: Penal Law §1191, supra, prohibits the payment of rebates by certain insurers. Penal Law §1200 prohibits the receipt of rebates by any person taking a policy of life insurance. Insurance Law §188 prohibits both the payment and receipt of rebates. See Insurance Law §5 and §25 (immunity provision).

Recommendation: transfer Penal Law §1200 to Insurance Law as new section 40-b.

§1201: "A person who, with intent to defraud or prejudice the insurer thereof, wilfully burns, or in any manner injures or destroys property not included or described in section fifteen hundred and six, which is insured at the time against loss or damage by fire or by any other casualty, under such circumstances that the offense is not arson in any of its degrees, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment."

Note: The staff makes no recommendation to transfer this sectic

since the acts proscribed will be dealt with in a revised Penal Law.

§1202: "A person who knowing it to be such:
1. Presents, or causes to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance; or,
2. Prepares, makes or subscribes a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such a claim,
Is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment."

Note: The staff makes no recommendation to transfer this section since the acts proscribed will be dealt with in a revised Penal Law.

§1203: "Any insurance corporation, or any officer, director or agent thereof who shall issue or circulate or cause or permit to be issued or circulated in this state any illustration, circular or statement indicating that such corporation can transact in this state any business of a character other than that which it is authorized to transact under the certificate of authority issued to it by the superintendent of insurance, shall be guilty of a misdemeanor, and the superintendent of insurance shall revoke the certificate of authority of the corporation or agent on a conviction for so offending."

Note: This section was added by Laws 1913, Ch. 483. Insurance Law §§126, 127, and 211 relate generally to advertising and misleading statements.

Recommendation: transfer Penal Law §1203 to Insurance Law as new section 40-c.

§1204: "Any person who wilfully and knowingly makes, circulates or transmits to another or others any statement, or rumor, written, printed or by word of mouth, which is untrue in fact and is directly or by inference derogatory to the financial condition or affects the solvency or financial standing of any insurance corporation or other insurer doing business in this state, or who knowingly counsels, aids, procures, or induces another to start, transmit or circulate any such statement

or rumor, is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both."

Note: This section was added by Laws 1933, Ch. 254. (See Insurance Law §§127, 211.)

Recommendation: transfer Penal Law §1204 to Insurance Law as new section 40-d.

Superseded by Memo No 5

July 5, 1962
PJMcQ/rc

STATE OF NEW YORK
INSURANCE DEPARTMENT
123 WILLIAM ST.
NEW YORK 38

PETER WARD
DEPUTY SUPERINTENDENT
AND GENERAL COUNSEL

AUG 20 1962

August 14, 1962

Hon. Peter J. McQuillen
Assistant Counsel
Temporary Commission on Revision of
the Penal Law and Criminal Code
Room 654
155 Leonard Street
New York, New York

In Reply Please Refer to File No. 11.62.1.2

Dear Mr. McQuillen:

Receipt is acknowledged of your letter to Superintendent Thacher of August 13, 1962 with attached staff memorandum concerning the relocation of sections of the Penal Law dealing with insurance.

To avoid any possible confusion on the part of the draftors of the legislation to effectuate the recommendations made, it is suggested that there be called to their attention, the following:

(1). Concerning the transfer of Penal Law §1197-a to the Insurance Law, appropriate adjustment of the wording of the last paragraph will be in order to eliminate the portion deemed invalid by reason of the decision in People v. Mancuso, 255 N.Y. 463, discussed in the memorandum, and

(2). Concerning the transfer of Penal Law §1200 to the Insurance Law, the matter to be transferred should be quoted in full instead of limiting such quotation to the first paragraph of the section as was done in the memorandum. Recourse by the legislative draftors to the complete text of Penal Law §1200 will be necessary to enable them to fully understand the discussion in the memorandum.

Superintendent Thacher in his letter of July 10, 1962 to Honorable Richard J. Bartlett, Chairman, advised that concerning Penal Law §1200 he would be guided by the final judgment of the Commission as to whether or not such section should remain within the Penal Law or be transferred to the Insurance Law. It is assumed that in arriving at the decision made, the provisions of that portion of Penal Law §1200 which have not been quoted in the memorandum were fully considered.

In all other respects we appear to be in accord.

We were pleased to be of assistance and assure you of our continuing cooperation.

Very truly yours,

Peter Ward

Peter Ward
Deputy Superintendent and General Counsel

RB/gh

NEW YORK STATE TEMPORARY COMMISSION ON REVISION

OF THE PENAL LAW AND CRIMINAL CODE

STAFF RECOMMENDATION NO. 5

Penal Law Article 112, "Insurance," §§1190-1204.

§1190: "Any applicant, officer, agent, solicitor, examining physician, surgeon or other person, who knowingly or wilfully makes any false or fraudulent statements or representations in or with reference to any application for membership or reinstatement or any other documentary or other proof for the purpose of obtaining or reinstating membership in or benefit from any fraternal beneficiary society, order or association, any corporation, association or society transacting the business of life or casualty insurance or both, upon the co-operative or assessment plan, or a corporation for the insurance of domestic animals, is guilty of a misdemeanor."

Note: Insurance Law §149 relates generally to representations by the insured, e. g., subdivision 2 reads: "No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract."

Penal Law §1190 does not require materiality.

Comments by Superintendent of Insurance: "Section 149 of the Insurance Law relates to a statement made to the insurer by, or by the authority of, the applicant for insurance, or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof.

Section 1190 of the Penal Law is broader in its scope in that it includes statements made, not only by the applicant, but also by an officer, agent, solicitor, examining physician, surgeon or other person. Further, it relates to statements made not only at the time of application but also when reinstatement is sought.

The Insurance Law provision is concerned primarily with the effect of statements made upon the contract of insurance. The Penal Law provision deals with a form of commercial fraud, the provisions of which should be perpetuated.

Integration of the provisions of Penal Law section 1190 into the Insurance Law appears feasible and desirable."

Recommendation: transfer Penal Law §1190 to Insurance Law as new section 149-a.

§1191: "Any life insurance corporation or corporation transacting the business of life insurance on the co-operative or assessment plan doing business in this state, or any officer or agent thereof, who:

1. Makes any discrimination in favor of individuals of the same class or of the same expectation of life either in the amount of the premium charged or in any return of premiums, dividends or other advantages; or,

2. Makes any contract for insurance or agreement as to such contract other than that which is plainly expressed in the policy issued; or,

3. Pays or allows, or offers to pay or allow as an inducement to any person to insure, any rebate or premium, or any special favor or advantage whatever, in the dividends to accrue thereon or any inducement whatever not specified in the policy; or,

4. Makes any distinction or discrimination between white persons and colored persons, wholly or partially of African descent, as to the premiums or rates charged for policies upon the lives of such persons, or in any other manner whatever; or demands or requires a greater premium from such colored persons than is at that time required by such company from white persons of the same age, sex, general condition of health and prospect of longevity; or makes or requires any rebate, diminution or discount upon the amount to be paid on such policy in case of the death of such colored persons insured, or inserts in the policy any condition, or makes any stipulation whereby such person insured shall bind himself, or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon white persons in similar cases, is guilty of a misdemeanor. Nothing in this section shall be construed to require any corporation doing business under article nine-b or fourteen of the insurance law, which limits and confines its business or membership to the members of a secret or fraternal order or body, to insure or accept any individual who is not a member of such secret or fraternal order or body."

Note: Discriminative practices in the sale of insurance because of race, creed or religion are covered in Insurance Law §40 (10). And Insurance Law §5 provides that a violation of any provision of this chapter, unless the same constitutes a felony, shall be a misdemeanor. Discrimination and rebating prohibitions are contained in Insurance Law §§188 and 209.

Comments by Superintendent of Insurance: "This section applies to life insurance companies transacting business on the cooperative or assessment plan. It deals with discriminations and rebates in premiums and benefits and also with discrimination between white persons and colored persons, wholly or partially of African descent.

The provisions thereof are amply covered by sections 40(10), 188 and 209 of the Insurance Law. Section 5 of the Insurance Law constitutes an adequate penal provision for violations of such sections.

No need appears for continuing in effect the provisions of Penal Law section 1191."

Recommendation: repeal Penal Law §1191. ✓

§1192: "Any person acting as agent, sub-agent or broker of a life insurance corporation doing business in this state, except as agent soliciting or procuring applications for industrial life insurance solely, who solicits or procures applications for insurance without first procuring a certificate of authority from the superintendent of insurance, is guilty of a misdemeanor."

Note: Insurance Law §§110-111 prohibit any person from acting as an insurance agent or broker without a license. Both sections carry misdemeanor sanctions for a violation, and both set forth detailed exceptions.

Comments by Superintendent of Insurance: "This section makes it a misdemeanor for any person to act as agent, sub-agent or broker of a life insurance company doing business in this state in soliciting or procuring applications for insurance without being licensed so to do by the Superintendent of Insurance.

The subject matter of this section is amply covered by sections 110, 111, 113, 114 and 119 of the Insurance Law. Section 5 of the Insurance Law makes a violation of the provisions of those sections a misdemeanor.

No need appears for continuing in effect the provisions of Penal Law section 1192."

Recommendation: repeal Penal Law §1192. (See Penal Law §1198, *infra*.)

§1194 "Any agent, shipper or other person, representing or acting for a marine insurance corporation doing business in this state who:

1. Charges or receives, directly or indirectly from any person for insurance of any property in transit upon the canals of the state, any greater sum than the regular rates of premium fixed by the corporation for the insurance of such property; or,

2. Demands or receives upon any policy of insurance issued upon any such property for the business of obtaining such insurance, a sum of money, as compensation or remuneration by way of salary, commission or in any other capacity, which includes any case, over fifteen per centum of the premium,

Is guilty of a misdemeanor."

Note: Insurance Law §128 relates generally to marine insurance. Section 129 requires that an insurance broker's right to compensation, other than commissions deductible from premiums, be in writing. The historical note in McKinney's Insurance Law indicates that §129 is based upon former §169(2) which was restricted to marine insurance contracts.

Comments by Superintendent of Insurance: "This section relates to overcharges by any agent, shipper or other person acting for a marine insurance company for insurance of property in transit upon the canals of the state. Derived from former section 577-e of the Penal Code enacted in 1881, it is limited in its application to insurance of property solely

transported upon the canals of this state. Since the enactment of such section, shipments via the canals of this state have materially decreased in volume and marine coverage for such shipments represents an insignificant volume of business.

Reference is made in the material enclosed with Assemblyman Bartlett's letter of March 13th to section 129 of the Insurance Law. That section deals solely with a broker's right to extra compensation based upon a written agreement and is inapplicable to agents. The department, however, has ample power to discipline agents for improper conduct. Its authority to proceed against insurers indirectly affords a means to deter improprieties of non-licensees acting on behalf of insurers.

No need to continue the provisions of Penal Law section 1194 is apparent."

The National Board of Fire Underwriters submitted the following comment: "We have checked with marine interests and they advise us that the situation which this section was designed to correct no longer exists and probably never will recur."

Recommendation: repeal Penal Law §1194.

§1195: "Any officer or agent of a corporation organized for the insurance of domestic animals who:
1. Refuses to make any report or perform any duty required by law; or,
2. Intentionally makes any false or fraudulent statement or report,
Is guilty of a misdemeanor punishable by a fine of not less than one hundred or more than five hundred dollars."

Note: Insurance Law §46(11) lists animal insurance as among the kinds of insurance which may be authorized in this state, and §§311(1) (a), 316(1) provide that stock and mutual casualty insurance and surety companies may do this kind of insurance business.

Comments by Superintendent of Insurance: "This section makes it a misdemeanor for an officer or agent of a corporation for the insurance of domestic animals to (1) refuse to make any report or perform any duty required by law, or (2) intentionally make any false or fraudulent statement or report.

For such conduct, an agent may be subjected to disciplinary action pursuant to section 117 of the Insurance Law. Although no section of the insurance statute provides a direct procedure against an officer of an insurance company for the conduct described, there are available procedures against the company which could be resorted to in order to bring about corrective action.

Retention of this statutory provision is deemed unnecessary from an insurance point of view. However, the Commission may wish to study this matter further to determine if the section still has a purpose apart from insurance."

Recommendation: repeal Penal Law §1195.

§1196: "Any officer, manager, director or agent of a casualty insurance corporation upon the co-operative or assessment plan, organized under the laws of this state, who transfers its risks or assets or any part thereof to or reinsures its risks or any part thereof, in any insurance corporation or association of another state or country which is not, at the time of such transfer or reinsurance authorized by law to do insurance business in this state, is guilty of a misdemeanor."

Note: Insurance Law §77 provides when an insurer is authorized to do an insurance business in this state, it may reinsure its risks and policy liabilities in another insurer.

Comments by Superintendent of Insurance: "Section 1196 of the Penal Law prohibits cooperative associations from transferring to and reinsuring risks in unauthorized foreign corporations.

Section 365 of the Insurance Law specifically deals with the right of a cooperative fire insurance company to reinsure subject to the applicable provisions of section 77 of such statute. The latter section deals with the question of reinsurance, is broad in scope and applies to 'Every insurer authorized to do an insurance business in this state,.....'.

Although section 5 of the Insurance Law makes every violation of such statute a misdemeanor unless it constitutes a felony, the specificity of the language of Penal Law section 1196 would appear to have a deterrent effect if set forth in detail in the Insurance Law.

Perpetuation of the provisions of Penal Law section 1196 appears to be desirable and such may be accomplished by integration into the Insurance Law."

Recommendation: transfer Penal Law §1196 to Insurance Law as new section 77-a.

§1196-a: "Any officer or director of a life or casualty insurance corporation upon the co-operative or assessment plan or of a fraternal beneficiary society, order or association, who shall sell his position as such officer or director for any money or valuable consideration, or who shall accept or receive, directly or indirectly, any money or valuable consideration for his resignation as such officer or director, shall be guilty of a felony if the money or valuable consideration accepted or received for the sale or resignation of such position as officer or director shall be more than five hundred dollars, and, if a less amount, shall be guilty of a misdemeano

Note: Insurance Law §78 relates generally to directors and officers, e. g., it provides, inter alia, that no director or officer of an insurer doing business in this state shall receive, in addition to his fixed salary or compensation, an money or valuable thing for negotiating or aiding in any purchase or sale of property or loan, made by such insurer.

Comments by the Superintendent of Insurance: "This section applies to the sale of his office or resignation therefrom for any money or valuable consideration by an officer or director of a life or casualty insurance corporation upon the cooperative or assessment plan or of a fraternal benefit society, order or association. If the consideration for such exceeds $500 it constitutes a felony. If less, the offender is guilty of a misdemeanor.

Such section is analagous to sections 499, 500 and 501 of the Insurance Law which prohibit the payment of any fee, commission or compensation to any director, officer or member of a company for aiding, promoting or assisting in a consolidation and makes it a felony for violating section 499 or for making a false affidavit pursuant thereto. Sectior 78 of the Insurance Law is limited to conflict of interest situations.

The provisions of Penal Law section 1196-a are salutary and not otherwise covered by the Insurance Law. Such provisions should be perpetuated in the Insurance Law."

Recommendation: transfer Penal Law §1196-a to Insurance Law as new section 78-a.

§1197: "Any officer, agent or representative of a corporation, association, or society doing a life or casaulty insurance business or both, upon the co-operative or assessment plan, who:

1. Neglects or refuses to perform any duty required of him by law; or
2. Intentionally makes any false or fraudulent statement or report; or,
3. Refuses to permit the superintendent of insurance or any examiner duly authorized by him for the purpose, to make an examination of the condition and business, books, papers and vouchers of any such corporation, association or society; or
4. Thirty days after any such corporation has been notified by the superintendent of insurance to designate some person residing in the same city, village or town where the principal business office within the state of such corporation is located, as a person upon whom service of legal process and papers may be made, as provided by law, collects any money or issues any certificate in carrying on such business, during the failure of such corporation to designate such person; or,
5. Being within this state the agent or representative of any such corporation, association or society, which has neglected or refused to comply with any duty imposed upon it by law, or which has failed or neglected to procure from the superintendent of insurance the certificate of authority to transact business within this state, as provided by law, acts as such agent, during such period of default,

Is guilty of a misdemeanor."

Note: The organization, licensing and corporate procedure of insurers are set forth in Article IV of the Insurance Law. Some of the powers of the Superintendent of Insurance are set forth in Article III. Subdivisions 1 and 2 of Penal Law §1197 are perhaps duplicated by Insurance Law §5 (Every

violation of any provision of this chapter shall...be a misdemeanor"). Subdivision 3 is duplicated somewhat by Insurance Law §24(3) (failure to produce any books, papers or records is a misdemeanor). Subdivision 4 concerns service of process; Insurance Law §§59, 59-a contain a comprehensive plan for the service of process on the Superintendent. Subdivision 5 relates to agents and representatives; this subject is dealt with at length in Insurance Law Article VI, "Agents, Brokers and Adjusters."

Comments by Superintendent of Insurance: "This section deals with specified misconduct of officers and agents of co-operative insurance companies.[There is no present day need for the provisions of Penal Law section 1197.]

See discussion of Penal Law section 1195."

Recommendation: repeal Penal Law section 1197.

§1197-a: "Every director of an insurance corporation who:

1. In case of the fraudulent insolvency of such corporation, shall have participated in such fraud; or

2. Wilfully does any act as such director which is expressly forbidden by statute, or wilfully omits to perform any duty imposed upon him as such director by statute,

Is guilty of a misdemeanor, if no other punishment is prescribed therefor by law.

The insolvency of an insurance corporation is deemed fraudulent unless its affairs appear upon investigation to have been administered fairly, legally and with the same care and diligence that agents receiving a compensation for their services are bound, by law, to observe."

Note: This section was added by Laws 1939, Ch. 185, §7, and is patterned after Penal Law §297.

Comments by Superintendent of Insurance: "This section deals with misconduct by directors of insurance companies. Specifically, it makes it a misdemeanor for such a director to (1) participate in a fraudulent insolvency of the company, or (2) wilfully do an act forbidden by statute, or (3) wilfully omit to perform a duty imposed upon him by statute.

Such provisions afford a direct approach against an offending director and avoid the necessity of resorting to procedures against the company.

Section 536 of the Insurance Law deals with voidable transfers and makes a director, among others, accountable therefor. Penal Law 1197-a is broader in scope and retention of its provisions appears desirable.

In People v. Mancuso, 255 N.Y. 463, there was considered a provision of secion 297 of the Penal Law which, except for its reference to a banking institution instead of an insurance corporation, is repeated verbatin in the last paragraph of section 1197-a of that statute. The court held that to the extent that the provision established a presumption of fraud in favor of the people, it is arbitrary and void but to the extent that it established a definition of a fraudulent insolvency, it is valid.

The nature of the provisions are such that they may readily be integrated into the Insurance Law. Appropriate adjustment of the wording of the last paragraph to eliminate the invalid portion would appear to be in order."

Recommendation: Transfer Penal Law §1197-a to Insurance Law as new section 68.

§1198: "Any agent of a fire or marine insurance corporation, incorporated by or existing under the government or laws of another country than the United States, and doing business in this state, who issues any policy of insurance after having been notified by the superintendent of insurance that the certificate of such corporation to do business within this state has been revoked, is guilty of a misdemeanor."

Note: Insurance Law §112 prohibits a person from acting for or aiding unlicensed or unauthorized insurers. A violation

of this section constitutes a misdemeanor under Insurance Law §5.

Comments by Superintendent of Insurance: "This section makes it a misdemeanor for an agent of an alien insurer whose authorization to do business in this state has been revoked to issue any new policy after notice of such revocation.

The substance thereof is adequately covered by section 112 of the Insurance Law. Section 5 makes a violation thereof a misdemeanor and section 117 confers disciplinary powers upon the Superintendent.

No need for retention of the provisions of Penal Law section 1198 is apparent."

Recommendation: repeal Penal Law §1198. (See Penal Law §1190, supra.)

§1199: "Any person acting for himself or for others, who solicits or procures, or aids in the solicitation or procurement of policies or certificates of insurance from, or adjusts losses or in any manner aids the transaction of any business for, any foreign insurance corporation, which has not executed and filed in the office of the superintendent of insurance, a written appointment of the superintendent to be the true and lawful attorney of such corporation in and for this state, upon whom all lawful process in any action or proceeding against the corporation may be served, is guilty of a misdemeanor."

Note: Insurance Law §59 provides that no insurer shall be authorized to do insurance business in this state unless there is filed a power of attorney appointing the Superintendent to receive process. And §112 prohibits a person from acting for or aiding unauthorized insurers. (See Insurance Law §5, supra.)

Comments by Superintendent of Insurance: "This section makes it a misdemeanor for any person to solicit, procure or aid in the solicitation or procurement of insurance policies, or to adjust losses or in any manner aid in the transaction of any insurance business for any foreign insurance corporation which has not executed and filed with the Superintendent a written designation of the Superintendent as its true and lawful attorney to receive service of process.

Section 59 of the Insurance Law requires the filing of such a designation as a condition to authorization to transact or continuance of an insurance business in this state. Subsection 4 thereof requires that the power of attorney be of indefinite duration and binding upon successor companies.

Licenses of foreign companies expire on June 30th of each year. The Superintendent may refuse a renewal if in his judgment such refusal is in the public interest or he may suspend or revoke the license of a foreign insurer, after notice and hearing, upon a finding of noncompliance with any requirement of the Insurance Law. (Sec-

tion 40)

Section 112 of the Insurance Law prohibits acting for or aiding unauthorized insurers other than for specified exceptions.

Secion 123 of the Insurance Law prohibits adjustment of losses on behalf of an insurer unless the person acting as an adjuster is appropriately licensed or is other wise excepted for such requirement.

In spite of this described coverage of the Penal Law provisions by existing provisions of the Insurance Law, integration of the provisions of Penal Law section 1199 into the Insurance Law is feasible and desirable at this time. Section 122 permits placement of insurance, under specified conditions, with unauthorized insurers. It would be inappropriate to eliminate any statutory controls the department has with respect to coverage by unauthorized insurers." The Superintendent observed that the staff Note "appears to overlook the fact that customers of excess line brokers are insured with unauthorized companies and statutory provision for such companies' appointment of a staturory agent for service of process is beneficial to such customers. I accordingly recommend that it [Penal Law §1199] be transferred to an appropriate section of the Insurance Law."

Recommendation: transfer Penal Law §1199 to Insurance Law as new section 59-b.

§1200 "Any person knowingly receiving any rebate or allowance or deduction from any premium, or any valuable thing, special favor or advantage whatever as an inducement to take any policy of life insurance, not specified in the policy is guilty of a misdemeanor."

Note: Penal Law §1191, supra, prohibits payment of rebates by certain insurers. Penal Law §1200 prohibits the receipt of rebates by anyperson taking a policy of life insurance. Insurance Law §188 prohibits both the payment and receipt of rebates. See Insurance Law §5 and §25 (immunity provision).

Comments by Superintendent of Insurance: "This section relates to the receipt of rebates, or any valuable thing, special favor or advantage not specified in the policy as an inducement to taking any policy of life insurance. A 1953 amendment thereof provides that a court, magistrate or grand jury, in any proceeding before it for a violation of this section, may confer immunity in accordance with section 2447 of the Penal Law.

Sections 188 and 209 of the Insurance Law provide safeguards against rebating. Section 25 of the Insurance Law provides for the granting of immunity by the Superintendent in accordance with Penal Law section 2447 in connection with proceedings before this department. The 1953 amendment, however, provides for the granting of immunity pursuant to Penal Law 2447 by a court, magistrate or grand jury. Such is more encompassing than the Insurance Law provision and reflects legislative thinking as recently as 1953. Were this section repealed there would be serious doubt as to the right of a court, magistrate or grand jury to grant immunity in a hearing involving receipt of a rebate, etc.

Section 1200 should be retained in the Penal Law." Subsequently the Superintendent wrote: "Whether or not Secion 1200 should remain within the Penal Law as an item relating primarily to criminal proceedings or be transferred to the Insurance Law is a matter as to which I shall be guided by the final judgment of the Commission."

Recommendation: transfer Penal Law §1200 to Insurance Law as new section 40-a.

§1201: "A person who, with intent to defraud or prejudice the insurer thereof, wilfully burns, or in any manner injures or destroys property not included or described in section fifteen hundred and six, which is insured at the time against loss or damage by fire or by any other casualty, under such circumstances that the offense is not arson in any of its degrees, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment."

Note: The staff makes no recommendation to transfer this section since the acts proscribed will be dealt with in a revised Penal Law.

§1202: "A person who knowing it to be such:

1. Presents, or causes to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance; or,

2. Prepares, makes or subscribes a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such a claim,

Is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment."

Note: The staff makes no recommendation to transfer this section since the acts proscribed will be dealt with in a revised Penal Law.

§1203: "Any insurance corporation, or any officer, director or agent thereof who shall issue or circulate or cause or permit to be issued or circulated in this state any illustration, circular or statement indicating that such corporation can transact in this state any business of a character other than that which it is authorized to transact under the certificate of authority issued to it by the superintendent of insurance, shall be guilty of a misdemeanor, and the superintendent of insuranc shall revoke the certificate of authority of the corporation or agent on a conviction for so offending."

Note: This section was added by Laws 1913, Ch. 483. Insurance Law §§126, 127, and 211 relate generally to advertisinc and misleading statements.

Comments by Superintendent of Insurance: "This section prohibits an insurance company, or any director, officer or agent thereof from advertising that the company can transact in this state any business of a character other than as authorized by its certificate of authority. It empowers the Superintendent to revoke the certificate of authority of a company or agent on a conviction for so offending.

Sections 97, 126, 127 and 211 of the Insurance Law deal with misleading advertising but fail to pinpoint with specificity an offense of the type spelled out in Penal Law section 1203. Further, the Superintendent is specifically authorized to revoke a company's license upon a conviction for the offense described.

The provisions of Penal Law section 1203 are salutary and should be perpetuated. Such may readily be integrated into the Insurance Law."

Recommendation: transfer Penal Law §1203 to Insurance Law as new section 40-b.

§1204: "Any person who wilfully and knowingly makes, circulates or transmits to another or others any statement, or rumor, written, printed or by word of mouth, which is untrue in fact and is directly or by inference derogatory to the financial condition or affects the solvency or financial standing of any insurance corporation or other insurer doing business in this state, or who knowingly counsels, aids, procures, or induces another to start, transmit or circulate any such statement or rumor, is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both."

Note: This section was added by Laws 1933, Ch. 254. (See Insurance Law §§127, 211.)

Comments by Superintendent of Insurance: "This section makes it a misdemeanor for any person to disseminate false or derogatory statements or rumors as to the financial condition or solvency of an insurance company.

Sections 97, 126, 127 and 211 of the Insurance Law deal with false advertising by companies, agents, brokers or representatives. Penal Law section 1204 does not appear to contemplate advertising. It is aimed at malicious attacks by any person upon the financial status of an insurance company. Such may result in irreparable loss or damage to a company and to its policyholders.

The perpetuation of the provisions of this section appears desirable and such may readily be integrated into the Insurance Law."

Recommendation: transfer Penal Law §1204 to Insurance Law as new section 40-c.

PJMcQ/pjc &cd
August 10, 1962

MEMORANDUM NO. 6

Penal Law Article 120, "Labor," §§1270-1279.

This article of the Penal Law contains eight sections, all misdemeanors. (§1277, relating to construction of buildings, was repealed by Laws 1962, Ch. 451.)

§1270 A person:

1. Refusing to admit the industrial commissioner, or any person authorized by him, to a mine, tunnel or quarry, and to each and every part thereof, for the purpose of examination and inspection; or,

2. Neglecting or refusing to comply with the provisions of article fifteen of the labor law upon written notice of the industrial commissioner.

Is guilty of misdemeanor, and upon conviction therefor shall be punished by a fine of not less than fifty dollars, or by imprisonment for not less than thirty days.

Note: Labor Law §436 provides that noncompliance with Article 15 is a misdemeanor punishable by a fine of not less than $250.00 or by imprisonment for one year or both.

Comments by Industrial Commissioner:

It is my belief that Section 1270 of the Penal Law serves no useful purpose and that it should be repealed.

Subdivision 1 of Section 1270 makes it a crime for any person to refuse to admit the Industrial Commissioner to a mine, tunnel, or quarry for the purpose of inspecting the premises. There is no need for such a provision. In the absence of a specific provision authorizing the Industrial Commissioner to inspect factories, construction sites, mercantile establishments or places of public assembly, the Industrial Commissioner inspects such places under Section 31 of the Labor Law; Section 32 of the Labor Law prohibits the interference with such inspections; the violation of these sections is a crime under Section 1275 of the Penal Law. These same sections suffice to assure adequate investigations of mines, tunnels, and quarries.

Subdivision 2 of Section 1270 of the Penal Law makes it a crime for any person to fail to comply with the provisions of Article 15 of the Labor Law. The failure to so comply with Article 15 is also a violation of Section 436 of the Labor Law which is a penal section. The penalties contained in the two sections are inconsistent and it is my belief that Section 436 of the Labor Law should remain undisturbed.

For these reasons I recommend the repeal of Section 1270 of the Penal Law.

Recommendation: repeal Penal Law §1270.

§1271 Any person or corporation:

1. Who, contracting with the state or a municipal corporation, shall require more than eight hours work for a day's labor; or,

2. Who shall require more than ten hours labor, including one-half hour for dinner, to be performed within twelve consecutive hours, by the employees of a street surface and elevated railway owned or operated by corporations whose main line of travel or routes lie principally within the corporate limits of cities of more than one hundred thousand inhabitants; or,

3. Who shall require the employees of a corporation owning or operating a brick yard to work contrary to the requirements of section one hundred and sixty-three of the labor law; or,

4. Who shall require or permit any employee engaged in or connected with the movement of any train of a corporation operating a line of railroad of thirty miles in length, or over, in whole or in part within this state, to remain on duty more than sixteen consecutive hours; or to require or permit any such employee who has been on duty sixteen consecutive hours to go on duty without having had at least ten hours off duty; or to require or permit any such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period to continue on duty or to go on duty without having had at least eight hours off duty within such twenty-four hour period; except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal;

Is guilty of a misdemeanor, and on conviction therefor shall be punished by a fine of not less than five hundred nor more than one thousand dollars for each offense.

Comments by Industrial Commissioner:

It is my belief that subdivision 1 of Section 1271 of the Penal Law should be transferred to the Labor Law where it should become part of Section 220, and that subdivision 2, 3 and 4 of Section 1271 of the Penal Law should be repealed.

Subdivision 1 of Section 1271 makes it a crime for a person who contracts with the state or a municipal corporation to require an employee to work more than eight hours a day. Regulation of the hours of labor of employees of persons who contract with the state or municipal corporations is a function of Section 220 of the Labor Law. Subdivision 2 of that section prohibits more than eight hours work on any day except under emergency conditions where permission is granted by the Industrial Commissioner. Although subdivision 3 of Section 220 makes it a crime for an employer to fail to pay his employees the prevailing rate of wage as prescribed by the Industrial Commissioner, subdivision 2 of the section has no penal provision relating to working more than eight hours a day in the absence of permission from the Industrial Commissioner.

I, therefore, recommend that subdivision 1 of Section 1271 be repealed, and that subdivision 2 of Section 220 of the Labor Law be amended by adding at the end of the subdivision a sentence to read substantially as follows:

> Any person or corporation contracting with the state or a public benefit corporation, or a municipal corporation, or a commission appointed pursuant to law that shall require more than eight hours work for a day's labor, unless otherwise permitted by law, is guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars for each offense.

Subdivision 2 of Section 1271 which relates to hours of work on street railroad is virtually identical to Section 164 of the Labor Law. The only significant difference is that the Labor Law provision has an exception for emergencies. Subdivision 3 of Section 1271 of the Penal Law which relates to the hours of work in brick yards is virtually identical to Section 163 of the Labor Law. Subdivision 4 of Section 1271 of the Penal Law which relates to hours of work on steam railroads is virtually identical with Section 165 of the Labor Law. Violation of these three sections of the Labor Law is punishable under Section 1275 of the Penal Law. The penalty provided in Section 1275 of the Penal Law is smaller than the penalty contained in Section 1271 of the Penal Law, but is adequate.

I, therefore, believe that these three subdivisions of Section 1271 of the Penal Law are unnecessary.

§1272 Each person, copartnership, corporation or joint-stock association carrying on a business by lease or otherwise, who does not pay the wages of all his or its employees in accordance with the provisions of the labor law is, and the officers of any such corporation who knowingly permit the corporation to violate the labor law by failing to pay the wages of any of its employees in accordance with the provisions thereof are guilty of a misdemeanor, and upon conviction therefor, shall be fined not less than one hundred nor more than ten thousand dollars or imprisoned for not more than one year, or punished by both such fine and imprisonment, for each such offense. An indictment of a person or corporation operating a steam surface railroad for an offense specified in this section may be found and tried in any county within the state in which such railroad ran at the time of such offense. (Am. L. 1941 ch. 809, in effect July 1.)

Comments by Industrial Commissioner:

Section 1272 of the Penal Law is one of the most useful tools of the Department of Labor in connection with its enforcement of Article 6 of the Labor Law relating to wage provisions. You are correct in your recommendation that it should be the final section of Article 6. In effecting this transfer, the language of Section 1272 of the Penal Law should not be changed.

Recommendation: transfer Penal Law §1272 to Labor Law as new section 199-d.

§1274 A person connected with or employed in a free public employment bureau, who shall charge or receive directly or indirectly any fee or compensation from any person applying to such bureau for help or employment, is guilty of a misdemeanor.

Comments by Industrial Commissioner:

I believe that Section 1274 of the Penal Law which makes it a crime for a fee to be charged in connection with services rendered by free public employment bureau has a place in the Labor Law as new Section 636 of that law. As such, it would be part of Title 9 of the Unemployment Insurance Law. The Unemployment Insurance Law regulates the Division of Employment, including its placement service. Title 9 relates to penalties and misdemeanors.

Recommendation: transfer Penal Law §1274 to Labor Law as new section 636.

§1275 Any person who violates or does not comply with any provision of the labor law, any provision of the industrial code, any rule, regulation or lawful order of the department of labor, industrial commissioner or industrial board, and any person who knowingly makes a false statement in or in relation to any application made for an employment certificate as to any matter required by the labor law to appear in any affidavit, record, transcript or certificate therein provided for, is guilty of a misdemeanor and upon conviction shall be punished, except as in this chapter or in the labor law otherwise provided, for a first offense by a fine of not more than fifty dollars; for a second offense by a fine of not less than fifty nor more than two hundred and fifty dollars, or by imprisonment for not more than thirty days or by both such fine and imprisonment; for a third offense by a fine of not less than two hundred and fifty dollars, or by imprisonment for not more than sixty days, or by both such fine and imprisonment. (Am. L. 1940 ch. 388, in effect Apr. 10.)

Comments by Industrial Commissioner:

I agree that Section 1275 of the Penal Law should be made part of the Labor Law, but do not believe that it should be made Section 850. Section 850 of the Labor Law is not a vacant section. Moreover, Section 1275 of the Penal Law which is the most useful tool in enforcing the Labor Law should be made part of the general provisions of the Labor Law. At present, Section 213 of the Labor Law relates to criminal prosecution and authorizes the Attorney General to prosecute any violations of the Labor Law. Section 1275 of the Penal Law belongs alongside of this provision.

I recommend that the present Section 213 of the Labor Law be renumbered Section 214 and that Section 1275 of the Penal Law be transferred to the Labor Law with its present language intact and that it be made new Section 213 of the Labor Law.

Recommendation: transfer Penal Law §1275 to Labor Law as new section 213, renumbering present Labor Law section 213 as section 214.

§1276 A person or corporation employing or directing another to do or perform any labor in the erection, demolition, repairing, altering or painting, any house, building or structure within this state, who knowingly or negligently furnishes or erects or causes to be furnished or erected for the performance of such labor, unsafe, unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances; or who hinders or obstructs any officer detailed to inspect the same, destroys or defaces any notice posted thereon, or permits the use thereof after the same has been declared unsafe by such officer contrary to the provisions of article ten of the labor law, is guilty of a misdemeanor.

Comments by Industrial Commissioner:

Your proposal was that Section 1276 of the Penal Law be transferred to the Labor Law where it should become new Section 243.

I believe that Section 1276 of the Penal Law which makes the furnishing of insecure scaffolding a crime should be repealed. Chapter 450 of the Laws of 1962 updated the substantive provisions relating to the enforcement of safety standards for scaffolding. This involved the repeal of Section 240, subdivision 4 of the Labor Law, specifically relating to scaffolding. At present the

Department of Labor is empowered to enforce safety standards with regard to scaffolding by injunctions under new Section 200 of the Labor Law. Penal enforcement is under Section 1275 of the Penal Law (which, as has been suggested, should become Section 213 of the Labor Law).

Section 1276 of the Penal Law is, therefore, unnecessary!

Recommendation: repeal Penal Law §1276.

§1278 Any person who represents himself or herself to be a member of, or who claims to represent a labor organization which does not exist within the state, at the time of such representation, or who has in his or her possession a credential, certificate or letter of introduction bearing a fraudulent seal, or bearing the seal of a labor organization which has ceased to exist, and does not exist at the time of such representation, and attempts to gain admission by the use of said credential, certificate, letter of introduction, as a member of any convention, or meeting of representatives of labor organizations of the state, shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not less than twenty dollars nor more than fifty dollars, and imprisonment for not less than ten days nor more than thirty days in the jail of the county wherein such conviction is had, or by both such fine and imprisonment.

Comments by Industrial Commissioner:

Your proposal was that Section 1278 of the Penal Law be transferred to the Labor Law where it should become new Section 209-b.

I concur in your recommendation that Section 1278 of the Penal Law which relates to fraudulent representation in labor organizations be transferred to the Labor Law where it should follow Section 209 of the Labor Law. I believe that it should become Section 209-a. My reason for not recommending that it become Section 209-b will be obvious from my comment on the next proposal.

Recommendation: transfer Penal Law §1278 to Labor Law as new section 209-a.

§1279 An employer of labor may adopt a badge, or other insignia of identification, to be worn or displayed by the employees for the purpose of identification while upon the premises of the employer and post a notice of the adoption of such badge, or insignia, near the main entrance of such premises. Such employer shall deposit with the industrial commission a replica of such badge or insignia, and such commission shall, if such badge or insignia be distinctive, issue to such employer a certificate authorizing the use thereof for the purposes of this section. Any person who, after the approval and adoption of such badge, or insignia, and posting of such notice, without authority or permission of the employer adopting the same, wilfully wears such badge, or displays such insignia, or any facsimile or any imitation thereof, or uses the same to obtain admittance to or remain upon the premises of the employer, is guilty of a misdemeanor.

Comments by Industrial Commissioner:

Your proposal was that Section 1279 of the Penal Law be transferred to the Labor Law where it should become new Section 209-a.

I do not believe that this section belongs in the Labor Law.

Sections 208 and 209 of the Labor Law relate to the misuse of union labels. The proposed Section 209-a of the Labor Law relates to misrepresentation of an individual as being a union representative. Section 1279 of the Penal Law does not relate to a similar misrepresentation; rather it relates to the power of an employer to adopt an insignia in order to protect him and his products. As such it does not belong in the Labor Law, but should be transferred to the General Business Law.

Recommendation: transfer Penal Law §1279 to the General Business Law.

§1891 A person who applies, or causes to be applied, to a steam boiler a higher pressure of steam than is allowed by law, or by the inspector, officer or person authorized to limit the pressure of steam to be applied to such boiler, is guilty of a misdemeanor.

§1893 An engineer or other person having charge of a steam boiler, steam engine, or other apparatus for generating or employing steam, employed in a railway, manufactory, or other mechanical works, who, wilfully or from ignorance or gross neglect, creates or allows to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or cause any other accident whereby human life is endangered, is guilty of a misdemeanor.

Comments by Industrial Commissioner:

Your proposal was that Sections 1891 and 1893 of the Penal Law be transferred to Article 17 of the Labor Law.

I believe that these sections of the Penal Law should be repealed. At any rate, these sections which relate to steam boilers have nothing to do with Article 17 of the Labor Law which is concerned with places of public assembly. Steam boilers are regulated by the Department of Labor under Section 204 of the Labor Law and under Industrial Code Rule No. 14 which was promulgated thereunder. Violations of Section 204 of the Labor Law and of Industrial Code Rule No. 14 are a crime under Section 1275 of the Penal Law.

The specific criminal provisions contained in Sections 1891 and 1893 of the Penal Law are unnecessary and should be repealed.

Recommendation: repeal Penal Law §§1891 and 1893.

§962 1. As used in this section, the term "person" shall include any firm, partnership, association, corporation or group of persons.

2. Whenever any workman who is engaged to perform labor shall be promised an agreed rate of wages for his services, be such promise in writing or oral, it shall be unlawful for any person, either for himself or any other person, to request, demand, or receive, either before or after such workman is engaged, a return, donation or contribution of any part or all of said workman's wages, salary, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment. Further, any person who directly or indirectly aids, requests or authorizes any other person to violate any of the provisions of this section shall be guilty of a violation of the provisions of this section.

3. Whenever an agreement between a bona fide labor organization and an employer or an association of employers requires

that workmen shall be paid an agreed wage or rate of wages for their services, it shall be unlawful for any person, either for himself or any other person, to request, demand or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, and any person who directly or indirectly aids, requests or authorizes any other person to violate any of the provisions of this section shall be guilty of a violation of the provisions of this section.

4. The provisions of this section shall not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

5. A violation of the provisions of this section shall constitute a misdemeanor. (Am. L. 1939 ch. 851, in effect June 13.)

Comments by Industrial Commissioner:

Your proposal was that Section 962 of the Penal Law go into Article 6 of the Labor Law.

I agree in your recommendation that Section 962 of the Penal Law which makes it a crime for an employer to demand a "kick-back" of wages should be transferred to Article 6 of the Labor Law and believe that it should become Section 199-c of such law.

Although the Department of Labor is presently not authorized to enforce Section 962 of the Penal Law and its transfer to the Labor Law would effect a substantive change by empowering the Department of Labor to enforce it hereinafter, the Department of Labor believes that it can undertake this responsibility within the present budgetary setup and without any great inconvenience.

In effecting the transfer, however, the language of Section 962 of the Penal Law should be amended by repealing subdivision 5 thereof. Subdivision 5 of Section 962 of the Penal Law is the penalty provision and as part of the Labor Law it should be enforceable under Section 1272 of the Penal Law, which, as I have recommended, should be transferred to the Labor Law as Section 199-d.

Recommendation: transfer Penal Law §962 to Labor Law as new section 199-c.

§531 Any person or employer of labor, and any person of any corporation on behalf of such corporation, who shall hereafter coerce or compel any person, employee, laborer or mechanic, to enter into an agreement, either written or verbal from such person, employee, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person securing employment, or continuing in the employment of any such person, employer or corporation, shall be deemed guilty of a misdemeanor.

The penalty for such misdemeanor shall be imprisonment in a penal institution for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

Comments by Industrial Commissioner:

Your proposal was that Section 531 of the Penal Law be transferred to the Labor Law where it should become new Section 704-a

I recommend the repeal of this section.

As pointed out in your letter, it was declared unconstitutional by the Court of Appeals in 1906 (People v. Marcus, 185 N. Y. 257), for the reason that it unduly restricted the freedom of individuals to contract. There is no doubt that this philosophy would not apply today. On the other hand, this provision which makes it a crime for an employer to coerce employees in connection with unionization is unnecessary. It is one of the several unfair labor practices which are listed in Section 704 of the Labor Law and the State Labor Relations Board has ample power to deal with unfair labor practices under present legislation. There seems little reason to make one unfair labor practice a crime while other unfair labor practices are treated in the traditional manner under Section 706 of the Labor Law.

I, therefore, recommend the repeal of Penal Law Section 531.

Recommendation: repeal Penal Law §531.

Penal Law Article 164, "Prize-Fighting and Sparring", §§1710-1716

This Article of the Penal Law contains seven sections. §1710 provides that a person who engages in or encourages a contention or fight between two or more persons, or a fight commonly called a ring or prize-fight, or who engages in a sparring exhibition at which an admission fee is charged, or who sends or publishes a challenge, or trains or assists any person in training or preparing for such a contention, exhibition or fight, is guilty of a misdemeanor. This section, derived from the early revised statutes, was last amended by Laws 1900, Ch. 270. §1711 defines a "challenge". §1712 provides that a person who bets "upon the result of such a fight or encounter" is guilty of a misdemeanor. People v. Solomon 296 New York 220 (1947) held that this section is inapplicable to a prize fight conducted under the Walker Act (discussed infra).

§1713 provides that a person who leaves the state with intent to elude any provision of this article or to commit any act without the state which is prohibited by this article, or who, being a resident of this state, does any act without the state, which would be punishable by the provisions of this article, if committed within the state, is guilty of the same offense and subject to the same punishment, as if the act had been committed within this state. §1714 provides that an indictment for an offense specified in the last section, may be tried in any county within the state. §1715 provides that when it is made to appear that there is reasonable ground to apprehend that an offense specified in §§1710, 1712 and 1713 is about to be committed, a magistrate must issue his warrant for the arrest of the person so about to offend. §1716 relates to witnesses' immunity.

All of these Penal Law sections antedate by many years the enactment of the Walker Act (Laws 1920, Ch. 912; McKinney's Unconsolidated Laws, Title 25, Chapter 1, "Boxing and Wrestling", §§8901-8933). This Act gives the State Athletic Commission broad and sweeping supervisory jurisdiction over all phases of prize-fighting, providing misdemeanor sanctions for violations. The Walker Act, in effect, renders Penal Law Article 164 obsolete. For example, §8907 requires all corporations, referees, judges, matchmakers, timekeepers, corporation treasurers, box office employees, ticket takers, doormen, ushers, professional boxers, professional wrestlers, their managers, trainers, seconds, announcers, and special policemen to obtain a license from the State Athletic Commission. No boxing, sparring or wrestling match or exhibition may be held unless such persons shall have first procured a license from the commission. §8916 provides that a violation of any provision of the Walker Act subjects the offender to a civil penalty not exceeding $5,000.00. §8931 provides that the provisions of this Act "shall not be construed to apply to any sparring, boxing or wrestling contest or exhibition conducted under the supervision or the control of the New York state national guard or naval militia where all of the contestants are members of the active militia; nor to any such contest or exhibition where the contestants are all amateurs". §8932 provides that Penal Law §1710 shall not apply to any boxing exhibition conducted pursuant to the Walker Act, nor to an amateur boxing exhibition. §8933 provides that any non-amateur boxing exhibition conducted without a license shall constitute a misdemeanor.

Recommendation: repeal Penal Law Article 164. The State Athletic Commission has no objection to this proposal.

Penal Law Article 176, "Quarantine," §§1960-1964.

This Article of the Penal Law contains five sections:

§1960 A master of a vessel subject to quarantine or visitation by the health officer, arriving in the port of New York, who refuses or omits:

1. To proceed to and anchor his vessel at the place assigned for quarantine, at the time of his arrival; or,

2. To submit his vessel, cargo and passengers, to the examination of the health officer, and to furnish all necessary information to enable that officer to determine the length of quarantine and other regulations to which they ought respectively to be subject; or,

3. To remain with his vessel at quarantine during the period assigned for her quarantine, and while at quarantine to comply with the directions and regulations prescribed by law, and with such as any of the officers of health, by virtue of the authority given to them by law, shall prescribe in relation to his vessel, his cargo, himself, his passengers or crew,

Is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

§1961 A master of a vessel hailed by a pilot, who:

1. Gives false information to such pilot, relative to the condition of his vessel, crew or passengers, or the health of the place or places from whence he came, or refuses to give such information as shall be lawfully required; or,

2. Lands any person from his vessel, or permits any person, except a pilot, to come on board of his vessel, or unlades or transships any portion of his cargo, before his vessel has been visited and examined by the health officers; or,

3. Approaches with his vessel nearer the city of New York than the place of quarantine to which he may be directed,

Is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or by both.

§1962 A person, who, being on board any vessel at the time of her arrival at the port of New York, lands from such vessel, or unlades, or transships or assists in unlading or transshipping any portion of her cargo, before such vessel has been visited and examined by the health officers, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

§1963 A person who goes on board of, or has any communication or intercourse with any vessel at quarantine, or with any of the crew or passengers of such vessel, without the permission of the health officer, and every person who, without such authority, enters the quarantine grounds or anchorage, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both; and in addition thereto he may be detained at quarantine so long as the health officer directs, not exceeding twenty days. And in case such person shall be taken sick of any infectious, contagious or pestilential disease, during such twenty days, he may be detained at the marine hospital, for such further time as the health officer directs.

§1964 A person who, having been lawfully ordered by a health officer to be detained in quarantine, and not having been discharged, leaves the quarantine grounds or anchorage, or wilfully violates any quarantine law or regulation, is guilty of a misdemeanor.

The New York State Department of Health wrote the following comment on the staff's initial recommendation to transfer this Article to the Public Health Law:

> Since the provisions of the above sections appear to relate only to the Port of New York, there would seem to be no reason for transferring them to the Public Health Law which has statewide application. It would seem more logical to have those sections incorporated in the New York City Health Code, if it is determined that they should not remain in the Penal Law.

The New York City Commissioner of Health wrote the following:

> Our records do not disclose a single instance in the past 20 years where it was necessary for the Department to invoke the provisions of the Penal Law in question. In point of fact the Federal Government has assumed and now exercises quarantine jurisdiction over vessels entering the port of New York. This function is performed by the United States Public Health Service of the Department of Health, Education, and Welfare which operates under a detailed set of regulations promulgated under the authority of 42 U.S.C. 216, et seq.. These regulations are contained in Title 42 Subchapter F of the Code of Federal Regulations.
>
> In actual practice our staff of epidemiologists works in close cooperation with the quarantine officer of the Public Health Service whenever the occasion arises, but the basic legal authority under which this work is carried out are the aforementioned Federal statutes and regulations.
>
> Additionally, under Section 556-4.0 and 556-5.0 of the Administrative Code of the City of New York,

this Department is already vested with sufficient authority to inspect and quarantine vessels entering the port of New York.

Under these circumstances we do not deem it necessary to incorporate the quarantine sections of the Penal Law into the New York City Health Code nor do we, insofar as the interests of this Department are concerned, have objection to their outright repeal.

Recommendation: repeal Penal Law Article 176.

Penal Law Article 204, "Taxes", §§2320-2322.

§2320 reads as follows:

> An appraiser appointed by virtue of the taxable transfers law, who takes any fee or reward from an executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay such tax, or any portion thereof, is guilty of a misdemeanor.

This section was added by Laws 1893, Ch. 692. The Department of Taxation and Finance commented as follows:

> Section 2320 provides that an appraiser under the Taxable Transfers Law who takes any fee or reward from an estate, fiduciary or beneficiary, or from any person liable for payment of the tax, is guilty of a misdemeanor. This section is obsolete by virtue of its reference to the "Taxable Transfers Law". Since September 1, 1930, the death tax imposed by this law has been the estate tax imposed by Article 10-c of the Tax Law. This section may also be deficient in its reference to appointed appraisers, since this might be construed to preclude application to county treasurers who serve as estate tax appraisers ex-officio; see Tax Law sections 249-u and 230 (1). Furthermore, in most cases the offense defined in section 2320 would also constitute an acceptance of a bribe under section 372 of the Penal Law, although the latter requires an agreement or understanding that the recipient's official action will be influenced. Accordingly, I doubt the need for any re-enactment of section 2320 even if it were revised to refer to any person acting as appraiser for the purposes of Article 10-c of the Tax Law. However, if such re-enactment into the Tax Law is deemed advisable, I believe it should be in section 249-u.

Recommendation: repeal Penal Law §2320.

§2321 reads as follows:

> A person, who, in making any statement, oral or written, which is required or authorized by law to be made as the basis of imposing any tax or assessment, or of an application to reduce any tax or assessment, wilfully makes, as to any material matter, any statement which he knows to be false, is guilty of a misdemeanor.

This section is derived from the early Revised Statutes.

The Department of Taxation and Finance commented as follows:

> It seems clear that this would apply, not only to the various taxes imposed by the Tax Law, but also to numerous others, such as real property taxes governed by the Real Property Tax Law, taxes imposed by the Pari-Mutuel Revenue Law and local nonproperty taxes imposed both by the city of New York and by various other cities and counties pursuant to Chapter 278 of the Laws of 1947 as amended.

Most articles of the Tax Law contain their own penalties for false statements or false returns; see section 217(corporate franchise tax), section 249-v (estate tax) and sections 376, 681 and 695, added by Chapter 1011 of the Laws of 1962 (all dealing with the personal income tax). Accordingly, I do not believe there is any need for re-enacting into the Tax Law the provisions of section 2321 of the Penal Law. If your Commission believes that some over-all provision should be re-enacted, I am inclined to believe it should be continued in the new Penal Law so that it will apply to all taxes, state and local, no matter under what statutes they may be imposed.

Recommendation: defer consideration of Penal Law §2321 until the Commission formulates a provision comparable to Model Penal Code §241.3, "Unsworn Falsification to Authorities".

§2322 reads as follows:

Any person, firm, corporation, or association, or agent or employee thereof, who mails or delivers or causes to be mailed or delivered, any notice, circular, pamphlet, card, handbill, printed or written notice of any kind other than that which is authorized or required by law with a statement of moneys due the state of New York or any political subdivision thereof, or with a tax bill or notification of a tax to be assessed or levied by the state of New York or any political subdivision thereof, is guilty of a misdemeanor.

This section was added by Laws 1948, Ch. 620. The Department of Taxation and Finance commented as follows:

Section 2322 of the Penal Law penalizes the sending of advertising and propaganda material with any tax bill, state or local. Like section 2321, this applies to so many different taxes that I believe it should be retained in the Penal Law rather than re-enacted in all the statutes which authorize our various state and local taxes. If any re-enactment were to be included in the Tax Law, I believe it should be a new section 5, where it would come under the "Miscellaneous" provisions of Article 1.

Recommendation: transfer Penal Law §2322 to Tax Law Article 1 as new section 5.

PJMcQ/rc/cd
8/30/62