

Theft Crime in Turkish Criminal Law: An Overview

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I. Introduction

The crime of theft is regulated under the heading of Offences Against Property in the tenth chapter of the second section titled as Offences Against the Person in the second book of the new Turkish Penal Code (TPC) (Law No. 5237).

While the section title in the former TPC (Law No. 765) was Offences Against Goods, this was amended as Offences Against Property with the new TPC, as in the Italian Penal Code dated 1930¹.

In penal code, property is used as a generic term which also includes ownership. The concept of ownership in Penal Code and that in Civil Code are the same. On the contrary, property appears to be an economic concept which leaves non-economic rights out. However, things like tuft of hair or a letter which has only sentimental but not an economic value to the owner and thus lies beyond the scope of the concept of property in private law are included in the concept of property in penal code².

The common character of the offenses against property is that they completely or partially abolish the benefit (usage, utilization, consumption) the owner or the possessor gets from the actual elements of the property.

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¹ TOROSLU, N; *Ceza Hukuku, Özel Kısım*, Savaş Yayınevi, Ankara Ekim 2005, s.123.

² TEZCAN, D / ERDEM, M.R/ ÖNOK, R.M; *5237 Sayılı Türk Ceza Kanunu'na Göre Teorik ve Pratik Ceza Özel Hukuku*, 4. Baskı, Seçkin Yayınevi, Ankara, 2006, s.398.

The crime of theft which is regulated under Offenses Against Property is settled with Art. 141-145 in the new TPC. According to Art. 141/1 which regulates the simple form of theft crime:

“Those who take a movable property from its place without the consent of the possessor to provide benefit to himself or someone else are sentenced to one to three years imprisonment.”

Thus theft can be defined as taking a movable property owned by someone else without his or her consent to provide benefit³.

As stated previously, the basic form of theft is regulated under Art. 141 in the new TPC. The qualified forms of this offense which impose heavier penalties are stated under Art. 142-143, and the conditions subject to less punishment are given place in Art. 144 and 146. The low economic value of the property stolen and the commission of the offense to meet a severe and urgent need are accepted as causes of impunity depending on the situation under Art. 145 and 147, respectively.

II. Legally Protected Interest

In doctrine, there are two different views with regard to the interest legally protected by the crime of theft. The proponents of the first view⁴ accept that possession is protected with the crime of theft. To clarify this view, Soyaslan⁵ states the following: *“in my opinion the right point of view is the second one. If we were to accept that theft crime protected ownership, then the owner’s taking a property back after s/he puts it in pledge from the possessor (who holds the property in pledge) without the possessor’s consent should not be regarded as an offense. Likewise, in the paragraph a of the ar-*

³ ÇAĞLAYAN, M.M; **Türk Ceza Kanunu, Açıklamalı, İçtihatlı, Gerekçeli**, Genişletilmiş 3.Baskı, Cilt 4 (Madde 456 – 592), Yetkin Hukuk Yayınları, Ankara 1984, s.296. EROL, H; **Yeni Türk Ceza Kanunu, Gerekçeli, Açıklamalı ve İçtihatlı**, Yayın Matbaacılık, Ankara 2005, s.694-695.

⁴ DÖNMEZER, S: **Kişilere ve Mala Karşı Cürümler**, Tıpkı 17.Bası Beta Yayınları, İstanbul, Ekim 2004, s.346; EREM, F; **Türk Ceza Kanunu Şerhi, Özel Hükümler**, Cilt:III, Seçkin Yayınevi, Ankara 1993, s. 2344; SOYASLAN, D: **Ceza Hukuku Özel Hükümler**, Gözden Geçirilmiş 6. Bası, Yetkin Yayınları, Ankara 2006, s.290; **Toroslu**, s.129.

⁵ Soyaslan, s. 290.

ticle 144, theft of the shared or co-owned property is punished, which means that according to the law theft crime protects possession but not ownership.”

Those who adopt the second view⁶ remark that ownership is legally protected with the regulation of the theft crime. As a matter of fact, in support of their claims, proponents of this view refer to the case in which owner’s taking a property without the possessor’s consent does not lead to theft crime⁷.

Besides, there are some authors⁸ who agree that both ownership and possession are legally protected with the regulation of the crime of theft.

In our opinion, it is not right to argue that only ownership or only possession is taken under legal protection with the theft crime. Of course, Art. 141/1 of the new TPC, which regulates the basic form of theft crime, was duly amended by saying “without the possessor’s consent”. However, in our opinion this amendment is not merely adequate to accept that only possession is protected.

Taking one’s property without the consent of the possessor is considered theft with regardless of the economic value of the property stolen. Because the economic loss incurred by taking one’s property is not taken into consideration, the property stolen does not need to have an economic value, and also in case the offender leaves money in the crime scene to compensate for the property loss, this does not prevent the constitution of the theft crime⁹.

⁶ Tezcan/Erdem/Önok, s. 399.

⁷ Tezcan/Erdem/Önok, s. 399.

⁸ PARLAR, A/HATİPOĞLU, M: 5237 sayılı Türk Ceza Kanunu Yorumu, 2. Cilt, Yayın Matbaacılık, Ankara- Şubat 2007 s. 1049.

⁹ Tezcan/Erdem/Önok, s. 399-400.

III. Material Issue

A. Property

The material issue of the theft crime is moveable property owned by someone else. In this case, for something to be the material object of theft crime, it is to be a property, it has to be movable and needs to be owned by someone else¹⁰.

The concept of property is determined according to Civil Code before all. Accordingly, properties are moveable things used and utilized in daily life and relationships to meet any need¹¹. The economic value of the property stolen is not considered important for the constitution of the offense. Properties which have sentimental but no real economic value can also be the subject of the theft crime if other conditions are met¹².

In this sense, animals can be considered as property and, if owned by someone, be the object of theft crime¹³.

As it is openly expressed in the law, any kind of energy which has an economic value can be the object of this crime¹⁴. Furthermore, the new TPC regards it as a qualified form of theft if “electrical energy” is the object of crime (Art. 142/1 f)¹⁵.

The state of the property is not considered important for the constitution of theft crime; it can be in solid, liquid or gaseous state. However, for something to be considered as a ‘property’, it has to be tangible¹⁶.

¹⁰ GÖZÜBÜYÜK, A.P: *Alman, Fransız, İsviçre ve İtalyan Ceza Kanunlarıyla Mukayeseli Türk Ceza Kanunu, Gözübüyük Şerhi*, Cilt IV (Hususi Kısım - Cürümler), Genişletilmiş Beşinci Bası, Kazancı Hukuk Yayınları, İstanbul Ocak 1988, s.581; Çağlayan, s. 297; Erem, s. 2344, Toroslu, s.130.

¹¹ Tezcan/Erdem/Önok, s.400; Erol, s.695.

¹² Dönmezer, s. 358; Çağlayan, s.297-298; Soyaslan, s.290; Toroslu, s. 130.

¹³ Tezcan/Erdem/Önok, s.400; Erol, s.695.

¹⁴ Erem, s. 2345-2346; Gözübüyük, s.583; Çağlayan, s.297; Tezcan/Erdem/Önok, s.401; Soyaslan, s. 290; Toroslu, s. 131; Erol, s.695; Parlar/Hatipoğlu, s. 1050.

¹⁵ Tezcan/Erdem/Önok, s.401.

¹⁶ Dönmezer, s.357; Erem, s. 2345-2346; Tezcan/Erdem/Önok, s.401; Erol, s.695.

In spite of all these, requests and other rights cannot be the object of the crime of theft. In a similar vein, with respect to service, one can mention the crime of gratuitous utilization of service instead of theft of service¹⁷.

B. Being Movable

For a property to be the object of theft crime, it needs to be movable; that is, it should be possible to transport it from one place to another¹⁸. The concept of chattels (movable property) is more inclusive in Penal Code than it is in Civil Code. For a property to be the object of theft crime, portability is necessary and adequate¹⁹.

Acts against immovable properties can lead to other crimes, but they cannot be the object of theft crime. Yet things removed from immovable properties are considered as movable properties and thus can be the object of theft crime²⁰. The doors and windows removed from a building²¹, the mines taken from a pit²² can all be considered as movable properties in this sense.

Ships, houseboats etc. can be stolen; these are considered as movable in the penal code. A field cannot be stolen but its soils can²³.

C. Belonging to Someone Else

For a property to be the object of theft crime, it must belong to someone else other than the offender. Properties whose ownership belongs

¹⁷ **Tezcan/Erdem/Önok**, s.400.

¹⁸ **Dönmezer**, s.356; **Erem**, s. 2350; **Gözübüyük**, s. 582; **Çağlayan**, s. 298; **Tezcan/Erdem/Önok**, s.404; **Soyaslan**, s.291; **Toroslu**, s. 130; **Parlar/Hatipoğlu**, s. 1050.

¹⁹ **Gözübüyük**, s.582; **Erol**, s.695; **Parlar/Hatipoğlu**, s. 1050.

²⁰ **Soyaslan**, s.291.

²¹ **Tezcan/Erdem/Önok**, s.404.

²² **Soyaslan**, s.291.

²³ **Erem**, s. 2351; **Toroslu**, s. 130.

to others are considered others' properties. Therefore, nobody can steal his or her own property²⁴.

The principles of private law apply when a property belongs to someone else. Therefore, when one loses the ownership of a property within the framework of civil code, theft is in question. For example, if a seller takes back something s/he sold by installments without the consent of the purchaser when installments are not paid, theft crime is constituted because ownership has already passed over the purchaser with the delivery of the goods. However, commission of theft to collect debt based on a judiciary relation is considered as a cause for diminished penalty in the new TPC²⁵.

Air, seawater and the like which everyone can utilize cannot be the object of theft crime²⁶.

A shared or co-owned property is considered to be a property which belongs to someone else with regard to the offender²⁷. However, even in this case, the law imposes reduction in penalty (Art. 144/1-a in new TPC).

Taking a property which does not have an owner does not constitute theft crime since a property without an owner is not considered as one's property²⁸. Likewise, it is not possible to commit theft crime for derelict properties, but for this to be the case the property must be conclusively abandoned by its owner in the form of renunciation²⁹.

²⁴ Dönmezer, s.361; Erem, s. 2351; Gözübüyük, s. 581; Çağlayan, s. 298; Tezcan/Erdem/Önok, s.405; Soyaslan, s.291; Toroslu, s. 131; Erol, s.695;Parlar/Hatipoğlu, s. 1050.

²⁵ Tezcan/Erdem/Önok, s.405.

²⁶ Gözübüyük, s.581;Toroslu, s.131.

²⁷ Gözübüyük, s.581;Tezcan/Erdem/Önok, s.406.

²⁸ Soyaslan, s.292; Erol, s.695.

²⁹ Dönmezer, s.365; Erem, s. 2352; Gözübüyük, s.581; Tezcan/Erdem/Önok, s.406.

IV. Elements of Crime

A. Material Element

The material element of theft crime is the removal of a property from its place without the consent of the possessor³⁰. This issue is justified as follows:

*"What is meant with the act of taking is ending the victim's possession of the property which is the object of crime and making it impossible for the victim to use his/her rights of disposition resulting from the possession of the property. When this right of disposition is abolished, the crime is completed."*³¹

The act which makes up the material element of the theft crime is the removal of the property from its place, which in turn implies the termination of actual dominance over the property and the establishment of a new dominance³².

While the way in which the material element is committed is unimportant, the property should not be taken with force and violence. Otherwise, the crime of robbery but not theft is constituted³³.

The crime of theft is generally committed secretly³⁴. However, commission with secrecy is not mandatory for the constitution of the theft crime. In case the conditions which turn a theft crime into a robbery are not met, the act constitutes theft crime even if it is not committed secretly³⁵.

³⁰ Erem, s. 2357; Gözübüyük, s.585; Çağlayan, s.299.

³¹ Gerekeçe için bk. ŞAHİN, C / ÖZGENÇ, İ: Türk Ceza Hukuku Mevzuatı, T.C. Adalet Bakanlığı, Eğitim Dairesi Başkanlığı, Ankara, Mart 2007, s. 267

³² Dönmezer, s.347; Erem, s. 2358; Gözübüyük, s.583; Çağlayan, s.299; Tezcan/Erdem/Önok, s.410; Soyaslan, s.292; Toroslu, s.131; Erol, s.695.

³³ Soyaslan, s.292; Toroslu, s.131-132.

³⁴ Erem, s. 2357.

³⁵ Toroslu, s.132.

It is not compulsory for the offender to take the property per se. The property could have been taken by using any means³⁶. The property could be taken via a trained dog, a small child or a mentally-ill person who does not hold criminal liability or by a bona-fide third party³⁷.

In principle, it is indisputable that the crime of theft is realized when the good is taken by the offender per se. However, in some cases, as in the example of a person who takes away a cell phone which is given to her/him to talk, the possessor could have given the possession of the property himself. It is impossible to argue that the crime of theft is realized in all these cases³⁸. When the victim gives any property to the offender to use it for a certain purpose and the offender disposes on the property, then the crime of misuse of good intention, instead of the crime of theft, is realized. In fact, this is the basic difference between these two crimes.

The removal of the property from its place is not adequate for the crime to be considered as completed. Rather, the property must be put under the offender's or a third party's disposition. In other words, the disposition of the possessor on the property has to be ceased³⁹. Otherwise, if the property is under the control and hegemony of the victim, it means the victim's possession goes on. In this case, the crime of theft does not occur with all its legal elements. Then, to put it clearly, the possession of the victim must be terminated for the realization of the crime.

For the act of removing a property to constitute a crime of theft, the property must be taken against the possessor's will. First of all, the property must be under one's possession, and then it must be taken from its place without the possessor's consent⁴⁰.

³⁶ Erem, s. 2357; Toroslu, s.132.

³⁷ Parlar/Hatipoğlu, s. 1051.

³⁸ Tezcan/Erdem/Önok, s.408.

³⁹ Dönmezer, s.349; Tezcan/Erdem/Önok, s.410; Soyaslan, s.292; Erol, s.695; Parlar/Hatipoğlu, s. 1051. Karşı görüşü savunan Toroslu, suçun tamamlanması için malın bulunduğu yerden alınmasının yeterli olduğunu belirtmektedir. (Toroslu, s. 132)

⁴⁰ Tezcan/Erdem/Önok, s.407; Parlar/Hatipoğlu, s. 1051.

The existence of the possessor's consent is a reason for legality. In case of the existence of this consent, the act will not constitute crime. The consent can be clearly stated and it can also be indicated implicitly⁴¹.

B. Moral Element

The crime of theft is committed deliberately. Besides, a general intent is not adequate. The property which is the object of theft must be taken from its place without the possessor's consent. For this reason, there must be a special intent of "utilization" besides a general intent.⁴²

Deliberation refers to taking a property which is in another person's possession and control with a conscious aim of having the possession of it. If the offender does not have the intention to utilize it, the act does not constitute a crime of theft. Utilization refers to the rights that the property provides to its owner or possessor. This aim of the offender will be realized after the commission of the act of theft. However, for the constitution and completion of the crime, realization of utilization is not necessary⁴³.

The offender could have taken action to make use of the property himself/herself, and s/he could also have taken action to make a third party make use of the property⁴⁴. In case there is participation between a third party and the offender, the former could also be punished. However, if the third party knows that the property is a product of theft and accepts it but does not participate in the commission of the act of theft,

⁴¹ **Parlar/Hatipoğlu**, s. 1051. **Karşı görüş: Tezcan/Erdem/Önok**; rıza dışılığın suçun hukuka aykırılık unsuruyla değil, tipiklik unsuruyla ilgili olduğunu, bu nedenle rızanın varlığı durumunda suçun tipiklik unsurunun gerçekleşmemiş olacağını ifade ederler. (**Tezcan/Erdem/Önok**, s.407)

⁴² **Dönmezer**, s. 367; **Erem**, s. 2365-2367; **Gözübüyük**, s.584; **Çağlayan**, s.299; **Tezcan/Erdem/Önok**, s.412; **Soyaslan**, s.296; **Toroslu**, s.134; **Erol**, s.695; **Parlar/Hatipoğlu**, s. 1051.

⁴³ **Çağlayan**, s.299; **Soyaslan**, s.296; **Erol**, s.695.

⁴⁴ **Erem**, s. 2369.

s/he is considered to commit the crime of buying or accepting a property of theft⁴⁵.

C. Illegality

In general, the causes of legality decriminalize theft. In this framework, discharge of duty, legitimate self-defense and state of necessity mentioned in Art. 24 and 25 of the new TPC 24 and 25 legitimize the act in question⁴⁶.

If the offender acts as a fulfillment of his or her duty, the act does not constitute a crime. This is the case when a consignment officer takes away an object that is subject to confiscation. If the consignment officer fulfills his/her duty by taking a property and putting it in storage without the possessor's consent, his/her act does not constitute crime⁴⁷.

It is suffice to state that all issues related to the causes of legality also apply here. However, we want to emphasize that self-defense of the property has become a part of the legislation with the new TPC and even in this case the act does not constitute crime of theft⁴⁸.

In doctrine, social appropriateness and default consent are mentioned as reasons which justify the crime. In one resolution, Yargıtay, the High Court of Appeal, accepted that in case the offender, who was playing near the garden of the victim, took and ate a few apples from the apple tree in the garden, this act does not constitute the crime of theft as "the act was a natural and ordinary manifestation of a social habit and a general tolerance which have been going on according to traditions, morals and customs". However, Art. 145 of the new TPC mentions the low economic value of the property stolen as one of the reasons for the withdrawal of punishment depending on the case⁴⁹.

⁴⁵ Tezcan/Erdem/Önok, s.413.

⁴⁶ Tezcan/Erdem/Önok, s.414; Soyaslan, s.297; Toroslu, s.134; Parlar/Hatipoğlu, s. 1052.

⁴⁷ Soyaslan, s.297.

⁴⁸ Soyaslan, s.297.

⁴⁹ Tezcan/Erdem/Önok, s.415.

V. The Special Forms of Crime

A. Attempt

Theft crime can also take the form of attempt. If the offender starts the act but fails to perform the act necessary to commit the crime due to a reason beyond his or her control, he/she is considered to have attempted to commit crime⁵⁰. In contrast to the former TPC which regulated attempt to crime under Art. 35, the difference between complete and incomplete attempt was revoked with the new TPC. Accordingly, the offender is punished according to the severity of the resulting damage or danger⁵¹.

In theory, it is stated that for the completion of the theft crime, the property must be put under the control of the offender or a third party. The offender's control area does not necessarily mean his/her place. Anywhere outside the owner's (or possessor's) area of control refers to the control area of the offender. However, in the justification of the law it is emphasized that *"What is meant with the act of taking is ending the victim's possession of the property which is the object of crime and making it impossible for the victim to use his/her rights of disposition resulting from the possession of the property. When this right of disposition is abolished, the crime is completed"*. Accordingly, the phase just before the property is taken out of the possessor's control area is accepted as an attempt phase⁵².

Therefore, theft crime can be considered as an offense by commission. If the property is taken from its place but possession is not realized after that, this constitutes a theft attempt⁵³.

In the crime of theft, the material issue is the movable property, and the existence or absence of a property during the commission

⁵⁰ Dönmezer, s.353; Erem, s. 2363; Gözübüyük, s.583-584.

⁵¹ Parlar/Hatipoğlu, s. 1052.

⁵² Dönmezer, s.354.

⁵³ Erem, s.2358.

of the crime is determined through an assessment of the time period before--rather than after--the commission of the act and according to the features and conditions of each incidence. In this determination, a negative result arrived, which implies the utter absence of material issue, means that crime cannot be committed, and a positive result means that the crime remains at the attempt phase. Therefore, because the act of an offender who breaks into a completely empty building without facing any obstacles with an aim of theft will probably not be realized (due to absolute absence), it can be considered that the crime cannot be committed. However, in the case of an offender who breaks into a house to steal money but cannot find money, the act will be regarded as an attempted crime, instead of a crime that cannot be committed, because the absence of money at home is not absolute but a relative absence according to the quality of the material issue⁵⁴.

B. Participation

In the crime of theft, there is not a particularity in terms of participation, and any form of participation can be manifested in this crime. In case of participation, assessment is made under the light of Art. 37-40 in the new TPC⁵⁵.

While the case in which the crime of theft is committed with the participation of “more than two persons” (at least three people) was regarded as qualified theft in the former TPC (Art. 491/end, Art. 492/end, and Art. 493/end), this qualified form of theft is not separately mentioned in the new TPC⁵⁶.

⁵⁴ **Dönmezer**, s.354.

⁵⁵ **Tezcan/Erdem/Önok**, s.417; **Parlar/Hatipoğlu**, s. 1052-1053.

⁵⁶ **Tezcan/Erdem/Önok**, s.417; **Parlar/Hatipoğlu**, s. 1053.

C. Successive Offense

In Art. 43/1 of the new TPC, the successive offense is defined as follows **“in case of commission of the same offense against a person more than once at different times, the offender is given a punishment”**.

In crimes of theft, in case of commission of more than one theft act against the same person in short periods of times with a decision to commit one crime, the offender is hold responsible for one crime, but his penalty is increased due to successive offenses. In this case, each act does not constitute a separate crime.

As it can be understood from the definition above, three conditions are to be met to accept the existence of successive offenses.

These are:

- a) decision to commit one crime
- b) commission of crime at different times,
- c) commission of the same crime.

An exception is regulated in the second subsection of the same article where it is stated that in case of commission of the same crime against more than one person with a single act, the provisions of the successive offenses are applied.

However, in the crime of theft, it is not possible for the latter mentioned case to be applied. The commission of the theft crime against more than one victim at the same time does not constitute successive crimes but instead as many crimes of theft as the number of victims⁵⁷.

If the properties of more than one victim are in the same place, and it is objectively impossible for the offender to know that they could belong to more than one person, the act constitutes one single crime of theft. In such a case, it is not possible to talk about as many crimes of theft as the

⁵⁷ Tezcan/Erdem/Önok, s.416; KOPARAN, M.R: YTCCK'da Malvarlığına Karşı Suçlar(Hırsızlık), <http://www.ceza-bb.adalet.gov.tr/makale/137.doc>.(15.06.2007), s.6.

number of victims. However, as in the case of teachers' room where it is expectedly known that objects belong to more than one person, as many crimes as the number of victims are realized. As a matter of fact, this issue is clearly specified in the following decree by the High Court of Appeal⁵⁸;

“As the circumstances of the commission of the crime are accepted, where defendants stole from stands in a market place which they knew belonged to different people, the application is to be made according to Art. 80 (successive crime) of the new TPC instead of Art. 71 (real concurrence) of the former TPC”.

D. Concurrence

One main philosophy underlying the new TPC is that there are as many crimes as the number of acts. Although the opposite view is taken in the doctrine, in case of commission of other acts in addition to the act of theft, the offender will be responsible separately for each act. Accordingly, an offender who commits theft from a dwelling will also be responsible for violation of dwelling immunity in addition to the crime of theft. In a similar vein, in case the offender gives damage to the property during the commission of theft, he or she will also be responsible for this act in addition to the act of theft.

Conclusion

The crime of theft, in which simple form is defined as the removal of a property from its place without the possessor's consent to derive benefit for himself or a third party, is regulated under the chapter titled Crimes Against Property.

The simple form of theft crime is regulated under Art. 141 and its qualified forms which impose heavier penalties are regulated under Art. 142-143 of the new TPC. The aggravating reasons are classified among themselves; depending on the importance of the object of crime, the va-

⁵⁸ Y.11. CD. 31.03.1997 tarih 937/ K. 916 sayılı Kararı için bk. YAŞAR, O: *İçtihatlı Türk Ceza Kanunu*, Seckin Yayınevi, Ankara 2001, s.269

lue of the property stolen and the way crime is committed, some crimes of theft were regulated to require heavier penalties.

Commission of crime at night, easier commission of crime, difficulty in recognizing the offender and the trouble the victim could get in if s/he asked for help, were considered common reason of aggravation in all forms of crime.

As it was not separately regulated in the former TPC, stealing by snatching was formerly sanctioned with a small penalty within the context of the simple form of the crime; but later this was regarded as an aggravating reason under the new TPC, which in turn made the penalty more deterrent and met the expectations of the society with regard to this issue.

Conditions subject to less punishment are also mentioned, and in case of commission of theft where the stolen property has a low economic value and in case of commission of theft to meet an essential and urgent need, the judge is given the judicial discretion not to give penalty depending on the quality of the incidence. In this way, it became possible not to give penalty in cases in which punishment would damage public conscience.

In parallel with one of the principles underlying the new Penal Code, which states that each act constitutes a separate crime, the irresolution regarding the offender whose act may not only constitute crime of theft but also the crime of the violation of immunity of domicile or the crime of damage to the property was also removed with the Law No. 5560 which added clause 4 to the Art. 142.