

REPORT ON ARTICLES 185, 190 and 195
REPORT TO LEGISLATIVE COMMITTEE OF
DISTRICT ATTORNEYS ASSOCIATION

of the

STATE OF NEW YORK

on

PROPOSED PENAL LAW
(Senate Intro. 3918,
Assembly Intro. 5376,
1964 Session)

I have been assigned to review Articles 185, 190 and 195 of The Study Bill of the Proposed Penal Law introduced in the 1964 legislature by the Bartlett Commission. The following is my report:

Except for the particular objections to those proposed articles hereinafter set forth, the staff notes of the Temporary Commission on Revision of the Penal Law and Criminal Code to the Study Bill contain cogent and adequate reasons for the enactment of those proposed articles 185, 190 and 195. Consequently, the comment herein given to these proposals will, to some extent, reiterate the reasons for the proposal assigned by the Bartlett Commission.

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ARTICLE 185

Article 185 covers bribery not involving public servants and related offenses. It contains ten sections which deal with commercial bribery, bribery of labor officials, sports bribery, tampering with sports contests and rent gouging.

Sections 185.00 and 185.05 condemn commercial bribery as a class B misdemeanor. The first section proscribes the conferring of or offering to confer a commercial bribe to an employee, agent or fiduciary and the second section condemns the solicitation or acceptance by an employee, agent or fiduciary, or an agreement by such, to accept, such bribe.

These sections substantially restate the provisions of the section 439 of the present Penal Law, with the exception that the provision of section 439, which condemns the receipt by an employee, authorized to procure materials or merchandise for his employer, of a gift, gratuity or bonus from the person supplying such material or merchandise is omitted. Thus, under the proposed statute there must be proof that any gift given to or received by an employee was with the intent or understanding that it will influence the employee's conduct in relation to his employer's affairs in order to constitute a violation of the law. In my opinion, this omission constitutes the proposed law practically self-defeating. The required intent in the situation

this law is designed to cover is usually almost impossible of proof. Commercial bribery will carry no sanctions under the proposed provision.

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Sections 185.10, 185.15 and 185.20 deal with the bribery of a labor official. The first-mentioned section defines a labor official. The second and third-mentioned sections condemn as a class D felony the giving to a labor official or the receipt by a labor official of any benefit in order to influence the labor official in respect of any of his acts, decisions or duties as such official. These proposed sections substantially, and with no essential difference, restate the provisions of section 380 of the present Penal Law, except for the immunity provision for testimony, which will not be required under the proposed Penal Law in view of the blanket power in that regard contained in article 70 of the proposed Penal Law.

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Section 185.40 condemns as a class A misdemeanor the tampering with any sports participant, sports official or with any animal or equipment or other thing involved in the conduct of a sport contest contrary to the rules and usages governing such contest.

This provision expands the scope of present §190-a of the Penal Law, which makes it a felony to interfere with, injure, destroy or tamper with by which a horse, or other animal used for the purposes of racing breeding or competition exhibition of skill is interfered with. The new provision does not limit such acts just to animals, but includes, by its breadth and generality, humans and equipment.

I have no criticism as to the proposed change.

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Section 185.45 deals with excessive rent charges for real property, commonly known as "rent gouging." This provision is in no essential way different from the present §965 of the Penal Law. There is no objection to this provision. With the decess of the Commercial Rent Law and the slow but sure decontrol of residence rents in many areas, this law may soon become a dead letter.

ARTICLE 190

Article 190 treats of frauds on creditors. It contains four sections, which deal with fraud in insolvency, fraud involving a security interest and fraudulent disposition of mortgaged property and property subject to a conditional sales con-

tract.

Section 190.00 condemns as a class A misdemeanor fraud in insolvency. In essence, it proscribes certain conduct which may prejudice unsecured creditors such as - with intent to benefit himself or another or to injure or defraud creditors and "knowing that proceedings have been or are about to be instituted for the appointment of an administrator, or knowing that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made" - conveys or disposes or conceals any interest in the debtor's estate, or obtains a substantial part or interest in the debtor's estate or presents to a creditor or administrator a false statement of a material matter or misrepresents or refuses to disclose to the administrator the existence or location of any interest in the debtor's estate. This section replaces present §§1170-1173 of the present Penal Law, which, according to the staff notes of the Temporary Commission, has remained essentially unchanged for over 100 years. The proposed section follows the form in the Model Penal Law (§224.11 and requires a defendant to know that an "administrator" has been or is about to be appointed, or that a composition agreement has been or is about to be made.

Section 190.05 deals with fraud involving a security interest. It condemns as a class A misdemeanor the selling or unlawful withholding of property and the wrongful failure to account for the proceeds thereof where there is a security agreement creating a security interest in personal property securing a monetary obligation owed to the secured party.

This provision is practically a condensed reiteration of §940-a of the present Penal Law as enacted by Chapter 552, §37, of the Laws of 1962, effective September 27, 1964, with the exception that the provision in the present statute (not yet in force) making it a felony if the amount is over \$100.00 is not included in a proposed law. This law has been a long-felt want in the business world. Now that it has come, the proposed Penal Law would dilute it by eliminating the distinction between a felony and a misdemeanor violation. If the amount presently required to constitute the crime a felony - \$100.00 - is considered too low for a felony, that amount may be increased. It should be recognized, however, that in most violations under this section considerable sums of money are involved, and for this crime to be a misdemeanor where large sums may have been illegally misappropriated is making it no more than a slap on the wrist which will have no deterrent effect upon dishonest business men.

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Sections 190.1 and 190.15, respectively, constitute the fraudulent disposition of mortgaged property or property subject to a conditional sale contract class A misdemeanors. These provisions substantially restate existing Penal Law, §§940 (1), 940 (2) and 1291 (2).

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ARTICLE 195

This article deals with frauds other than those covered by Articles 185 and 190. It contains ten sections, four of which deal with fraud, in connection with issuing a bad check, one dealing with false advertising, one dealing with criminal impersonation, one dealing with concealing a will and two dealing with misconduct at a corporate election.

The four sections dealing with the offense of "issuing a bad check" (§§195.00 - 195.15) include most of the features of present §1292-a of the Penal Law, except for some changes of substance, some of which I consider undesirable.

For instance, present §1292-a requires that there be an "intent to defraud," but that term is not defined. Proposed §195.05, however, specifically defines the requisite intent as an

intention or belief at the time of utterance or passing a check that payment will be refused upon presentation.

Section 195.10 deals with presumptions and contains some needed refinements in the present law. One not included, however, should be considered. Subdivision 3 provides that dishonor of a check and insufficiency of funds in the account at the time of presentation may be proven by a notice of protest declaring the dishonor and insufficiency, and such proof shall constitute presumptive evidence of such dishonor and insufficiency. This follows the presumption in subdivision 2 of an intention that the check be dishonored upon presentation when there is no account or there are insufficient funds in the bank. But this does not cope with the favorite device to avoid this penal statute used by those who issue checks without sufficient money in the bank. That device is to stop payment on the check. It is suggested that this statute provide that where payment on a check is stopped, the drawee or bank is required to state in the notice of protest or other certification whether there is sufficient funds in the bank to pay the check if it had not been stopped, and that such notice of protest shall also constitute presumptive evidence of insufficient funds.

Section 195.15 introduces a new and very salutary feature in a statute such as this. It permits a defendant who has issued a bad check to avoid prosecution or conviction by making the check good within ten days after dishonor.

Different from present §1292-a, the crime of a bad check constitutes a single grade of offense, namely a class B misdemeanor. This according to the staff notes of the Bartlett Commission, was done in order to keep other violations such as larceny within their own ambit instead of sprinkling them through various parts of the Penal Law. In fact, §160.05 (a) (c) of the proposed Penal Law specifically makes it a larceny to acquire property through the issuing of the "bad check" crime.

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Section 195.20 deals with false advertising. Subdivision 1 is essentially a reworded reiteration of §421 of the present Penal Law with the improvement that the phrase "any advertisement" replaces the detailed listing of advertising media in the existing section, thus obviating the need for amendment whenever a new advertising medium appears. Subdivision 2 provides an affirmative defense under this section (which must be established by a preponderance of the evidence) that the alleged false statement

was not knowingly or recklessly made. This is new and was adapted from the Model Penal Code. This addition is desirable, since the present law imposes absolute liability, and a defendant should be permitted to establish (particularly when the onus is on him to do so by a preponderance of the evidence) that there was no venal or fraudulent intent in his action.

Section 195.25 makes criminal impersonation for the purpose of defrauding a class A misdemeanor. This section is a substantial restatement of the present Penal Law prohibiting the impersonation of public officers (§§854, 931, 936-b, 1846) and private persons (§§928, 930, 942, 1278). No criticism is offered of this section which gathers together into one place related acts scattered through different parts of the existing Penal Law.

Section 195.30 makes it a class E felony to conceal, suppress, mutilate or destroy a will or codicil with intent to defraud. This section is simply a much shortened substantially reiterated version of present § 2052 of the present Penal Law.

Sections 195.35 and 195.40 proscribe, respectively, misconduct by a corporate director and misconduct at a corporate election as class B misdemeanors, and substantially, without any significant change, restate §§664 and 668, respectively, of the existing Penal Law.

Respectfully submitted,

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Dated: August 28, 1964.