Association of the Bar of the

City of New York

Committee on Criminal Courts

Report on Proposed Penal Law

Articles 190 and 195

Section 190.00 This section defines the fraud of insolvency, a class A misdemeanor. The crime is presently set forth in sections 1170-1173 of the Penal Law, each of which requires substantially an intent to defraud creditors. The proposed provision broadens the required intent to include both an intent to defraud creditors or in the alternative an "intent to benefit himself or another". It was pointed out that since any person tempted to commit the proscribed acts would probably be in business, the intent to benefit himself or another would be largely meaningless and might include an innocent intent, such as to enter into a voluntary arrangement with creditors or to secure a new loan. It was, therefore, determined that the committee should recommend the deletion of the phrase "with intent to benefit himself or another or".

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The committee recommends that subdivision (a) be reworded to cover a person who assists or participates in a fraudulent conveyance, transfer, removal etc., since the present wording seems to cover only the person who himself does the conveying, transferring, removing, etc.

accessorial conduct (This is covered)!

The committee recommends that the wording of subdivision (b) be changed to "obtains title to or possession of any substantial part of the debtor's estate". The present wording includes anyone who obtains an interest in a debtor's estate and many interests, such as that of a person who purchases an obligation of the debtor, do not involve any fraud on other creditors. Even if as recommended, an intent to defraud is required, there would still seem to be no reason to proscribe acts which may have a legitimate end and which do not naturally relate to a fraud.

It is recommended that subdivision (d) be reworded to provide that a refusal to disclose would be criminal only if the administrator is legally entitled to the disclosure. By such rewording, some of the problems with respect to the right against self incrimination and with respect to a claim of immunity would also be avoided. The Committee also suggests that the desirability of a limited immunity for disclosures, such as is provided in 11 U.S.C.A. § 25 should be considered.

The Committee noted without comment that certain acts, such as concealment of property by a knowingly insolvent debtor to prevent a levy, which are now proscribed by Section 1171 would not be criminal under the proposed provision if done without knowledge by the debtor that the bankruptcy proceedings are imminent.

Section 190.05 This section defines a fraud involving a security interest a class A misdemeanor. The Committee recommends that an intent to defraud be added as an element of the crime. It was also suggested that proof of the crime should not require proof that the security interest was properly perfected.

Section 190.10 This section defines the crime of fraudulent disposition of mortgaged property, a class A misdemeanor. Since the crime consists of disposing of property upon which there is a mortgage or other lien created by an instrument intended to operate as a mortgage, the Committee recommends that the required intent be broadened to include an intent to defraud not only the mortgagee or purchaser, but also the lien holder and any creditor of the mortgagor.

Section 190.15 This section defines the crime of fraudulently disposing of property subject to a conditional sales contract. The Committee recommends deletion of this section, since a conditional sale with delivery would in the terminology of the Uniform Commercial Code create a security interest, with respect to which fraudulent conduct would be covered by proposed Penal Law section 190.05.

Section 195.00 This section defines terms used in the provisions relating to the issuance of bad checks. The Committee recommends that the definitions be reworded to conform where possible to those used by the Uniform Commercial Code. For instance, it would seem that a check should be defined as a draft on a bank payable on demand (Uniform Com. Code §§ 3-104, 3-114), that the drawer of a check should be defined as the person signing as the maker (Uniform Com. Code § 3-104), that "issue" should be used instead of "utter" (Uniform Com. Code § 3-102), and that "negotiate" should be used instead of "pass" (Uniform Com. Code § 3-202). It was also noted that the definitions of drawer and representative drawer are not drafted with the same terminology and phrases such as "draw the check", "signs the check", "primary obligor", "principal drawer or obligor" should be made consistent. Moreover, the need for the term "representative drawer" does not appear, since a check cannot be signed by an agent of a drawer under the Uniform Commercial Code or banking practice and an employee signing for a corporation would be responsible for the crime under proposed Section 50.25. The Committee recommends that the phrase "with the drawee" be added before the words "no funds or account" in the definition of "insufficient funds" in order that it be clear that a total absence of funds anywhere is not required. Also in connection with the definition of insufficient funds, it was pointed out that no change was made in the present law which does not cover a situation where although the bank balance is sufficient to cover the check when drawn, the drawer expects the check to be dishonored because the balance will be used to pay other checks previously issued.

Section 195.05. This section defines the crime of issuing a bad check. It was mentioned that in place of the present requirement of intent to defraud, the proposed section requires an intent or belief at the time of utterance that the check will be dishonored, and that the change would protect a person issuing a bad check, believing that it would be paid by mistake.

Section 195.10 Approved without comment.

Section 195.15 This section provides for the defenses that the check was paid within ten days of dishonor or that the defendant was merely executing the instructions of his employer. The Committee recommends that these be made affirmative defenses which the defendant would have the burden to prove, since the proof would readily be available to him. A question was raised as to whether the defense of payment should be available if it was subsequent to an arrest.

Section 195.20 Approved without comment.

Section 195.25 This section defines the crime of criminal impersonation. The committee recommended that the necessary criminal intent be clarified by the addition of the word "unlawfully" to the phrase "intent to gain a benefit".

Section 195.35 This section defines the crime of misconduct by a corporate director, a class B misdemeanor. It was pointed out that the definition of the crime was too broad and included acts by directors authorized by corporate laws, such as the declaration of a dividend from earnings when surplus of a Delaware corporation is impaired, the declaration of a dividend when surplus of certain types of New York corporations is impaired (N.Y.Bus. Corp. Law § 510), and the purchase of stock of the corporation with its own funds but not from surplus (Bus. Corp. Law § 513). The Committee recommends that this proposed section be redrafted with the advice of, and in terms of the new corporation laws being drafted by the Joint Legislative Committee to Study Revision of the Corporate Laws, care of Robert S. Lesher, Esq. 1708 Rand Building, Buffalo 3, N.Y. which has drafted the new Business Corporation Law and is working on the revision of our other corporation laws.

Section 195.40 This section defines the crime of misconduct at a corporate election. The Committee raised the question whether the section should not apply to all corporate elections, not just elections of stock corporations, and again suggests that the advice of the Lesher Committee be sought.