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CRIMINAL MISAPPROPRIATIONS IN WISCONSIN—PART II*

By Gordon B. Baldwin**

943.21 FRAUD ON HOTEL OR RESTAURANT KEEPER

This section deals with the misappropriation of certain kinds of services. The actor must abscond without paying for the food, lodging or other service. "Abscond" in this sense means to depart clandestinely. A person absconds if he departs without the knowledge or consent of the operator of the hotel, motel, boarding or lodging house, or restaurant. If the person who furnished the service or other accommodation consents to the actor's leaving without paying, (for example, where he extends credit) no offense is committed.

The actor must intentionally abscond without paying, i.e., he must know that he has not paid and that credit has not been extended by the person furnishing the services or accommodations. Someone who absent-mindedly walks out of a restaurant without paying is not punished by this section. Curiously the statute does not apply to the man who with an intent to defraud remains on the premises and does not abscond.

943.21 is a restatement of part of section 343.402 entitled Fraud on innkeeper. Subsection (1) of the old section proscribed obtaining lodging or other service at a hotel, inn, or boarding or lodging house; the new section includes motels as well. Specifically the old subsection covered: (1) The obtaining of lodging without paying unless credit was expressly given; such conduct is not absconding, (2) The obtaining of credit by a false show of baggage or other misrepresentation; but in practice if such a person actually paid his bill upon leaving he would not be prosecuted, so the new section is limited to cases where he does not pay, (3) Absconding without paying, (4) Defrauding the proprietor in any other way while a guest at his place. The latter conduct is covered by the general section of theft, 943.20.

Subsection (2) of the old law provided that the return unpaid of any check or other order for the payment of money given to pay for lodging or other service was prima facie evidence of an intent to defraud. This was dropped because the person giving the worthless

*This is the second and last part of this article. The first part appeared in Vol. 44, Winter, 1960-61, No. 3 of the Marquette Law Review.

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175 WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.).

176 A lodging house has been said to include a house in which furnished rooms were rented to three or more persons at a stipulated rental per week, and services were supplied to keep the rooms in orderly condition. 15 Op. Atty. Gen. 114.
check or other order is covered by the new section on worthless checks (943.24) which contains a prima facie evidence provision.

Subsection (3) was very similar to subsection (1) except that it applied to obtaining food at restaurants.

943.22 Use of Cheating Tokens

This section also deals with obtaining property or services but is restricted to the use of certain means. It replaces part of 343.341 which punished persons who placed or deposited any "token, slug, false or counterfeited coin, device . . . with intent to cheat or defraud. . . ." The new section accomplishes the same purpose with much simpler and revealing language. Nothing in the legislative history of this section indicates that a substantive change in the law was intended, although the language expressing the mental element has been revised. The old law established a prima facie case of intent to defraud where a slug was used to obtain services. The present law merely requires that the state show that the defendant knew he was not depositing lawful money or an authorized token. The jury, of course, may infer the requisite mental element from their consideration of all the surrounding circumstances.

943.23 Operating Vehicle Without Owner’s Consent

A. General Comments

Common law larceny, as well as theft under 943.20(1), paragraphs (a) and (c), requires proof that the actor intended to deprive the owner "permanently of possession." Consequently, where the actor takes the property under circumstances indicating merely an intention to use temporarily, criminal liability does not obtain unless it can be shown that the actor disposed of the property in a manner that amounted to a reckless exposure to loss, in which case a jury might properly infer an intent to deprive the owner permanently of possession. In many situations, however, the jury can not properly find such an intention. To meet the problem created by the actor who "borrows" or otherwise uses valuable property without the consent of the owner and without an intent to deprive the owner permanently, specific criminal statutes are required. Statutes dealing with such temporary use of automobiles and other vehicles are commonly referred to as proscribing "joy-riding."

943.23 makes two important changes in the old section which result in a broader scope to the law. First, the statute is no longer restricted

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177 The Proposed Code in 343.21(1), listed as prima facie evidence of stealing: "Obtaining property of another or services of a public utility by depositing anything except lawful money or authorized tokens in any receptacle used for the deposit of such coins or tokens; . . . ."

178 The Proposed Code’s treatment of stealing (343.20) would merely have required an intentional use.

to the operation of devices on the "public" highway;\textsuperscript{180} the act may take place anywhere within the jurisdiction of the state.\textsuperscript{181} Second, the statute is no longer restricted to "motor vehicles."

B. \textit{Vehicles}

"Vehicle" is defined in the criminal code as "any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air."\textsuperscript{182} A "self-propelled device" could, without undue strain, be construed to refer to animals as well as the more modern forms of transportation such as automobiles, motorboats, airplanes, locomotives, etc. However, the definition is not without its problems. Are such devices as bicycles, sailboats and iceboats within the purview of this section? Authoritative answers must await decision of the courts. A limitation on the kind of "vehicle" intended may be implied by the use of the word "drive" in referring to the act of misappropriation. One "drives" an automobile, a team of horses, or perhaps a locomotive, but airplanes were intended to be included, and one does not "drive" them. Moreover, it seems hardly correct to say that the horseback rider "drives" his mount, or that a sailor "drives" his sailboat. An answer to these riddles may be supplied by an analysis of the essential problem which is whether the temporary misappropriation proscribed by this section is deemed so serious that the criminal law should attach sanctions. The elimination of the word "motor" in the new statute indicates that the device does not automatically exclude reference to horses, gliders, sailboats, iceboats, and less conventional means of transportation.

C. \textit{Requisite Act}

The statute applies to whomever "takes and drives" any vehicle. "Takes and drives" was used in preference to the phrase "intentionally operates" in the Proposed Code. The word "operates" might be applied to a mere starting of the motor and it was for that reason that the Model Penal Code rejected its use in preference to "takes."\textsuperscript{183} Evidently it was believed that conduct merely tentatively indicating an intention to drive the vehicle should not be covered.

D. \textit{Without Consent}

The consent of the owner to the use of the vehicle is a defense under

\textsuperscript{180} Schroeder v. State, 222 Wis. 251, 267 N.W. 899 (1936).

\textsuperscript{181} See Wis. Stat. §939.03 (1959).

\textsuperscript{182} The Model Penal Code defines "vehicle" as "any device for transportation by land, water or air, including mobile equipment with provision for transport of an operator, and draught or riding animals." \textsc{Model Penal Code} §206.6(2) (Tent. Draft No. 4). The varying constructions given to the work are set forth in standard law dictionaries. See \textsc{Black, Law Dictionary}, 1724 (4th ed. 1951).

\textsuperscript{183} See \textsc{Model Penal Code} §206.6(2) (Tent. Draft No. 2) and \textsc{Model Penal Code} §206.6(2) (Tent. Draft No. 4).
this section, as under the prior law. In State v. Mularkey, the defendant hired an automobile for a short trip, but in violation of the agreement the auto was taken on a further journey and then abandoned. The extra driving was without the consent, permission or knowledge of the owner. The Supreme Court held that the extra driving did not result in a violation of the joy-riding statute stating: "the mere unauthorized or extended use of such a vehicle by one who has lawfully obtained the consent of the owner to its taking or use . . . is not a violation of this statute. . . ." The Court indicated that the substance of the offense is the "obtaining of the possession in the first instance without the consent of the owner." The evident reason for this holding as well as others like it is that courts are reluctant to chart a course which would make criminal an ordinary breach of contract. The owner who lets his automobile for hire must assume some risk that the terms of the hire may be broken. The owner has a civil remedy which in a proper case might even be in conversion for the value of the car.

E. Relation to the Crime of Larceny

Under the prior statute an acquittal for larceny did not preclude a trial and conviction for joy-riding because an essential element of the crime—operation on a public highway—was not required for larceny. Each of the crimes was a distinct statutory offense. This result should no longer obtain. Information which might lead to a conviction for larceny is sufficient to sustain a conviction under 943.23 if the jury does not find an intent to deprive the owner permanently. The line between 943.20 and 943.23 may be a close one, but it is one which a jury might with proper instruction be able to determine.

The language adopted in 943.23 is similar to that finally adopted in the Theft statute and leads to the conclusion that something in the nature of a trespassory act is required. The requirement that the defendant "drive" the vehicle implies the need for some kind of movement, perhaps merely a turning of the wheel.

943.24 Issue of Worthless Check

A. General Comments

Special legislation has traditionally been enacted to deal with bad checks because they involved a promise to perform in the future, and this was, under the old dogma, not a false representation: a check was

184 See definition for "without consent" in §939.22(48) (1959).
185 195 Wis. 549, 218 N.W. 809 (1928).
186 Id at 551, 218 N.W. at 810.
188 Eastway v. State, 189 Wis. 56, 206 N.W. 879 (1926).
189 Schroeder v. State, 222 Wis. 251, 267 N.W. 899 (1936); State v. Mularkey, supra note 185.
no more than the drawer's promise that the bank would pay. On the facts this, of course, is absurd, for the giving of the check is in normal usage a representation of fact that there are or will be funds to back it.

This section covers persons who, at the time they issue a check or other order for the payment of money, intend that it shall not be paid. The important element of intent in 943.24 differs from the prior law which required that the actor have knowledge that he did not have sufficient funds in or credit with the bank or other depository on which the check or order was drawn. Under the present statute a person who writes a check with sufficient funds in the bank but with intent to stop payment on the check is guilty of the same kind of conduct as the person who writes a check without funds. Of course, the fact that the actor did not have sufficient funds is persuasive evidence that he intended the check should not be paid and accordingly this is deemed prima facie evidence of the requisite intent.

B. Requisite Act

The statute applies to one who "issues" a worthless check. "Issue" has been substituted for the phrase "shall make or draw, or utter or deliver" because it simplifies the language and proscribes the desired activity. The word has a well-defined meaning in the law of negotiable instruments: the first delivery of the instrument, complete in form, to a person who takes it as a holder. It would appear that the second delivery of a worthless check would not be covered. This deficiency could be corrected by the addition of the phrase "or passes" as was done in the Model Penal Code.

C. Checks Not Covered

As stated in subsection (3) two types of checks are not included: (a) a check given for past consideration except a payroll check, and (b) a postdated check. Payroll checks were included because after some debate in the Criminal Code Advisory Committee it was noted that they have created some problem in metropolitan areas. Payroll checks are given for past consideration but are treated as exceptions because of the special reliance placed upon them.

A check given to release a lien is not given for past consideration, although the services giving rise to the lien were performed before the check was issued. Thus a person giving a worthless check to an auto-

191 State v. Foxton, 166 Iowa 181, 147 N.W. 347 (1914).
192 WIS. STAT. §343.401 (1953), Issue of Worthless Check.
193 WIS. STAT. §943.24(2) (1959).
195 MODEL PENAL CODE §206.22 (Tent. Draft No. 4).
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mobile repair shop and who receives the car at that time is covered by this section.

Postdated checks are not included in this section, because it has been the custom of merchants in some areas to encourage the giving of postdated checks when the customer does not have sufficient funds on hand to pay for the purchase. Furthermore, postdated checks are sometimes received as a means of encouraging the payment of debts. The person who takes a postdated check should be on notice that there may not be sufficient funds in the account of the issuer.

An issue that remains debatable is whether the section applies to a person who knowingly issues a worthless check as a gift. The prior law required "an intent to defraud," but this is no longer a requisite. One who issues such a bad check, although not cheating the recipient, knows that the check will be negotiated for cash, credit or property, and that improper bank credits are made. The proscription of this result may be within the objective of the criminal law.

The issuer of such a check must realize that reliance will be placed upon it. Because the penalty for the violation of this statute is relatively light, no great hardship is encountered by this construction. A number of courts have held that the defendant need not obtain anything of value in order to be convicted under similar statutes.

943.25 TRANSFER OF ENCUMBERED PROPERTY

A. General Comments

This section embodies a restatement of two old sections, and represents a considerable revision of the Proposed Code. It adds two pertinent features to the Proposed Code: first, the 72 hour notice provision

196 No Wisconsin cases have been discovered. See Annot., 59 A.L.R. 2d 1159 (1958): Construction and effect of "bad check" statute with respect to check in payment of pre-existing debt.

197 MODEL PENAL CODE §206.22, Comment (Tent. Draft No. 2).

198 People v. Khan, 41 Cal. App. 393, 182 Pac. 803 (1919); People v. Freedman, 111 Cal. App. 2d 611, 245 P. 2d 45 (1952); State v. Lowenstein, 393 Ohio St. 142 N.E. 897 (1924); State v. Meeks, 30 Ariz. 436, 247 Pac. 1099 (1926); for contra cases see 59 A.L.R. 2d at 1161 (1958).

199 Wis. STAT. §343.321 (1953), and Wis. STAT. §343.69 (1953), sale of mortgaged property.

200 Proposed Code, 343.25 (1953):

Transfer of Incumbered Property. (1) Any person in possession of property in which another has a security interest, who, with intent to defraud, conceals, removes or transfers it may be fined not more than $1,000 or imprisoned not more than 5 years or both.

(2) If the security interest was created in personal property, it is prima facie evidence of an intent to defraud if the actor, with knowledge that the security interest exists, removes or transfers the property by sale or gift or for security purposes without the consent of the holder of the security interest or without authorization by law or by the agreement creating the security interest.

(3) In this section "security interest" means an interest in property which secures payment or other performance of an obligation. Examples are mortgages and conditional sales contracts.
in referring to prima facie evidence, and second, it permits a person to place an additional mortgage on a chattel without the consent of the first mortgagee or without giving him notice. The present section is designed to protect the interest of the innocent purchaser as well as the holder of the encumbrance or security interest. The innocent purchaser is on constructive notice of any lien filed on the property. The existence of a recorded lien may be evidence that the defendant did not "intend to defraud," but it should not by itself insulate the defendant from criminal liability. "Security interest" is defined broadly to include an interest in property which secures payment or other performance of an obligation. Hence it includes mortgages, conditional sales contracts, trust receipts and liens. An attorney general's opinion rendered under the prior law stated that the interest should be an enforceable one, but it is difficult to find a rational reason for such a limitation because the important element in this crime is whether the defendant intended to defraud another.

Prosecution for this offense may take place in a county where the lien was filed, or where the transfer took place, or in the county from which the property was removed with intent to defraud.

B. Intent to Defraud

"Intent to defraud" requires actual knowledge that another has a security interest in the property. An innocent purchaser with only constructive knowledge of an encumbrance or security interest on the property (the interest is recorded for example) would not have an "intent to defraud," if he removed or transferred the property in violation of the terms of the encumbrance or security interest. "Intent to defraud" is here used in the sense of an intent to cause pecuniary loss, either to the person whose encumbrance or security interest is endangered or defeated, or to the innocent purchaser who has, at best, only constructive notice of the security interest or encumbrance.

A 1919 opinion of the Attorney General concluded that no "intent to defraud" could be found under the predecessor statute in a case in which the mortgagor of an automobile, without consent of the mortgagee, removed the engine and crank shaft to have them repaired. The cost of repairs was some hundred dollars more than estimated and the mortgagor could not make the payment. No intend to defraud, said the Attorney General, was disclosed by these circumstances. The mortgagee could pay the bill himself to secure his property.

203 The phrase "intent to defraud" varies with the content in which it is used. See United States v. Lepowitch, 318 U.S. 702 (1943); United States v. Cohn, 270 U.S. 339 (1925); Commonwealth v. Coe, 115 Mass. 481 (1874).
204 Cf., Porter v. Burtis, 197 Wis. 227, 221 N.W. 741 (1928).
205 In protecting the innocent purchaser the statute may be broader than the pre-existing law. See 26 Op. Atty. Gen. 105 (1937).
C. Application to Persons

The statute applies generally to persons who commit certain acts upon encumbered property or a security interest. It is not restricted so as to apply only to mortgagees who dispose of encumbered property. The Proposed Code applied to "any person in possession," but this limitation does not obtain in the present statute.\footnote{Proposed Code 343.25(1) (1953).}

It is not essential that the defendant have a legal interest in the property involved. In \textit{State v. Hunkins},\footnote{90 Wis. 264, 62 N.W. 1047, 63 N.W. 167 (1895).} the defendant conveyed record title to certain real estate to his mother who held the property in trust. An encumbrance existed on the property, although it was not recorded. At the request of the defendant the property was conveyed by his mother to innocent purchasers who paid full value to the defendant. The purchasers were not informed of the encumbrance by the defendant, who then hurried to the office of the register of deeds and placed the prior mortgage on record a few minutes before the grantees put their new deed upon record. Upon being prosecuted for a violation of a predecessor statute,\footnote{Ch. 244, Laws of 1887 (S & B ANN. STAT. §4431(a)).} the defendant contended that the statute covered only the person who "executes" the conveyance. The court denied the plea on the ground that the conveyor was acting in the capacity of an agent. This construction was reached, however, as a device for rejecting the defendant's argument that the statute did not proscribe his fraud. If the defendant's argument is accepted, said the court:

[the] construction emasculates the statute, and makes its evasion ridiculously easy. All that the fraudulent vendor has to do is to place the title in the name of an innocent party and have him make the conveyance, and by this means the act which, if done by his own hand, would be criminal, has become purged of all criminality because done at his direction by the hand of an innocent tool. The law is scarcely as helpless as this.\footnote{Supra note 208, at 267-268, 62 N.W. at 1048.}

In accord with the \textit{Hunkins} decision is a 1932 opinion of the Attorney General. In this instance the encumbered property was owned by a corporation, the stock of which was almost entirely owned by its president. The president conducted a sale of the encumbered corporate property, deposited the funds received to the credit of the company, and subsequently transferred them to his personal account. On these facts the Attorney General concluded there could be criminal liability.\footnote{21 Op. Atty. Gen. 108 (1932), citing Milbrath v. State, 138 Wis. 354, 120 N.W. 252 (1909) as authority for disregarding the corporate entity. See also Kralovetz v. State, 191 Wis. 374, 211 N.W. 277 (1926) and Weber v. State, 190 Wis. 257, 208 N.W. 923 (1926).}

"Persons in possession" is a broad description, for it includes not only the debtor or his assigns but also his personal representatives or...
his heirs. The scope of the present statute is broader, for these people remain within its purview together with persons who have no legal interest in the property involved. An overlap with the theft statute, therefore, may exist. The thief who takes and disposes of an automobile on which he knows there is a chattel mortgage may thus commit theft under 943.20 and a violation of 943.25.

D. 943.25(2)(a) A Prima Facie Case

The prima facie evidence provision operates only when the security interest was created in personal property. Real property is excluded because it is not uncommon practice to transfer land without giving notice to the holder of the encumbrance, for he is usually protected by the registration provisions applicable to real property. A proper definition of "personal property" may offer some difficulty because of the question whether it includes personal property which later becomes affixed to real estate. If the subject matter is real property the misappropriation becomes subject to the provisions of 943.25(1). Otherwise the problem is simply did the defendant intend to defraud, and the prima facie provision offers one method of showing an intent to defraud. The prima facie evidence provision will cause confusion unless it is clearly understood that its provisions are not conditions precedent to the commission of the crime. Prima facie evidence means that there is such a relation between the facts constituting prima facie evidence and the prohibited conduct, that proof of those facts creates an inference that the actor was guilty of the prohibited conduct. The jury is required to consider the prima facie evidence along with other evidence in determining whether they are convinced beyond a reasonable doubt of the defendant's guilt.

The removal or sale of the property is not prima facie evidence if it is made with the consent of the holder of the security interest or with authorization of law or by the agreement creating the security interest. The consent of the holder of the security interest may be oral, whereas under the prior law it had to be in writing. "Authorization by law" refers to situations such as that provided in the Uniform Conditional Sales Act which allows the temporary removal, for not more than 30 days, of property held under a conditional sales contract. "Agreement creating the security interest" refers to arrangements commonly

\[\text{WIS. STAT. } \S 939.71 \text{ (1959), } \ldots \text{ a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require.}\]

\[\text{(Italics Added) Theft under } \S 943.20(1)(a) \text{ requires proof of "intent to deprive owner permanently" while } \S 943.25 \text{ requires proof of "intent to defraud." } \S 943.25 \text{ requires the state to show the actor's knowledge of a security interest, while to prove theft no such knowledge need be shown.}\]

\[\text{Spaulding v. Chicago and Northwestern Railroad Co., } 33 \text{ W. } 582 \text{ (1873).}\]

\[\text{WIS. STAT. } \S 343.69 \text{ (1953). See also } 35 \text{ Op. Atty. Gen. } 364 \text{ (1946).}\]

\[\text{WIS. STAT. } \S 122.13 \text{ (1959).}\]
included in chattel mortgages on stock in trade which contemplates the sale of the goods. The 72 hours provision was in part retained from the prior statute.

943.26 Removing or Damaging Encumbered Real Property

Whereas 943.25(2)(a) deals with personal property, 943.26 concerns real property. The statute proscribes only conduct by mortgagors or vendees under a land contract who intentionally do any act which substantially impairs the security interest.

For example, the vendee of a residence under a land contract who intentionally cuts down a valuable shade tree reduces the value of the property. If the act was done without the consent of the vendor the actor will violate this section.

943.30 Threats to Injure or Accuse of Crime

A. General Comments

This section concerns matters within the ambit of common law extortion and blackmail. Coercion, rather than deception, characterizes this offense. It is one of the few provisions in the Criminal Code taken almost verbatim from the prior law, and its only substantive change is in the increased maximum penalty. Conforming with the general pattern of the Criminal Code, a minimum penalty is no longer specified.

The inability of the Criminal Code Advisory Committee to agree on a change means that problems will continue which formerly vexed the common law of extortion such as the meaning of “malice” and “intent to extort.” One reason given for the rejection of the Proposed Code’s provision was the belief that it might in some unknown way engender new controversies in the field of employment relations where a federal statute already occupies an important place. The majority felt that any change, even to effect a restatement of the law, should best be left for special legislative treatment. In view of the defense of mistake of law, neither the Proposed Code nor the present statute should constitute a real threat to labor unions’ legitimate interests.

The Proposed Code’s provisions remain of considerable value, as they describe in simpler terms the kind of behavior which was deemed

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216 This section is based on Ch. 143 §9 of Wis. Laws 1955, which created a new section, §343.315 which was slightly modified and adopted into the Criminal Code.
217 Defined in Wis. Stat. §939.22(48).
218 “Without consent” is defined in §939.22(48).
221 The FEDERAL ANTI-RACKETEERING ACT, which in some cases will overlap with the WISCONSIN CRIMINAL CODE, is found at 18 U.S.C. 1951.
to be within the purview of this section and 943.31 of the Criminal Code. 223

B. The Act.

The crime defined in 943.30 usually involves a type of attempted misappropriation. Hence there need be no actual transfer or other act of misappropriation. 224 The crime consists of a threat coupled with an intent to induce the transfer. The Wisconsin Supreme Court, in language which accords with the common law, has stated: "The gist of the offense described in the statute is the attempt to extort money. . . . If the threat be of the kind referred to in the statute, and is made with the intent thereby to extort money, or with the intent to accomplish any of the other objects mentioned therein, the crime has been committed." 225

This is not a complete analysis for the crime is also committed when the threat is to induce another to do an act against his will. In State v. Compton, 226 a threat was made to induce the victims to abandon their business and leave town. This was held to be sufficient to constitute a violation of the statute.

Reduced to its essentials, the statute proscribes two kinds of conduct: (1) the obtaining of something to which the actor is not entitled by threatening his victim, and (2) the obtaining of property to which the actor may be entitled by means of methods deemed objectionable. The objectionable method of this latter instance may be a failure to do something. For example X, who has been defrauded by Y, threatens Y that unless a certain sum is repaid X will seriously injure Y and will accuse Y of committing a crime. X has a clear right to the damages, but the threat may amount to such a danger to the community's tranquility that it should be deemed criminal conduct in order to preserve the public peace as well as to deter others from doing the same thing. However, when X threatens to accuse Y of a crime, X is fulfilling a public duty. Whether or not this should be the basis of a criminal act should depend on whether the threat is accompanied by the implication that the payment of money will keep X quiet. It is the law's intention that crime be punished and that persons with knowledge of a crime aid in the enforcement of the law. X's failure to act contravenes this basic purpose.

223 The Proposed Code would have provided: "343.26 Extortion. Whoever makes any of the following threats with intent to induce the threatened person against his will to transfer to the actor or another property to which the actor knows he or such other person is not legally entitled may be fined not more than $2,000 or imprisoned not more than 5 years or both . . . "


225 O'Neill v. State, supra note 224.

226 77 Wis. 460, 46 N.W. 535 (1890). The defendant sent a letter to two ladies stating "If you do not leave this city inside 10 days you will be tarred and feathered, now we 'mean' it from the lovers of decent 'Citizens.' You are counted a nuisants (sic.) by all." This gentle invitation was held criminal.
1. **Kinds of threats**
   
   a) **Threat to accuse another of any crime or offense.**

   It is of course desirable that crimes should not go unpunished and accordingly, the law must not discourage the prosecution of criminals. A person threatening to accuse another of the commission of a crime may be threatening to do what is really a public duty. Nevertheless almost every extortion statute punishes one who threatens to accuse another of a crime. In *O'Neil v. State*, a conviction of extortion was affirmed as the defendants were found to have threatened to accuse their victim of criminal libel. The Attorney General took the position, in an old opinion, that the statute is violated when there is a threat to "prosecute" but not where there is merely a threat to "accuse." It is hard to see the real significance of this distinction if in both cases there is an intent to misappropriate the property of another. The distinction may have been made, however, as a check against the possibility of convicting a person who threatens merely to inform the law enforcement authorities of a possible criminal act. Such a person is presumably fulfilling his public duty, while the person who threatens to prosecute evinces a more definite intent to misappropriate. The real question is always whether an unlawful attempt to secure the property of another has been made. The suggested distinction does not direct itself at that question. The distinction is rebutted by the words of the statute as well as by language of the *O'Neil* case, and in *State v. McDonald*, although some ambiguity persists in these decisions.

   The defendant may be convicted although the threat to accuse another of a crime is not couched in precise language. It is sufficient if the threat is in "language approximating a legal definition of the crime of which accusation is threatened." If the threat is ambiguous or of uncertain meaning, innuendoes declaring this purpose and meaning may be properly considered.

   The statute does not require that the threatened harm be unlawful. The actor may have the right or the duty to accuse another of the crime, but if he employs threats to secure property to which he is not entitled the statute should apply. Accordingly, the policeman who is obliged to...

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227 Supra note 224.
228 13 Op. Atty. Gen. 423 (1924). This distinction was made by the Municipal Court of Milwaukee in Schultz v. State, 135 Wis. 644, 649, 114 N.W. 505, 506 (1908), but the Supreme Court did not pass on the propriety of the charge.
229 Supra note 224, at 398-399, although the court's opinion uses "accuse" and "prosecute" somewhat indiscriminately.
230 192 Wis. 612, 618, 213 N.W. 295, 297 (1927). Here again the language of the opinion makes indiscriminate use of the words "accuse" and "prosecute."
231 Id. at 617, 213 N.W. at 297.
232 Id. at 618, 213 N.W. at 297 (dictum); Commonwealth v. Nathan, 93 Pa. Super. 193 (1928).
arrest would be unfaithful to his trust if he did not act, and he would violate 943.30 if he required the arrestee to pay money to avoid arrest.\textsuperscript{233}

\textbf{b) Threat to do any injury.}

Two major distinctions exist between a violation of 943.30 and 943.32, entitled \textit{Robbery}. First, in robbery the defendant has actually taken property from another. Second, the taking in the robbery situation is under circumstances involving the actual use of force or "threat of imminent force" against a person. The danger to the victim in the extortion situation is more remote. Hence the distinction between the two crimes is verbally certain although in some cases the difference in fact can be very small.

Courts have sometimes encountered some difficulty in determining whether or not the threat was to do "injury." In \textit{Schultz v. State},\textsuperscript{234} the defendant, a newspaper reporter, threatened to "expose" the fact that this complainant, a member of the county board of supervisors, had made a "corrupt agreement," unless he was paid fifty dollars. The jury convicted the defendant on the ground that this constituted a "threat to do injury to the person, business or calling" of the complainant, but the Supreme Court reversed stating, "we think it clear that it [the statute] was not intended to cover injury by reputation. . . ."\textsuperscript{235} An injury, said the Court, means "physical injury," and the defendant's act was not directed toward the accomplishment of this object. On the other hand, in \textit{Mayer v. State},\textsuperscript{236} a conviction was sustained where the defendant threatened to call a strike unless his victim paid him $200. This, said the court, was a threat to do injury to business within the terms of the statute. "The disastrous effect of a strike upon a business is too well known to require any effort to establish its ill effects. It is almost bound to result in the interruption of business, with loss and confusion affecting with disaster, to a considerable extent, the business assailed."\textsuperscript{237}

A threat by a person that unless the recipient pays, the sender "will take it out of his hide" constitutes a violation of this section,\textsuperscript{238} according to an opinion of the Attorney General. The facts revealed a correspondence from the actor disclosing an attempt to collect a $2.13

\textsuperscript{233} See \textit{MODEL PENAL CODE} §206.3, Comment (Tent. Draft No. 2); State v. Sweeney, 180 Minn. 450, 231 N.W. 225, 73 A.L.R. 380 (1930).

\textsuperscript{234} \textit{Id.} at 650, 114 N.W. at 507. \textit{Supra} note 228 at 650. The jury did not consider whether the acts charged constituted a "threat to accuse of a crime." The behavior under question in the Schultz case may now be treated under §943.31.

\textsuperscript{235} 222 Wis. 34, 267 N.W. 290 (1936); \textit{accord}, United States v. Compagna, 146 F. 2d 524 (2d Cir. 1944).

\textsuperscript{236} \textit{Id.} at 37, 267 N.W. at 291; \textit{accord}, 14 Op. Atty. Gen. 466 (1925). Persons wearing masks and robes entered a restaurant and informed the owner that she must "clean up . . . and run this place respectable . . . Unless you obey our orders we are going to . . . ship you straight back to England." This, in the opinion of the Attorney General was a threat to injure the business.

debt. Two of the letters contained the ominous threat to “take it out of your hide.” The opinion may mark the Plimsoll line between an honest attempt to collect a just debt, and a criminal offense.

Relatively few cases have arisen under the Wisconsin statute hence the courts will be required to analyze the functions of the statute to determine its meaning. The intention of the legislature would surely not be thwarted by construing 943.30 to proscribe such threats as the threat of a professor to flunk a student unless certain sums were paid (injury to business or calling), or a threat by employer to pay in order to avoid dismissal from employment.

c) The person threatened.

It is not required that the threat be to injure the person from whom the property, advantage or other actions is demanded. For example, the statute is violated when the defendant threatens to harm a child unless its father pays a sum of money. Moreover the threat can be to do harm to anyone, and is not restricted to one who bears a special relationship with the intended victim.

C. The Mental Element.

The mental element required for a conviction under this statute is expressed in vague and general terms; “any person who shall maliciously threaten . . . with intent . . . to compel the person so threatened to do any act against his will. . . .” “Maliciously” in this sense simply means without any elements of justification or mitigation. Some confusion

239 The correspondence supplies a good example of how not to write collection letters. The letters read as follows:

June 15, 1915
Dear Sir:
We received your money order for $2 and have applied it to your slow account. I suppose you think this will fix up or fix it up for at least a while. I wish you were here—you good for nothing—I would learn you that your lies wouldn't go with me. If you pay the other $2.13 in a few days—all right—I will wait, but I will fix you plenty if you don't.

August 16, 1915
Dear Sir:
Do you know you are owing us a bill of $2.13 that you had ought to have paid a long time ago? You wooden headed good for nothing liar. I will take this out of your hide if you don't pay it pretty soon.

September 8, 1915
Dear Sir:
Do you know you are owing us $2.13 since Dec. 19th, old sleepy David? I would like to get my eye on you. I will fix you a plenty you good for nothing.

September 22, 1915
Dear Sir:
Old sleepy nothing you are owing us bill here of $2.13. Why don't you pay it? Wait until I see you. I will take it out of your hide with some interest along with it.

240 Held to be a property interest; see State v. Vallee, 136 Me. 432, 12 A. 2d 421 (1940). Contrary, In re McCabe 29 Mont. 28, 73 Pac. 1106 (1903).

241 See PERKINS, CRIMINAL LAW 679 (1952) : “The malice required . . . is not a feeling of ill will toward the person threatened—but the willful doing of the act with illegal intent.” State v. Compton, 77 Wis. 460, 466, 46 N.W. 535, 537 (1890).
surrounds the use of the term in Wisconsin. In *Stockman v. State*, the court stated the issue of the defendant's liability as to whether the defendant sought to settle a claim for civil damages which she in good faith supposed she had or whether she extorted money under threat of criminal prosecution. The court thus conveyed the idea that good faith is the decisive element in determining whether or not the crime was committed. However in *O'Neill v. State*, the court made it quite clear that good faith alone was not a defense:

The belief on the part of the injured person that he has a right to recover damages when he demands payment thereof in connection with stating that he will prosecute the wrongdoer if he fails to pay, does not necessarily constitute a defense to a charge of extortion. . . . There is still the crucial issue as to whether the prosecution was threatened maliciously with the intent to extort money from the wrongdoer instead of the matter of prosecution being merely mentioned incidentally in seeking to obtain a settlement by the payment of reasonable compensation for the damage sustained.

Thus, the *O'Neill* case holding an instruction to the jury that “the defendants had a right to demand money . . . in settlement of their claim, and to tell [the complainant] that if she did not pay damages, they would institute criminal proceedings” must be qualified. It should be added that “defendants had such right if in making their demand and threat they were not acting so maliciously with the intent to thereby extort money.” This isn't really very helpful for we are right back where we started. Criminality hangs on the concept of malice and an intent "to extort."

Case law does not supply much further elucidation on the mental element in this crime. “To extort” according to one court, “is to wrest from, to exact, to take under a claim of protection or the exercise of influence contrary to good morals and common honesty.” In accordance with the purpose of the crime the phrase has been construed broadly, to cover any unjustifiable exaction.

Unlike the crime of robbery it is apparent that the actor's claim of right does not automatically exclude criminal liability under 943.30. The cases seem to attempt a distinction between the “malicious threat” and a mere incidental reference to prosecution during efforts or negotiations to obtain a reasonable settlement.

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242 236 Wis. 27, 293 N.W. 923 (1940).
243 Supra note 224.
244 Id. at 400, 296 N.W. at 100, citing with approval Commonwealth v. Coolidge, 128 Mass. 55, 58-59 (1880).
245 Id. at 402, 296 N.W. at 101.
246 Commonwealth v. Hoagland, 93 Pa. Super. 274 (1928); See also Hanley v. State, 125 Wis. 396, 104 N.W. 57 (1905). Conduct of public officers is now specially controlled by §946.12 which has replaced the old statutes referring to “extortion” by a public officer. Wis. Stat. §348.29 (1953).
247 See *in re Sherin*, 27 S.D. 232, 130 N.W. 761 (1911).
943.31 Threats to Communicate Derogatory Information

A. General Comments

This section deals with those who threaten to injure another's reputation intending thereby to obtain property to which they are not entitled. Under 943.30 it is not a crime merely to threaten to injure a person's reputation.\(^1\)\(^4\) Nor is it a violation of 943.30 to threaten to expose the fact that a person has committed a crime in the absence of a threat to accuse or prosecute.\(^2\)\(^4\) Under the law prior to the Criminal Code, the only way in which threats to injure the reputation of another could be made criminal was to find a conspiracy.\(^2\)\(^5\) No substantial reason exists for making group-behavior criminal which would not be criminal if done by one person alone. The crucial question is whether the behavior, and not the combination, is deemed so serious that it should be made the subject of criminal liability. 943.31 fills the gap left in the prior law and makes criminal the threat to do injury to the reputation of another.\(^2\)\(^5\) The so-called badger game is covered by this section.

B. Requisite Act.

The requisite act is a threat to communicate information. As in 943.30 this section deals with an attempted misappropriation. A completed misappropriation is not essential.

It is not relevant that the threatened communication will convey true information. Thus in a Pennsylvania case a crime was found where the defendant threatened to publish a photograph showing the victim's deceased husband in a "compromising" position with his secretary.\(^2\)\(^5\) That the threatened publication is libellous is not essential, nor is it required that the threatened matter be considered immoral by the general community so long as the reputation is affected by the threat. For example, A's rich father, a person of particularly strong political views, is A's only source of financial support. B threatens to tell A's father that A has voted for a political party of which the father disapproves unless A pays B a certain sum of money to which B is not entitled. A believes that if this information is communicated to the father the allowance will be discontinued. B is clearly guilty of a violation of 943.31.\(^2\)\(^5\) This


\(^2\)\(^5\) Statutes of similar import are: Ala. Code Tit. 14 Sec. 49 (1940); Conn. Gen-Stat. Sec. 8379 (1949); Va. Code §18-232 (1950); W. Va. Code Ann. §5928 (1949); 18 U.S.C. 875(d), 876. The Louisiana general extortion statute is even broader. It proscribes any threat to do "any other harm."


follows because the threatened harm need not be unlawful, and because the use of the phrase "to anyone" indicated that the communication may be made to a person who might have a particularly strong reaction to the information. It is not material that in fact no injury to the reputation would in fact occur if the threat were made.

C. The Mental Element

The mental element required for a conviction is simply described. The threat is to induce another to transfer property to a person "known not to be entitled to it." The state must show that the defendant made the threat with the intention of inducing a transfer to one "known" not to be entitled to the property. As in other sections of the Criminal Code an honest error, whether of law or fact, will be a defense if it negates the existence of an essential state of mind.

943.32 Robbery

A. General Comments

The behavior proscribed in this section is, as in the extortion statute, designed to effect misappropriations of property accompanied by some substantial additional harm, or risk of harm, to the person or property of another. Prior to the Criminal Code the statutes of Wisconsin did not define the crime of robbery and the common law therefore prevailed. In two respects the Criminal Code differs from common law robbery. (1) The scope of the crime has been narrowed in that the "force" or "fear" which is sufficient to constitute robbery under 943.32 is limited to violence or the threat of violence against a person. Some decisions at common law included within the scope of robbery, threats which induced fear of injury to property or reputation. Under the Criminal Code such threats are dealt with under 943.30 and 943.31. (2) The threatened use of force under 943.32 may include that exercised for the purpose of escaping ("carrying away") with the property. In the past some decisions have held that the "sneakthief" who takes

254 The policemen who threatens to arrest is an example of one who threatens nothing unlawful, but whose behavior may, in some circumstances be criminal. See Model Penal Code (Tent. Draft No. 2, p. 75).
256 For a general discussion see Ibid.
257 The prior law was contained in Wis. Stats. §§340.40, 340.43, and 340.44 (1953). Most other states merely incorporated common-law robbery by reference. However, about a dozen jurisdictions make some attempt at defining the "fear" required for robbery (e.g., Cal. Pen. Code §212 (1949); Hawaii Rev. Laws §11595 (1945). The Swiss, German and Indian penal codes limit the force or threatened force to personal violence. The Swiss and Indian codes also include as a part of the crime the use of force to effect an escape with the property. See Swiss Crim. Code, Art. 139 (30 J. of Crim. L. & Criminology-Supp. 1939); German Crim. Code §249 (Library of Congress, Washington, D.C., 1947); Indian Pen. Code §390 (Gour. 1910).
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property by stealth and who is discovered and uses or threatens to use force in escaping with the property was not to be convicted of robbery. Force used in escaping is treated just as force used in taking the property. This is in conformity with the policy of the Criminal Code which makes danger to human life an aggravating fact in dealing with property crimes.

B. Requisite Action

1. In General

To sustain a conviction the defendant must be one who "takes property from the person or presence of the owner." "Owner" is defined as "a person in possession of the property whether his possession is lawful or unlawful." The essential condition is that the defendant act in conflict with the interest of a person whose right of possession is superior to his own. For example, as between the clerk in a jewelry store and the alleged robber, the clerk has possession although as between the clerk and the store owner the clerk may have only custody rather than possession. The taking from the clerk under circumstances involving an additional risk to the victim will constitute robbery in Wisconsin.

The taking that the statute requires is dealt with in the law of theft. As the critical behavior which the statutes desires to preclude is not so much the taking, but the accompanying circumstances by which the taking is accomplished, this provision is unlikely to give difficulty. It is sufficient if there is some unjustified assertion of control. Any of the behavior described in 943.20 (1) should be sufficient to fulfill the requirement of the statute. Thus the bailee of property who, in order to misappropriate the property, withholds it and uses force to do so may properly be convicted of robbery under this section. To accomplish the purpose of the statute, the word "takes" may be construed broadly within these limits. Ancient restrictions such as the necessity that the property be "carried away" as well as taken will not obtain.

The taking must be from the "person or presence of the owner." "Presence of the owner" means such proximity to the owner as will enable the actor when he takes the property, to use or threaten the im-

259 See State v. Holmes, 317 Mo. 9, 295 S.W. 71 (1927); and State v. Sala, 63 Nev. 270, 169 P. 2d 524 (1946); CLARK & MARSHALL, supra note 258, at 789; and Annot., 58 A.L.R. 656 (1929).
260 1953 LEG. COUNCIL REP. 125.
261 WIS. STAT. §943.32(b).
262 WIS. STAT. §943.20 (1959).
263 See James v. State, 53 Ala. 380 (1875); and CLARK & MARSHALL, supra note 258, at 785.
265 Cases such as Rex. v. Lapier, 1 Leach C.C. 320, 2 East, Pleas of the Crown 557, 708 (1784), will no longer tantalize us. Here the defendant tore an earring from a lady's ear, but lost his grasp and it fell into her hair. The court was troubled by the necessity for an "asportation" but concluded that it was present.
minent use of force. The essential feature here is the presence of an increased risk to the safety of the victim. No change in the law is effected by this provision, for many cases have held that a taking in the presence of the owner may be regarded as a taking from the person. Nothing in the statute requires that the victim actually be aware of the taking if the requisite risk is present.

2. Alternative behavior.

Two kinds of behavior-circumstances are sufficient to make the taking of property with an intent to steal, robbery.

a) The use of force.

Robbery is committed if the actor used force either for the purpose of accomplishing the taking of the property or for the purpose of accomplishing an escape with the property or for both purposes.

The force necessary must be used for the purpose of overcoming the victim's physical resistance or physical power of resistance to the taking or carrying away with the property. Hence some contest of physical strength, or some exercise of force for the purpose of knocking the victim unconscious or stunning him in order to steal is implied. A close factual situation is presented here. The thief who knocks a package from the arms of his intended victim is not guilty of robbery, for although he deprived the owner of the opportunity to resist, he did not overcome the owner's physical power of resistance. On the other hand, if the owner resists, even slightly, the snatching is sufficient to constitute robbery. Similarly robbery is committed if the actor stuns the victim so that he remains unaware of the taking. The distinctions are admittedly difficult but are justifiably imposed on court or jury because of the additional risk to the person where some resistance occurs, or where the actor's conduct is directed toward removing the chance of resistance.

b) Threat of the imminent use of force.

The threat of the imminent use of force against the person, unless the owner acquiesces to the taking or carrying away of the property, is the most common method of accomplishing robbery. For example, D threatens to shoot X unless X hands over a wallet, or D knocks X down and then demands the wallet. In the latter case it is proper to imply a threat to continue the beating unless X complies with the demand. Furthermore when the force is inflicted upon Y in the presence of X, for the purpose of compelling X to acquiesce to the taking of property, the


267 See cases cited in Perkins, Criminal Law 238 (1952) and Clark & Marshall, supra note 258 at 786.


269 State v. Parker, 262 Mo. 169, 170 S.W. 1121 (1914); People v. McGinty, 24 Hun. 62 (N.Y. 1881); King v. Baker. 1 Leach 290, 168 Eng. Rep. 247 (1783); Perkins, supra note 267, at 238; Clark & Marshall, supra note 258 at 788.
conduct is essentially a threat to continue the abuse unless X complies with the demand.

The threat must be to use force against a person. If the threat is simply to burn the victim's house it is not robbery, although it may constitute a violation of 943.30. The threat may be accomplished by menacing words or gestures provided the victim has reasonable grounds for believing that physical force against his person will be used to enforce acquiescence. The necessity that the victim reasonably believe that physical force will be used to enforce acquiescence is not apparent on the face of the statute. The requirement is present, however, because of the initial requisite that there is a taking of property. There is no taking of property within the meaning of 943.32 if the victim willingly consents. It ought to be pretty clear that a heavyweight boxer who gives up his money when threatened with a beating by an obviously unarmed eighty year old lady has not been compelled to acquiesce, but has in fact consented to the taking.\textsuperscript{270} The risk to person with which the statute proposes to deal is not present in this situation. Whether or not a particular threat will suffice depends therefore, on such facts as the relationship of the parties, the nature and value of the property, and the apparent ability of the actor to carry out the threat. If the threat is not likely to compel acquiescence an attempt to commit robbery may be argued.\textsuperscript{271}

Robbery is not accomplished unless the threat is to assert the imminent use of force. A threat to kill the victim "tomorrow" unless property is surrendered would constitute a violation of 943.30 but not 943.32. The distinction is based upon the varying risks to the person that are present. A threat to do something in the future and not imminently, is deemed less dangerous because presumably the victim may take action to protect himself, and there is a chance that the actor may change his mind, and the threatened harm will be avoided. Determining what is imminent requires asking, whether the threat was "near at hand," "mediate rather than immediate," "impending," or "on the point of happening."

3. \textit{Aggravating circumstances}

Under the law prior to the Criminal Code the robbery was deemed more serious if it was accomplished while being armed with a dangerous weapon and with an intent, if resisted, to kill or maim the person robbed.\textsuperscript{272} The Criminal Code now proscribes robbery in broader terms

\textsuperscript{270} CLARK & MARSHALL, supra note 258, at 790-793; People v. Bodkin, 304 Ill. 124, 136 N.E. 494 (1922); State v. Sipes, 233 N.C. 633, 65 S.E. 2d 127 (1951).

\textsuperscript{271} See WIS. STAT. §939.32 (1959).

\textsuperscript{272} WIS. STAT. §340.39 (1953), Assault and theft, being armed. Robbery under the statutes of other jurisdictions generally is aggravated by the place where it is committed or by the way in which it is committed. Under the former is train robbery (Alabama, Iowa, Nebraska, North Carolina, Pennsylvania, and South Carolina) and bank robbery (Indiana, Kansas, Kentucky, Michigan,
when the actor is armed with a dangerous weapon. It is not necessary to prove intent to kill or maim if resisted.

A "dangerous" weapon is defined in 939.22(10) as: "any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." This definition is broader than that which was in effect prior to the Code. "Great bodily harm" is further defined in 939.22(14).

If during the course of the robbery the victim is killed, prosecution is permissible under the felony-murder statute—third degree murder. A conviction for felony-murder will, however, bar a conviction for robbery.

C. The Mental Element

To sustain a conviction under 943.32 the prosecution must prove an "intent to steal." Stealing may be broadly construed to include any of the offenses that come within 943.20, the general theft article. The Supreme Court of the United States had indicated in another context that the word must be broadly construed to give effect to the statute in which it appears.

If the actor mistakenly but honestly believes that by his act he is recovering his own property, this will not constitute an offense of theft under 943.20(1)(a) nor the crime of robbery under 943.32. Robbery

New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee and West Virginia). By far the most prevalent aggravating element is the method used to commit the robbery, and, of the different aggravating methods, being armed with a dangerous weapon is the most common (Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, and Wyoming). Others are: Use of torture (California, Vermont, and West Virginia; wounding or striking (Indiana, Minnesota, and New York); extent of fear produced in the victim (Kansas, North Dakota, and South Dakota); presence of confederates (Colorado, Illinois, Iowa, Minnesota, New York, Oklahoma, Pennsylvania, and South Dakota); use of an automobile (New York).

273 WIS. STAT. §940.03 (1959).
274 State v. Carlson, 5 Wis. 2d 595, 93 N.W. 2d 354 (1958).
275 The Proposed Code referred to one who acted "with intent to appropriate . . . to his own use." (See 343.27 of Proposed Code—WIS. STAT. 1953). The Code's provision amounts to the same thing—under both, an intent to return or a claim of right, are defenses.
276 United States v. Turley, 352 U.S. 407 (1957), which, in effect, approved a definition of stealing offered in United States v. Adcock, 49 F. Supp. 351, 353 (W.D. Ky. 1943) wherein the court stated: "... the word 'stolen' is used in the statute not in the technical sense of what constitutes larceny, but in its well known and accepted meaning of taking the personal property of another for one's own use without right or law, and that such a taking can exist whenever the intent to do so comes into existence and is deliberately carried out regardless of how the party so taking . . . may have originally come into possession of it."
277 WIS. STAT. §939.43 (1959).
is essentially an aggravated form of theft, and if theft is not accomplished neither is robbery.\textsuperscript{278}

Where the actor does resort to force or its threat in order to obtain property to which he believes himself entitled, he may be convicted of battery, 940.20, or attempted battery, 939.32. Such behavior, in spite of the actor’s claim of right, may create the additional risk to the person which the criminal law aims to prevent.

\textbf{943.34 Receiving Stolen Property}

\textit{A. General Comments}

This section is essentially a simplification of a prior statute, although the conduct proscribed is stated more succinctly.\textsuperscript{279} Punishing receivers is justified in order to discourage theft by making it more difficult for the actor to realize the unlawful gain. The receiver of stolen property is treated with the same severity as the actual thief in view of his at least equally reprehensible conduct toward the property of others.\textsuperscript{280} Analogous statutes are found in every state.\textsuperscript{281} During the preliminary drafting of the new section it was suggested that the statute explicitly authorize a greater penalty for the “dealer in stolen property.” This was rejected, and accordingly whether a heavier penalty can be imposed upon the professional receiver is within the discretion of the judge. The dealer is treated specially in section 943.35.

Deleted from the prior law is the provision that the receiver could be prosecuted although the thief had not been convicted. This was dropped because it was a legacy from the days when a receiver could be convicted only as an accessory and a receiver could be prosecuted only if the thief


\textsuperscript{279} Wis. Stat. §343.19 (1953).

\textsuperscript{280} Historically the receiver was treated less severely probably due to the absence of any “trespassary” taking. See PERKINS, supra note 267, at 274. Hall suggests that the “fault” of the receiver is greater than that of the thief. HALL, THEFT, LAW AND SOCIETY ch. 5 (2d ed. 1955).

\textsuperscript{281} See, for example: ALA. CODE, Tit. 14, §§338 (1940); ARIZ. CODE §§3-5506 (1939); ARK. STAT. ANN. §§41-3934 (1947); CAL. PENAL CODE §496bble (1949); CIV. STAT. ANN. ch. 48 §95 (1935); CONN. STAT. §8403 (1949); D. C. CODE §§22-2205 (1951); FLA. STAT. §811.16 (1951); HAWAI I REV. LAWS §§11550 (1945); IDAHO CODE §§18-4612 (1947); IOWA CODE §§712.1 (1950); KY. STAT. §§433.290 (1945); LA. STAT. §§14-69 (1950); MAIN. LAWS, CH. 119, §11 (1944); MICH. STAT. ANN. ART. 27 §§562 (1951); MISS. LAWS ANN. ch. 266, §60 (1933); MONT. CODE §§622.18 (1949); MONT. CODE §§94-2721 (1950); N. Y. PENAL LAW §1308 (1944); N. MEX. STAT. §§41-4514 and 41-4516 (1941); OKLA. STAT. TIT. 21, §§1713 (1941); PA. STAT. ANN. TIT. 18, §§4817 (1945); S. D. CODE §§13.3813 (1939). See also National Stolen Property Act which makes the transportation of stolen property in interstate commerce a federal offense. 18 U.S.C. §2311 \textit{et seq.}
had been convicted. Today, inasmuch as receiving stolen property is dealt with as a separate crime, no need for such a provision now exists.  

B. Requisite Act

1. Property.

The broad definition of property contained in 943.20(2)(a) should be applicable here. However, in view of the civil remedies available against the receiver of encumbered real property, who knows the property to be encumbered, no violence to the purpose of the statute would be accomplished by restricting 943.34 to the receiving of stolen property where civil remedies are inadequate to protect the true owner. The Model Penal Code refers to “movable property.” This solution has merit and might well be adopted.

2. The property must be stolen.

a) “Stolen” is not a word of art. It received no particular restrictive definition at common law, and accordingly modern references to “stolen property” have been to objects which have been the subject of a wide range of misappropriating conduct, without limitation as to whether it was the subject of larceny, embezzlement, or false pretenses. Any receipt of property taken in violation of 943.20(1) is clearly within the purview of the receiving statute. The place of the theft should not be material.

Furthermore, property which the actor receives or conceals, which has been the object of the behavior specified in all the other misappropriation offenses, may properly be considered within this section. The gist of the offense of receiving stolen property is the actor’s continued exercise of control over property contrary to the rights of the true owner. It makes absolutely no difference to the receiver how the property was acquired by the first wrongdoer. The manner by which the property was taken has no criminological significance.

The Model Penal Code takes the position that “stolen property” means any property acquired by theft, which in turn is given the very broadest connotation.

283 Model Penal Code §§205.8 (Tent. Draft No. 4) Theft by Receiving. A comment to this provision states that the question of what property should be included in the receiving statute should be determined by whether the civil remedies are adequate. Such interests as intangible non-movable rights under contracts or patents may be adequately protected by the civil law. Terms such as “stolen goods” and “personal property” were rejected as being too narrow. Some courts might have construed the latter phrases as being inapplicable to minerals taken from land.
284 United States v. Turley, supra note 276.
285 §§943.21-943.40 subject to the exception suggested above that where civil remedies afford adequate protection the criminal law should not tread.
286 This problem is not adequately dealt with in the standard texts, nor in the Model Penal Code. The absence of many reported cases may indicate that the problem is not a major one. However, see People v. Pollak, 154 App. Div. 716, 139 N.Y. Supp. 831 (2d Dept. 1913).
287 Model Penal Code §206.63 (Tent. Draft No. 4).
b) The property in fact must be stolen by someone other than the defendant. Mere belief on the part of the receiver, no matter how reasonable will not be sufficient to constitute a violation of this statute if the property is not stolen. In *People v. Jaffe*, a New York case, the thief was apprehended by the police and was persuaded to cooperate in detecting the receiver. The property was delivered to the receiver who, of course, believed it to be stolen. Although the issue in the case was whether the defendant was guilty of any attempt to receive stolen goods, all parties conceded that the offense of receiving could not be charged because in fact the goods were not stolen.

Several tentative drafts of 943.34 would have made criminality turn merely upon the actor’s belief that the property was stolen, thus rejecting the assumption of the *Jaffe* case. This suggestion was explicitly rejected. No objection exists to a charge of an attempt to receive stolen property where the property is not in fact stolen.

Perhaps to insulate the criminal law from some domestic disharmony the theft statute does not proscribe the taking of joint property by one spouse from the other spouse. When one spouse takes jointly-owned property from the other under circumstances which, but for the statute, would be theft and disposes of this property by selling it to D, the question arises, is D guilty of receiving stolen property. The reasons which induced the legislature to limit the law of theft do not apply here. Domestic tranquility will not be harmed by convicting D of receiving stolen property. Surely no principles of strict construction would be violated by construing the statute so as to proscribe conduct which but for a debatable technicality might be clear. The taking by the spouse is a misappropriation which, but for policy considerations having nothing to do with the problem of receiving, is not considered criminal. No cases of this nature have been discovered, however, and such authority as has been found does not purport to meet the issue squarely.

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289 Some ambiguity exists here because belief that the articles were stolen is sufficient to satisfy the required mental element. (See §939.23).
290 *185 N.Y. 497, 78 N.E. 169 (1906).*
293 *Wis. Stat. §943.20 (2) (d) (1959).*
294 For an example of this kind of functional construction, see *State v. Hunkins*, 90 Wis. 2d 62, N.W. 2d 1047, 63 N.W. 167 (1895).
295 Cf., *People v. Jaffe*, supra note 290. See also such broad statements in the texts and cases stating that: “It is necessary to show that, in fact and law the property received had been stolen,” *Clark & Marshall*, supra note 258, at 861. [Italics Added.] The validity of this generalization is questionable for it seems to be a relic of the old prerequisite that conviction of the thief precede the conviction of the receiver.
3. Receiving or concealing.

The defendant's behavior with respect to the property is described as "receiving" or "concealing." The behavior which the statute seeks to reveal can be summarized best as the acquisition of control.

a) "Receiving." One can "receive" stolen property without physically taking possession of it. Thus in LeFanti v. United States, a conviction for receiving stolen property was sustained where it appeared that a certain bale of silk was stolen by two boys and, at the direction of the defendant, was dumped among some bushes or weeds along a road, although the defendant, who was arrested almost immediately after this dumping, asserted no actual physical control over the property. A conviction can be sustained if the defendant is in a position to exercise some kind of unauthorized control over the property. The defendant can be found to have received stolen property if the property has been delivered to another at the direction of the defendant.

b) "Concealing." The defendant may be found to have "concealed" stolen property where evidence of any delivery to him is lacking. Hence the unexplained possession of stolen property under circumstances which indicate that the defendant knew it to be stolen may amount to the concealment that the statute requires.

C. Value

In view of the fact that the severity of punishment varies with the value of the property received, it has been held that only the jury can make such findings if a sentence based upon a value in excess of $100 is to be imposed.

D. The Mental Element

The State must prove that the defendant "intentionally" received stolen property. "Intentionally" is defined in 939.23 and as applied to the crime of receiving stolen property, it effects no change on established law. The actor must either intend to receive stolen property, or believe (rather than "know") that he receives stolen property. A subjective

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296 Under the old law "receiving" and "concealing" were two substantive offenses, Houtte v. State, 164 Wis. 354, 160 N.W. 64 (1916).
297 MODEL PENAL CODE §206.8, comment 2 (Tent. Draft No. 2); 2 WHARTON, CRIMINAL LAW 287 (1957).
298 259 Fed. 460 (3d Cir. 1919).
299 Cases in other jurisdictions are collected in CLARK & MARSHALL, supra note 258, at 858; PERKINS, supra note 267, at 275 and 2 WHARTON, supra note 297, at 287.
300 Cf., State v. Godsey, supra note 288, where the Court reversed a conviction on the ground that the evidence did not establish that the defendant knew the property to be stolen, although the defendant had failed to produce any evidence of ownership of the property in question.
301 Cf., Heyroth v. State, 275 Wis. 104, 81 N.W. 2d 56 (1957), which was decided under the prior statute which provided that if the value of the goods stolen did not exceed $20 the imprisonment could be in the county jail for six months. See also, Koch v. State, 126 Wis. 470, 106 N.W. 531 (1906) and State v. Clementi, supra note 261.
302 Belief that the goods received were stolen has been held the equivalent of
test of knowledge or belief is applied here, in spite of vigorous criticism that it is almost impossible to prove actual knowledge. Hence some statutes merely require the jury to find that the defendant "ought to have known that the property was stolen."

In Meath v. State, the Court stated:

By the express language of this statute [4417 Stats. 1898] an essential element of the offense is that the defendant shall, at the time of his receiving or dealing with the stolen property, know that such property has been stolen. It is as essential that the jury shall, beyond a reasonable doubt, find that he had such knowledge at the time of his transaction with the property as they must that the property was theretofore stolen.304 Accordingly, it is reversible error to instruct the jury that they need only determine that the defendant "ought to have known" that the property was stolen.305 The Supreme Court of Wisconsin has been insistent that the question of the defendant's actual knowledge or belief be clearly presented. In a case where the evidence was sufficient to sustain a conviction, a new trial was ordered in the exercise of the Court's discretionary powers because of its "misgivings whether the trial of the case was so conducted as to present sharply to the attention of the trial judge the distinction held to be essential in the Meath Case."306 The required mens rea may be inferred from the evidence. As the Court in the Meath case stated:

Such guilty knowledge, or its equivalent, guilty belief, may be proven by circumstantial evidence, but it is not sufficient that such circumstantial evidence convinces the jury beyond a reasonable doubt that the defendant ought to have known that the property was stolen; it must go a substantial step further and satisfy them that he did know or believe.307

A vast variety of evidence is relevant therefore. The inadequacy of the price paid for the goods, the irresponsibility of the vendor, the secrecy of the transaction, are examples of pertinent evidence.

Some difficulty may be presented in cases where the defendant is

knowledge, Meath vs. State, 174 Wis. 80, 83, 182 N.W. 334 (1921) and Heyroth v. State, supra note 301. A tentative draft of the Code penalized whoever "believing or suspecting" that property was stolen, receives or disposes of it. This was rejected apparently on the ground that its description was too broad.


304 Supra note 302, at 83, 182 N.W. at 335; accord, Oosterwyk v. State, 242 Wis. 398, 8 N.W. 2d 346 (1943).

305 Meath v. State, supra note 302, notwithstanding any intimation in State v. Jacobs, 167 Wis. 299, 166 N.W. 324 (1918), to the contrary. Even in the Jacobs decision the court insisted on an "individual test of the defendant's guilty knowledge." See also CLARK & MARSHALL supra note 258, at 864-865.

306 Oosterwyk v. State, supra note 304, at 405, 8 N.W. 2d at 349.

307 Meath v. State, supra note 302, at 83, 182 N.W. 2d at 335, quoted approvingly in Heyroth v. State, supra note 302 at 109, 81 N.W. 2d at 60.
discovered with stolen property in his possession. In *State v. Godsey* the defendant was charged with receiving stolen property, an automobile worth about $2400, although there was no direct evidence of a theft. The defendant failed to produce any evidence of ownership nor did he claim to possess any legal title. His testimony was contradictory, but he once testified that he had purchased the car from someone for $1250 and had paid $250 down. The Supreme Court held the evidence to be insufficient to sustain a conviction on the ground that there was an entire lack of evidence that he received it "knowing the same to have been stolen." The Court cited *Corpus Juris Secundum* with approval:

The unexplained possession by one person of goods belonging to another does not establish that a theft has been committed... Since... the thief cannot be guilty of receiving stolen goods which he himself has stolen, the evidence in a prosecution for receiving stolen property must be sufficient to prove that the property had been stolen or unlawfully obtained by someone other than accused... 

Once the State established that the goods were stolen unexplained possession is relevant to prove the crime of receiving.

The terms of the statute accord no special dispensation to one who intentionally receives stolen property with the added intention of returning the property to the true owner. Such a person is specifically covered by the Model Penal Code's treatment.

943.35 Receiving Property From Children

A. General Comments.

This section, which imposes strict liability on dealers in second-hand articles or junk and pawnbrokers, is substantially a restatement of two prior statutes. The rationale for this section is that pawnbrokers, second-hand and junk dealers may furnish the means by which thieves may dispose of stolen property, and consequently the law is justified in

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308 272 Wis. 406, 407, 75 N.W. 2d 572, 573 (1956).
310 Jenkins v. State, 62 Wis. 49, 21 N.W. 232 (1885), cf., State v. Johnson, 11 Wis. 2d 130, 104 N.W. 2d 379 (1960). To prove theft the owner of the goods allegedly stolen should testify as to his ownership if possible. *State v. Moon*, 41 Wis. 684, 688 (1877).
311 Model Penal Code §206.8, comment 2 (Tent. Draft No. 2) states: "The typical case raising this problem is that of an insurance company or detective agency which advertises that it will pay a reward for the return of stolen property, 'no questions asked.' A minority of the present statutes make provisions for this by requiring, for example, that the receiving be without intent to return to the owner or with intent to use for the actor's own purposes. Statutes not containing such provisions would probably be construed to be inapplicable to receiving on behalf of the owner. Of course, agreements to refrain from prosecution will be subject to provisions . . . dealing with compounding criminal liability."
placing a heavy burden on such businesses.\textsuperscript{313} Children are sometimes encouraged to steal because of the ready means that pawnbrokers and second-hand junk dealers afford for disposing of the misappropriated property. Therefore such businesses are absolutely prohibited from purchasing or acquiring an interest for value in personal property from a child under eighteen without the written consent of the child’s parent or guardian.\textsuperscript{314}

B. \textit{Strict Liability}

In view of the absence of any requirement that the defendant act “intentionally,” “knowingly,” or words to the same effect, and considering 939.23, it is clear that to sustain a conviction the State need do no more than prove the requisite acts.\textsuperscript{315} It is equally clear that the defendant’s belief, even if reasonable, that the child from whom he acquired the property was eighteen or over is not relevant.\textsuperscript{316} The statute would be virtually meaningless and would add nothing to the conventional receiving stolen property crime unless it is construed as it was intended. Criminal intent is not an element in this crime.

C. \textit{The Thrust of the Statute}

It applies only to dealers in second-hand articles or junk and pawnbrokers, or others who loan money and take personal property as a security. The risk of the statute, therefore, is placed upon a particular business or calling and not upon the casual purchaser.

A pawnbroker includes “any person who engages in the business of lending money on the deposit or pledge of personal property, other than choses in action, securities, or written evidences of indebtedness; or purchases personal property with an expressed or implied agreement or understanding to sell it back at a subsequent time at a stipulated price.”\textsuperscript{317}

The dealer must have the written consent of the parent or guardian to the child’s disposition of the property. It is entirely conceivable that

\textsuperscript{313} They are subject to a high degree of regulation under §59.07(38).

\textsuperscript{314} \textit{Analogous legislation}: Several states have similar legislation. Some make purchases presumptive evidence that the property received from children is stolen. See: \textit{Ariz. Code} §43-5506 (1949 Supp.) [presumptive evidence that property was stolen if it is jewelry, silver or plated ware and purchased from person under 18 not at a regular place of business]; \textit{Cal. Penal Code} §496 (1949) [presumptive evidence that property was stolen if bought from person under 18 not at a regular place of business]; \textit{Mont. Rev. Codes, Tit. 94-2721} (1947 Rev. Code) [same as California except the age is 21]. Other states make it a crime to make such purchase: \textit{N. J. Rev. Stat.} 2:164-5 (1949 Supp.) [purchase from a person under 16 of jewelry, hardware, waste metal, plumbers’ or builders’ supplies or fixtures, metal pipes or conduits, junk of a metallic nature, bric-a-brac, second-hand clothing, or house furnishing goods, which may have been stolen, is a misdemeanor]; \textit{Ind. Stat.} §18-3236 (1950), and \textit{N. Y. Penal Law} §484(4) (1944).

\textsuperscript{315} The 1950 recommended Code referred to “intentional” purchases from children. This was deleted in subsequent drafts in view of the language of §939.23.

\textsuperscript{316} \textit{Wis. Stat.} §939.43(2) (1959) “A mistake as to the age of a minor . . . is not a defense.”

\textsuperscript{317} \textit{Wis. Stat.} §115.10(3) (a) (1959).
the child might produce a false instrument purportedly giving such consent and that the dealer or pawnbroker might rely upon it. The mistake of the dealer or pawnbroker would be no defense under the general mistake statute because it would not negate "the existence of a state of mind essential to the crime." This strict result is again justifiable because of the purpose of the statute which would be frustrated if even the good faith of the pawnbroker or dealer were a defense.

943.37 Alteration of Property Identification Marks

A. General Comments

The purpose of this section is to deter behavior which will make it more difficult to identify property. The risk of loss for misappropriations of such property is considerably enhanced where characteristic marks of identification such as serial numbers, identification marks and numbers are removed. Prior to the Code three different sections dealt with such conduct. The Criminal Code has codified the essential provisions of the prior law. Because the 1953 Proposed Code was considerably broader in its treatment, it was rejected in favor of wording that adopted many of the specific provisions of the prior law.

B. The Mental Element

The State must prove that the defendant acted "with intent to prevent the identification of the property." Such an intent may be inferred from such acts as filing off the motor number from an automobile engine. The Proposed Code had several prima facie evidence provisions which were in effect explicit statements constituting evidence that would permit a jury to find the requisite intent. Thus any alteration or removal of an identification mark constituted such prima facie evidence. The 1950 recommended code even included a statement to the effect that the prima facie evidence provisions did not apply to anyone who recovered property which was stolen and on which the serial number or mark had been altered or removed prior to the recovery. The deletion

318 Wis. STAT. §§343.183 Destruction of manufacturer's serial number; 343.452 Removal of brands, etc. from casks; and 343.54 Celleration and forgery of log marks.

319 The Proposed Code stated: 343.31 Alteration of property identification marks.

(1) Whoever alters or removes any serial number or other identification mark on personal property with intent to prevent its identification may be fined not more than $200 or imprisoned not more than 6 months or both. The alteration or removal of the serial number or other identification mark on personal property is prima facie evidence of an intent to prevent identification of the property.

(2) Whoever, knowing that the serial number or other identification mark has been altered or removed, possesses personal property with intent to prevent its identification may be fined not more than $200 or imprisoned not more than 6 months or both. Possession of two or more similar items of personal property with the serial number or the other identification marks on it altered or removed is prima facie evidence of knowledge of the alteration or removal and of an intent to prevent identification of the property.

of this prima facie provision and its exception means only that it was felt to be too cumbersome to include such provisions.

C. **Requisite Act**

1) **Identification marks on logs and lumber.**

This provision is based upon old section 343.54 which made it a crime to cut out, alter, or destroy any mark made by the owner on his logs or lumber without his consent. The prior law required that the logs or lumber had to be in or near a river or some tributary. This is no longer required—the logs or lumber may be anywhere. If the state fails to prove that the altering or removing of the identification mark was done “with intent to prevent identification” a conviction may still lie for a violation of 943.01.

2) **Altering or removing mark from a receptacle used by beverage manufacturers.**

This general provision was drafted to replace 343.452 which dealt with the removal of brands, names or marks from certain containers of beverages. The conduct sought to be proscribed is dealt with much more succinctly than in the prior law.

3) **Altering or removing manufacturer’s identification number.**

Manufactured goods are frequently identified by a serial number. The alteration or removal of this number renders the goods less traceable and accordingly the alteration or removal of such numbers is prohibited. This provision is very similar in effect to the prior law, 343.183, although the new section is once again less cumbersome.

Punished also is the possession of personal property with knowledge that the identification number has been altered or removed. Such persons might also be convicted for receiving stolen property; for the knowledge that a serial number has been altered or removed may be evidence which together with other circumstances would permit the jury to convict the actor of receiving stolen property. To sustain a conviction under 943.37, however, the prosecution need only prove that the defendant possessed property with knowledge that the identification was removed. Prosecution is aided by the prima facie provision to the effect that possession of two or more similar items with the identification num-

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321 See for similar legislation N. Y. PENAL LAW §436(b) (1944).
322 See Wis. Stat. §343.51 (1953).
323 Wis. Stat. §343.452 (1953): Removal of brands, etc., from casks. Any person who shall willfully, maliciously or wantonly obliterate, injure, or destroy the names, marks or brands affixed to any cask, barrel, keg, bottle, jug, fountain, box or other package used or intended to be used by any person or firm domiciled in this state or by any corporation created under the laws thereof and engaged in the manufacture or sale of ale, porter, lager beer, soda water, mineral water or other beverage in any such package as is herein mentioned, shall be punished by imprisonment in the county jail not exceeding sixty days or by fine of not more than one hundred dollars, or by both such imprisonment and fine.
ber removed or altered will permit the jury to infer, together with other evidence, an intent to prevent identification of the property.

This provision mentions only identification "numbers," and is thus similar to the prior law. The Proposed Code referred to identification "marks." Furthermore, the section refers only to "manufactured" items while the Proposed Code referred to any personal property. The present statute is, therefore, considerably narrower in scope than the Proposed Code.

943.38 Forgery

A. General Comments

Prior to the Code separate statutes were needed to deal with conduct not within the traditional definition of common law forgery. This section supplies a comprehensive definition of forgery. Although it embodies a consolidation of sixteen prior statutes, it remains one of the more complex sections of the Criminal Code, primarily because of the attempt to create two classes of forgery, one subject to less serious penalties than the other. A dominant feature in the Code's treatment of forgery is the combination of the once separate crimes of forgery and uttering, into a single offense.\(^{324}\)

As defined in the Code, forgery involves an attempt to misappropriate the property, services or reputation of another. No actual misappropriation need occur. Because attempted misappropriation creates a more indiscriminate risk of loss when it is attempted by means of a false making of certain kinds of commonly relied upon documents or objects, the criminal law has traditionally treated the forger more severely than the ordinary thief. The penalty imposed is determined by the risks created rather than the value of what the actor attempts to secure. Furthermore certain writings and objects are relied upon by society in the transaction of business affairs and any act which might serve to cast suspicion on the validity of such writings or objects, according to the rationale of forgery, be proscribed.\(^{325}\) A consolidation of the false-making-offenses as complete as that contained in the Proposed Code was rejected in favor of a section establishing a gradation of penalties depending upon the seriousness of the defendant's act.\(^{326}\)

\(^{324}\) State v. Nichols, 7 Wis. 2d 126, 95 N.W. 2d 765 (1959). They were once separate offenses: Zeidler v. State, 189 Wis. 44, 206 N.W. 872 (1926).

\(^{325}\) The Model Penal Code retains a forgery provision but recognizes that the need for a separate forgery statute is diminished by the presence of provisions dealing with fraud, attempt, complicity, and professional criminality. See Model Penal Code §223.1, comment (Tent. Draft No. 11).

\(^{326}\) The Proposed Code stated: 343.32 Forgery. Whoever with intent to defraud does any of the following may be fined not more than $5000 or imprisoned not more than 10 years or both:

(1) Makes or alters any writing of a kind having legal efficacy or commonly relied upon in business or commercial transactions so that it purports to have been made by another, or at another time, or with different terms, or by authority of one who did not give such authority; or
B. Proscribed Acts.

Paragraph .1) of 943.38 deals with conduct which was forgery at common law and under the prior statutes.\(^\text{327}\) It requires a false making or altering.

1) False making or altering.

At common law courts required a false making or altering. False referred not to the contents or to the facts stated, but to the act of making or altering.\(^\text{328}\) Courts in many jurisdictions have struggled to make sense out of the distinction between the false making of an instrument (which was forgery), and the production of a genuine instrument which merely contained false statements which was not a forgery.\(^\text{329}\) To constitute forgery, according to this view, the instrument must be made to appear to have authenticity it does not possess, because it purports to be an act done by another, or an act done at a different time.\(^\text{330}\) A false making can be accomplished by alterations made by inserting words or making erasures. Courts have not, however, agreed on when a "false making" includes an act done by an agent.\(^\text{331}\) In view of the broad scope given to forgery by courts considering Wisconsin law and the comprehensive treatment of the subject in the Criminal Code, such problems

\(^\text{327}\) The following statutes (1953 Wisconsin Statutes) were repealed and replaced: 343.38 False certificate of stock, which in part penalized officers and agents of corporations who signed false certificates of stock or certificates which were not authorized by the board of directors or by the charter or by-laws. This act is within the purview of 943.39. 343.56 Forgery and counterfeiting, was the general forgery section. It prohibited the false making of a long list of instruments. 343.59 Connecting parts of bank notes, prohibited joining together different parts of genuine instruments in order to make an additional one. 343.60 Fictitious signatures to note, etc. penalized the signing of a name, purporting to be that of any corporation officer or agent, to any evidence of debt issued by such corporation.


\(^\text{329}\) The close distinction is illustrated by DeRose v. People, 64 Colo. 332, 171 Pac. 359 (1918) where the defendant, a railroad section boss, padded the time-roll which he was authorized to keep. This was held not to be a forgery. On the other hand the famous case of Queen v. Ritson, L. R. 1 Cr. Cas. Res. 200 (1869), held that forgery was committed when a false date was placed in a deed for the purpose of indicating that the deed was prior in time to an encumbrance.

\(^\text{330}\) State v. Coyle, 41 Wis. 267 (1876).

\(^\text{331}\) Pasadena Investment Co. v. Peerless Cas. Co., 132 Cal. Ap. 2d 328, 282 P. 2d 124, 52 A.L.R. 203 (1955). Plaintiff had a bond from defendant which indemnified him against any loss through forged instruments. Plaintiff purchased certain accounts receivable evidenced by invoices, and by written receipts signed by persons who had received the goods. The invoices and the receipts were false in that they did not represent goods sold, although the signatures of the assignors were genuine. This was held not to be a forgery. Contra, Security National Bank of Durand v. Fidelity & Casualty Co., 246 F. 2d 582 (7th Cir. 1957) wherein the court was required to find Wisconsin law.
need no longer be a source of great difficulty under 943.38. A false making, said the 7th Circuit Court of Appeals in a case involving Wisconsin law, "might be accomplished by the fraudulent application of a false signature to a true instrument or a real signature to a false instrument."332 The important elements are the intent to defraud and the means used by the actor. Hence a false making or altering can be accomplished by any of the means stated in the statute. Viz., "so that it purports to have been made by another, or at another time, or with different provisions, or by authority of one who did not give such authority." [Emphasis supplied]

2) **Object of forgery**

The writings and objects which are specially protected by the law of forgery are listed. Almost every kind of instrument affecting private or public rights is included. The first category listed is the broadest, "a writing or object whereby legal rights or obligations are created, terminated or transferred, or any writing commonly relied upon in business or commercial transactions as evidence of debt or property rights. . . ." This functional description replaced a long list of instruments in the prior statute.333 It is not as comprehensive a description, however, as that contained in the Proposed Code which referred to "any writing of a kind having legal efficacy or commonly relied upon in business or commercial transactions."334 To determine whether the instrument purports to deal with legal rights or obligations or whether it is relied upon as evidence of a debt or property rights, the court may properly consider extrinsic evidence.335

Under the Code the results would probably be in accord with a decision of the United States Court of Military Appeals. The object forged according to the Uniform Code of Military Justice must, if genuine, apparently impose a legal liability on another, or change his legal right or liability to his prejudice.336 D, while intoxicated and under an assumed

### Footnotes

332 Quick Service Box Co. v. St. Paul Mercury Indemnity Co., 95 F. 2d 15, 16-17 (7th Cir. 1938), cited approvingly in Security National Bank of Durand v. Fidelity St. Casualty Co. of N.Y., 246 F. 2d 152, 155 (7th Cir. 1957); but cf., Fitzgibbons Boiler Co. v. Employers Liability Assurance Co., 105 F. 2d 893 (2d Cir. 1939). The Wisconsin view has been approved by the commentators to the Model Penal Code. See MODEL PENAL CODE §223.1, comment (Tent. Draft No. 11).

333 Wis. Stat. §§343.56 (1953) which included charters, wills, testaments, writings obligatory, letter of attorney, insurance policies, bills of lading, bills of exchange, promissory notes, or any orders, acquittances or discharges for money or other property, bank notes, etc. Similar statutes are found in many jurisdictions, e.g., NEW YORK PENAL LAW §884 (1944).

334 Proposed Code §§343.32(1). Accord, In re Court de Toulouse Lautrec, 102 F. 878 (7th Cir. 1900).

335 Cf., State v. Schwartz, 64 Wis. 432, 25 N.W. 417 (1885) where the defendant altered a promissory note which said "... I promise to pay . . . $5.00 as per deed." to "... $25.00 as per deed, 10 per cent till paid."

336 Uniform Code of Military Justice, art. 123 provides: Any person . . . who, with intent to defraud—(1) falsely makes or alters any signature, or any part of any writing which would, if genuine, apparently impose a legal liabil-
name, married X. Ten days later he regretted his haste and sent a letter to the girl under the purported signature of a legal officer stating that D had been killed, and that since the marriage was not known to the government no "retributions" [sic] would be made. The making of this peculiar letter was held not to be a forgery because the letter could have no possible legal efficacy.\textsuperscript{337} An instrument obviously ineffective on its face does not constitute a forgery.\textsuperscript{338} \textit{Lurye v. State}\textsuperscript{339} is illustrative. The City of Superior, heavily in debt during the depression, had in July 1933 no funds with which to meet its current obligations. The common council therefore issued scrip, although there was no authority for them to do so, and no action against the city to collect on the scrip could have been maintained. The defendant was charged with uttering forged scrip\textsuperscript{340} and his defense was that the charge did not lie because the real scrip was void on its face.\textsuperscript{341} The Court sustained the conviction holding:

\begin{quote}
... the document in question did not carry upon its face evidence of the fact that it was void. The so-called certificate of indebtedness was legally nothing more nor less than an acknowledgment of the receipt of a certain sum and a promise on the part of the city to return it, when and if the city was able. If it be true that no action could have been maintained upon it, the city was certainly under a moral obligation to carry out its part of the arrangement. The certificate of indebtedness had the appearance of validity, and could therefore be the subject of forgery.\textsuperscript{342}
\end{quote}

Consequently if the writing or object otherwise fulfills the requirements and it has the appearance of validity, it may be the subject of forgery. Extrinsic facts may be introduced to show that the item may have the appearance of validity.\textsuperscript{343}

An overlap with Federal crimes should be noted. Title 18 of the United States Code contains some 39 different sections pertaining to the forging or counterfeiting of items in which the Federal government has a particular interest.\textsuperscript{344} A conviction or acquittal for forgery in Wisconsin on another or change his legal right or liability to his prejudice ... is guilty of forgery.

\textsuperscript{337} United States v. Strand, 6 U.S.C.M.A. 297 (1955) "To be subject of forgery." The court said, "The letter must be capable of being used as proof of the facts it recites ... It must be invested with some legal force ... Hence, in the absence of allegations of extrinsic facts indicating how the letter could have had some legal effect, it is a false, but not a forged writing." See also Johns v. State, 23 Wis. 504 (1863) and People v. Shall, 9 Cow. (N.Y.) 778, 784 (1829).

\textsuperscript{338} See Annot., 174 A.L.R. 1300 (1948) Invalid Instrument as Subject of Forgery.

\textsuperscript{339} 221 Wis. 68, 265 N.W. 221 (1936).

\textsuperscript{340} Wis. Stat. §343.57 (1953).

\textsuperscript{341} Defendant relied upon Johns v. State, \textit{supra} note 337.

\textsuperscript{342} \textit{Supra} note 339, at 76, 265 N.W. at 224, citing Norton v. State, 129 Wis. 659, 109 N.W. 531 (1906).

\textsuperscript{343} No Wisconsin cases have been discovered, but cases in other jurisdictions support the view. Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639 (1875) and \textit{Clark & Marshall}, \textit{supra} note 258, at 852.

\textsuperscript{344} 18 U.S.C. §§471-509.
consin does not automatically bar conviction in the Federal courts, and vice versa.\textsuperscript{345}

The other objects of forgery are:

a) a public record or certified or authenticated copy.

b) an official authentication or certification of a copy of a public record.

c) an official return or certificate entitled to be received in evidence of its contents.

\section*{C. The Act of Forging}

The defendants making or altering must be of such a nature that the writing or object "purports to have been made by another, or at another time, or with different provisions, or by authority of one who did not give such authority."

An instrument may purport to be made by another although no effort to counterfeit that signature is made.\textsuperscript{346} It is sufficient if there is an intent to indicate that the writing or object was made by another or at another time.

\textit{State v. Schwartz}\textsuperscript{347} is illustrative of a case involving the making of an instrument with different provisions. The defendant held a valid promissory note which stated "For value received, . . . I promise to pay to Wm. Schwartz, or order, $5.00 as per deed." This was altered by the defendant who erased the dollar sign and added some terms to read, "For value received, . . . I promise to pay to Wm. Schwartz, or order, $25.00 as per deed, 10 per cent till paid." A forgery conviction was sustained.

The scope of this particular provision to a false making by authority of one who did not give such authority has not been fully determined, although it probably enlarges the common law definition.\textsuperscript{348} It does appear to be illustrated by the case of \textit{Security National Bank of Durand v. Fidelity & Casualty Co. of N.Y.},\textsuperscript{349} a 7th Circuit Court of Appeals decision involving Wisconsin law. This civil case was decided on the basis of the Criminal Code. The plaintiff bank sued on an indemnity bond issued by the defendant against any loss sustained by the plaintiff on the faith of written instruments "which prove to have been counterfeit or forged as to the signature." The bank loaned money to a corporation engaged in the business of buying and selling dairy products. The corporation sold products to purchasers which sale was evidenced by an invoice. To secure the advance of funds, the corporation sent a


\textsuperscript{346} \textit{Schmidt v. State}, 169 Wis. 575, 173 N.W. 638 (1919).

\textsuperscript{347} \textit{Supra} note 335.

\textsuperscript{348} It clearly replaces §343.38, False certificate of stock, which penalized officers of corporations who signed false certificates of stock which were not authorized either by the directors—the charter or the by-laws.

\textsuperscript{349} 246 F. 2d 582 (7th Cir. 1957).
duplicate invoice to the bank and assigned the account receivable. The bank then paid 80% of the face value of the invoice to the corporation. The president and managing agent of the corporation acted for the corporation during these transactions and signed the assignments of accounts receivable. In November of 1954, the president of the corporation presented a number of invoices and assigned them to the bank. The bank paid some $17,000 to the corporation on the strength of the invoices and assignments. It subsequently appeared that these invoices did not represent actual goods sold. The corporation became insolvent, and the bank alleged that it suffered a loss by forgery as to signature. The defendant insurer argued that because the signatures upon the invoices and assignments were genuine, no forgery was accomplished, and the assignments and invoices were merely false statements. The Court rejected the defendants' argument and held that the acts of the president of the corporation fell within the ambit of the Wisconsin forgery statute then in existence. Despite authority to the contrary, the Court followed the rule announced in *Quick Service Box Co. v. St. Paul Mercury Indemnity Co.*, wherein the Court stated:

... though one may under certain conditions have authority to sign certain names, yet, if he sign such to a false document or to an unauthorized one, it is forgery ... forgery is not necessarily confined to the false writing of another's name. It may be committed in other ways. The essence of forgery does not so much consist in counterfeiting as in endeavoring to give appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another which it is not or to make a man's own act appear to have been done at a time when it was not performed and by force of such falsity to give it an operation which in truth and justice it ought not to have. In other words, if the deceit consists in making it appear that a man's own act was done under circumstances which would make it valid and genuine, when in fact it was false and unauthorized, the result is the same.

D. The Mental Element

The mental element which the State must prove to sustain a conviction for forgery under 943.38(1) and (3) is described as an "intent to injure or defraud." In so describing the mental element, the Criminal Code is in accord with the prior statutes and the common law of forgery. The accomplishment of the fraud is not required in view of the objective of the law of forgery to deal with attempted misappropriations. An earlier draft of this section would have spelled out the meaning of the

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350 Wis. Stat. §343.56 (1953) "Any person who shall falsely make, alter, forge or counterfeit ... an ... assignable instrument with intent to injure or defraud shall be punished...."

351 95 F. 2d 15 (7th Cir. 1938).

352 Id. at 17.

353 Wis. Stat. §343.56 (1953).
intend as “an intent to deceive and thereby to induce another to relinquish any property or to act or omit to act.” The comments to the Proposed Code define the mental element as “an intent either to obtain property from another or to cause him to do some act or refrain from some act in reliance on the writing or object being genuine.”

The leading case with respect to the requirement of fraud is State v. Wells. The defendant had acquired title to certain lands from one Robbins through two deeds of conveyance. One of the deeds contained an agreement on the part of the grantee to assume a mortgage on the premises. Some time later the defendant agreed to sell these premises to another. This agreement was made late in the evening and no one was then available to draw the conveyance. A real-estate agent who was present suggested that one of the prior deeds be used by erasing Well’s name and substituting the name of the purchaser. Wells alleged that he did not at first agree to this procedure, and that he consulted with Robbins before the deed was eventually altered as suggested. A conviction for forgery was reversed and the defendant discharged by the court which stated:

The mere fact that Wells employed this method of conveying title... in view of the agreement in the deed to pay the mortgage and in view of the judgments recorded against him, would perhaps justify an inference that he employed this method for the purpose of defrauding his judgment creditors or for the purpose of escaping liability upon the agreement to pay the mortgage. But the explanatory evidence revealing the situation and the circumstances under which Wells was prompted to make the changes in the deed conclusively negative any intent on the part of Wells to defraud anyone... The attitude of Wells before and after the transaction strongly indicates that his anxiety in the premises was set at rest by the interview (with Robbins).... Although the method adopted was capable of working fraud, especially upon the judgment creditors, there is no reason to believe that the method was adopted for the purpose of working a fraud upon any one. ... ‘The transaction was not forgery, it was foolishness.’

In the Wells case the Court makes it quite clear that to prove or negate fraud the entire surroundings of the transaction may supply relevant evidence.

The Wells case affords an example of a case where the jury’s finding of an “intent to defraud” was overruled. That this will not be done

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354 1953 LEG. COUNCIL REP. 130.
355 195 Wis. 551, 218 N.W. 811 (1928).
356 Id. at 553.
357 Accord, Schmidt v. State, supra note 346.
   The Wells case cites with approval People v. Kemp, 76 Mich. 410, 43 N.W. 439 (1889).
in closer cases is illustrated by *Lurye v. State*, where the court recognized that the jury could have concluded that no intent to defraud was present on the basis of evidence of the defendant's reputation and conduct in the community together with his protestations of innocence. But, said the Court:

... his story does not ring true. He admitted ... that he purchased $2500 of scrip (which was forged) for $700. ... Such a discount would indicate to any ordinary prudent, careful businessman that there was something wrong. The only thing that could be wrong was the fact that the scrip was not genuine. ... The jury were not bound by his statements as to his intention. ... 359

It is well established that it is not necessary to prove that the defendant intended to defraud any particular person. It is sufficient if the defendant knows that the writing or object is not genuine and he intends some reliance upon it.360

E. *Uttering.*

The crime of uttering, once the subject of separate statutes, is now merely another phase of forgery and is subject to the same penalty. The act of uttering or possession with intent to utter are equally criminal.

Forgery is an attempt to defraud; uttering is usually the consummation of the fraud, and both are now merged into the single offense proscribed by 943.38.

In the recent case of *State v. Nichols*, the Supreme Court confirmed the purpose of the Code's draftsmen that forgery and uttering were to be combined so that they constituted but a single offense. Accordingly, where one forges an instrument and then utters it as genuine, there can be only one sentence.

The act of uttering usually is accomplished by a passing or delivery of the instrument, but the simple presentation of the instrument is probably sufficient to constitute the offense. In view of its common law origin the experience of other jurisdictions is relevant in defining the offense. The Model Penal Code defines "utter" as meaning "issue, authenticate, transfer, publish, or otherwise give currency to a forged writing or object." The definition makes sense and is in accord with the common law.

F. *Forgery of Other Instruments.*

The false making of pictures, sculptures, antiques, labels, trade-
marks, transportation tickets, and real estate abstracts is covered by paragraph (3) of 943.38. Illustrative is the making of an object to look like a dinosaur head or a piece of old furniture. An important objective of this section is to make punishable acts which are harmful not only because they may result in a misappropriation from the one who relies on the falsity, but because they damage the purported author of the falsity. Thus one who falsely makes a membership card in a labor union may be misappropriating the reputation or standing of the labor union. The interests of such organizations and other possessors of distinctive names and labels is deemed worthy of this protection of the criminal law.

943.39 Fraudulent Writings

This section embodies a restatement of four prior statutes. The "intent to injure or defraud" specified as an element of the crime is used in the same sense as in the forgery section. Moreover, the actor must know that the writing is in fact false. One who is convicted for theft under section 943.20 may, because of false pretenses involving reliance upon a fraudulent writing specified here, also commit a violation of this section.

943.40 Fraudulent Destruction of Certain Writings

This section restates the provisions of two prior statutes. Once again the key element is the "intent to defraud" which is of the same kind as set forth in the forgery statute. Unaccompanied by such intent the destruction of many of the instruments within the forgery statute would not accomplish a misappropriation of another's property interest.
CONCLUSION

The criminal statutes dealing with misappropriation reflect the draftsmen's belief that every fraud or conversion should not be deemed criminal. They do not, however, mean that the legislature has run the gamut of criminality. Other actions may be deemed so serious as to require the proscription of the criminal law. The disclosures during 1959 and 1960 of the rigging of various television quiz shows prompted public indignation, but what crime the producers or participants committed has been difficult to determine, unless they committed crimes such as perjury before an investigating grand jury, or violated Federal statutes pertaining to interstate communication.\(^{370}\) The need for careful study of this kind of problem is obvious and is illustrative of the changing conditions with which the criminal law must deal.\(^{371}\)

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\(^{371}\) For an interesting survey of statutes dealing with the modern problems of corruption see Control of Nongovernmental Corruption by Criminal Legislation, 108 U. Pa. L. Rev. 848 (1960).