Tape 11 - Sides 1 and 2
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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

July 31, 1972

Members Present: Mr. Robert W. Chandler, Chairman
Senator John D. Burns
Representative George F. Cole
Mr. Bruce Spaulding

Staff Present: Mr. Donald L. Paillette, Project Director

Others Present: Judge Charles S. Crookham, Commission member
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Bob Burns, Clackamas County District Attorney's Office

Agenda: Criminal Trials; General Provisions
Preliminary Draft No. 1; July 1972

The meeting was called to order at 9:30 a.m. by Chairman Robert W. Chandler in the offices of Mr. Spaulding, Standard Plaza, Portland.

Criminal Trials; Preliminary Draft No. 1; July 1972

Mr. Paillette indicated that one of the areas on which he had received a number of inquiries during the course of the revision, many of them from judges, was on the question of joint trials, and the Criminal Trials draft attempted to change the law with respect to that subject. He outlined that he and Mr. Gustafson had spent considerable time discussing the different methods of approaching the revision of statutes relating to criminal trials, and this draft was based largely on the ABA Standards. Basically, he said, the present criminal trial procedure was working well and he knew of no areas of major discontent, but at the same time there were some idiosyncrasies in the statutes which this draft attempted to correct. The draft contained two new sections, sections 2 and 3, which would be added to and made a part of ORS chapter 136 by means of the statement in section 1.

Section 2. Jury trial. Section 2, Mr. Paillette continued, did two things. First, it placed the statement that a defendant had the right to public trial by an impartial jury in the statute and, secondly, subsection (2) was included to clarify an ambiguity with respect to waiver of jury. The Constitution did not allow a waiver in a capital case and it was virtually hornbook law that a capital case was one punishable by death. Because jury waivers were prohibited in capital cases, however, did not necessarily mean that a jury could not be waived in a case where the crime was punishable by life imprisonment.

The Constitution in Article I, s. 11, says that with the consent of the judge, jury trial may be waived in writing but that provision excludes capital cases. Subsection (2) provided that the election must be in writing and with the consent of the judges. The other obvious approach would be to interpret "capital" by statute as including life imprisonment.

Senator Burns said he had a distinct impression from time to time that some judges hid under the consent provision in cases where it might be in the best interest of the defendant to try the case in front of the court, but the court refused that consent because the judge didn't want the responsibility.

Mr. Paillette pointed out that a requirement could be written into the statute making consent to a jury waiver mandatory, but Senator Burns said he would not be willing to go that far.

Senator Burns moved to approve section 2. Motion carried unanimously.

Section 3. Challenge to the jury panel. Mr. Paillette explained that section 3 was another new provision and it was his belief that it contained a reasonable and fair approach and was in accord with the realities of life and the trend of recent cases. There was, he said, a curious situation in Oregon with respect to the challenge to the jury panel because the criminal code incorporated by reference the civil procedure code which did not allow this type of challenge. The staff, therefore, was faced with trying to write a departure from the civil code. He was reluctant to get involved in rewriting the civil procedure code but at the same time there were some different considerations involved in criminal cases, particularly in light of some of the decisions cited in the commentary to section 3.

Garner v. Alexander, 167 Or 670, 120 P2d 238 (1941), was a habeas corpus attempt where the court held that the alleged discrimination in excluding women from the jury panel could not be reached by habeas corpus which seemed to leave the defendant without a remedy, at least as far as state courts were concerned. Section 3 required the challenge to be made before the voir dire examination and the grounds were limited to error where there was a material departure from the requirement of the law governing selection of jurors.

At common law, Mr. Paillette said, this right to challenge the panel existed but it was changed by the Deady Code, and an early case, State v. Fitzhugh, 2 Or 227 (1867), spoke to that question. He commented that section 3 might create some uneasiness with respect to the kinds of challenges that might be raised and to the possibility that it might be used as a dilatory device to delay the trial. He noted also that the statute dealing with selection of jurors was amended by the draft (ORS 10.110 on pages 31 and 32).

Mr. Paillette called attention to page 4 of the commentary which cited Peters v. Kiff, 11 Cr L 3157, ___ US ___ (1972), where Mr. Peters,

who was a white man, objected to the systematic exclusion of blacks from the jury panel and the court held that he did have standing to assert that he was not provided a fair trial because he was entitled to a representation of a fair cross section on the jury panel.

Chairman Chandler was of the opinion that initially section 3 might result in some dilatory motions but that situation would soon correct itself, presuming the judges ruled properly. He did not believe the section would create any major delays.

Mr. Milbank commented that one problem in some counties was that at the beginning of the jury term, the jury system was fair but by the end of the term there were 12 to 15 well used jurors who were called frequently because they were readily available and willing to serve. His recollection was that such a situation had at one time been challenged in Marion County where it was shown that the court administrator was not calling those on the panel who said they were too busy to serve.

Chairman Chandler observed that the problem Mr. Milbank cited was probably caused at least partially by the length of the terms of court, and it was unlikely that section 3 would have any impact on that situation.

Senator Burns commented that once section 3 was codified, there might be those who would endeavor to get ORS 10.110 amended to provide that specific percentages of minorities, etc., must be included on the panel. Mr. Paillette replied that the staff had considered writing in more definitive guidelines, but it was too difficult to find an arbitrary formula that could be applied in all counties. Due process, he said, was the basic consideration. The draft incorporated the rationale of the ABA Standards, and he directed attention to the commentary of the ABA set forth in the third paragraph on page 5 of the draft commentary.

Mr. Spaulding pointed out that section 3 would be of no assistance to the defendant who had no way of knowing about the "material departure" until the voir dire examination of the jury began, and this discovery would probably not be made in the majority of cases until that time.

Senator Burns said one answer to that problem might be to require that the defendant be provided with a list of the names and addresses of the jurors on the panel X number of days before trial. Other members pointed out that they had never encountered any problem in obtaining that information. Mr. Spaulding commented that it was a simple matter to get their names, but the defendant might not know of some irregularity in their selection until he had an opportunity to question them.

Mr. Paillette said it might create a problem to allow the challenge after voir dire began because it could then be used as a stalling technique.

Representative Cole inquired as to the meaning of "jury panel" and was told by Mr. Paillette that as used in section 3, it referred to the over-all panel that was drawn at the beginning of the term of court.

Senator Burns moved approval of section 3. Motion carried unanimously.

Section 4. ORS 136.010. When as issue of fact arises. Mr. Paillette explained that the language of subsection (2) of section 4 was amended to make it consistent with the draft on former jeopardy. It would make no change in the procedural mechanism but under the former jeopardy draft, a conviction or acquittal was by definition called "former jeopardy."

Chairman Chandler pointed out that an issue of fact was decided by a jury or by the trier of fact. It seemed to him, he said, that the decision on a plea of former jeopardy was in most cases a highly technical matter and should be a matter for decision by the court rather than by the jury. He asked why a jury should decide the question of former jeopardy; in his opinion it was too complex and technical to be placed in the hands of jurors. Mr. Spaulding expressed agreement. Chairman Chandler added that the jury would have to be instructed on the law by the judge anyway so the result was that the judge would be deciding the question in most cases because he would in effect be instructing the jury what to find. Mr. Paillette replied that the judge was making the finding at the present time. If he sustained a plea of former jeopardy, that was the end of the case.

Mr. Spaulding commented that former jeopardy was a question of fact whether the fact was determined by the judge or by the jury. He noted that section 4 did not say that the issue of fact had to be tried to a jury but it did make that implication.

Mr. Paillette recalled that there was a case in Multnomah County (State v. Garrett) where a woman allegedly had set fire to her house, killed two of her children and was charged with felony murder. On the first charge she was acquitted. At the trial on the second killing she entered a plea of former jeopardy and the court entered an order sustaining the plea. The state tried to appeal that order and argued that sustaining the plea of former jeopardy was the same as a demurrer and consequently it could be appealed, but the Supreme Court upheld the trial court and said it was not appealable because the grounds on which the state could appeal were set by statute and that was not one of them. That question did not go to a jury, he said, but was decided by the court.

Mr. Paillette noted that ORS 138.060 which set forth grounds for appeal by the state was amended in 1963 as a result of that case so subsection (2) of that statute presently provided that the state may appeal from an order sustaining a plea of former conviction or acquittal, which would be a pre-trial order.

Mr. Spaulding asked if it would be constitutional to require that a plea of former jeopardy be tried by the court. Chairman Chandler replied that the statute could probably provide that a plea of former jeopardy, if entered, shall be entered before the start of voir dire and that would take care of the jury question because there would be no one but the court to decide the issue at that stage.

Senator Burns pointed out that the former jeopardy record would have to be proved and it would require some evidence. Chairman Chandler asserted that there were other cases where evidence was required before the judge ruled on motions -- motions to suppress, for example. If the judge wanted to hear evidence, there was nothing to prevent it.

Mr. Milbank said that issues of fact arose at the present time under the new criminal code's concept of affirmative defenses with respect to insanity, diminished responsibility, alibi, etc. They were submitted to the jury to be ruled on and they were no longer pleadings. He suggested that former jeopardy might be out of place in section 4.

Mr. Spaulding replied that issues of fact such as alibi and diminished responsibility, if true, made the defendant never guilty of either all or a part of the charge. Former jeopardy was a different thing because it said he was guilty but he had already been tried. Mr. Milbank commented that under former jeopardy he could be formerly acquitted. Mr. Spaulding acknowledged that that was possible because of the fact that the charge was not proven beyond a reasonable doubt, but it was consistent with his having committed the act charged and it was not consistent with alibi, insanity, etc.

After further discussion, the subcommittee decided to await the arrival of Judge Crookham before continuing this discussion. Further consideration of section 4 will be found on page 8 of these minutes.

<u>ORS 136.020 through 136.050</u>. With respect to the ORS sections set forth on page 8 of the draft, Mr. Paillette advised that there were a few editorial changes that should be made to these sections depending on how drafts in other areas of the procedure code were finally adopted. For example, the definition of "accusatory instrument" which had now been approved by the Commission would require some of them to be amended by inserting "accusatory instrument" in place of "indictment." "Accusatory instrument" would be defined, he said, in the general definition section as meaning an indictment, information or complaint. In ORS 136.040, Mr. Paillette indicated that "charge" would be more proper than "indictment."

Senator Burns proposed to insert "district" in place of "county" in ORS 136.030 and other members agreed with this suggestion.

With respect to ORS 136.020, Mr. Spaulding commented that an issue of law might arise in other ways than in the form of a demurrer, an example being an objection to the introduction of evidence. Mr. Paillette replied that it would be treated the same as a demurrer for ruling by the court.

Chairman Chandler commented that he did not see the wording of ORS 136.020 as being exclusive and Mr. Paillette said he did not believe it could be read that way either.

Mr. Spaulding pointed out that section 2 used the term, "judge of the court," which he liked much better than "court" as used in ORS 136.030. Senator Burns observed that the terms should be consistent in any event.

Chairman Chandler pointed out that under ORS 136.040 an attorney could enter a plea of guilty for his client who was charged with a misdemeanor if he failed to show up in court at the proper time. Mr. Milbank explained that the attorney had no authority to plead an absent defendant guilty, but the situation where the defendant failed to appear was not unusual. A misdemeanor charge could be tried without his presence, but a plea of guilty could not be entered in that instance.

Mr. Spaulding commented that he had always felt that in some cases it was unfair to require a defendant to be present at a felony trial because for some people it was a terrible ordeal. However, it would require a change in the Constitution to permit the defendant to waive his appearance. Mr. Paillette said he would question whether that concept would be acceptable to the legislature or to the people because, theoretically at least, the provision was included in the Constitution for the protection of the defendant.

Senator Burns then moved adoption of the following amendments to the statutes set out on page 8 of the draft:

(1) ORS 136.020: Delete "indictment" and insert "accusatory instrument."

(2) ORS 136.030: After "shall be tried by" insert "judge of the".

(3) ORS 136.030: Delete "county" and insert "district".

(4) ORS 136.040: Delete "indictment" and insert "charge".

Motion carried. Amendment (3) was subsequently rescinded. See page 26 of these minutes.

Senator Burns asked if, in view of the case law requiring counsel in all cases, it would be necessary to add "and by counsel" at the end of ORS 136.040. Mr. Paillette replied that such an amendment would not be desirable because the defendant had a right to waive counsel if he did not want one.

Senator Burns moved to adopt ORS 136.020, 136.030 and 136.040 as amended. Motion carried unanimously.

ORS 136.050. Degree of crime for which guilty defendant can be convicted when doubt as to degree exists. Mr. Paillette explained

that ORS 136.050 was the "lesser included" statute. It was, he said, a standard instruction given to juries.

Mr. Spaulding moved to approve ORS 136.050 without amendment. Motion carried unanimously.

Section 5. ORS 136.060. Jointly indicted defendants; separate or joint trial. Mr. Paillette outlined that Oregon was one of the few states not providing for jointly indicted defendants to be tried jointly. He pointed out that subsection (1) of section 5 was taken from the New York Criminal Procedure Code while subsection (2) came from the Federal Rules of Criminal Procedure. It was a kind of safety valve and would give the court an opportunity to find out whether or not a joint trial would result in real prejudice to the defendant. Mr. Paillette's personal opinion was that it was time that Oregon adopted joint trials for defendants in order to speed up the process and to have more efficient and effective administration of justice.

In reply to a question by the Chairman, Mr. Spaulding said the result of section 5 would be that in practically every case the court would decide that the cases could not be severed. He based his statement on his experience in federal court which operated under a similar rule and where he had seen jointly tried cases end up in what he thought was real injustice. The only argument in favor of such a system, he said, was speeding up the court system and saving some money.

Senator Burns concurred with Mr. Spaulding and said his experience with this system in federal court was that the judges never severed the defendants, and this was extremely unfair to the defendant who might be less guilty from an equitable point of view than the codefendant. Without the rule in the new criminal code requiring defendants to be brought to trial in 60 days, Senator Burns said he might be persuaded that joinder of defendants was necessary in order to shorten the holding period in the jails. But the 60 day provision was in effect, and he opposed joinder.

Chairman Chandler expressed the view that there was a great deal of public dissatisfaction with long drawn out trials where more than one defendant was involved yet it was necessary to hold separate trials with essentially the same facts and the same witnesses at all of them.

Mr. Spaulding pointed out that the state could get away from joinder if they did not want to join by using separate indictments but the defendant did not have that choice. He expressed the view that if joint trials were to be forced upon defendants they should also be forced upon the state. Chairman Chandler said he could see nothing wrong with that premise but asked if such a thing could be accomplished.

Mr. Spaulding said that one difficulty with requiring the state to join would be that they might not be able to find one defendant or they might not know about the second one at the time they indicted the first. He added that a further problem arose when there was a conflict between the defendants. The defendant who lead off at the trial and who cross examined first had a distinct advantage over the next defendant.

After further discussion of section 5, Senator Burns pointed out that a significant policy decision was embodied in this section and for that reason he moved that it be submitted to the full Commission without recommendation so the final decision could be made there. Motion carried. Voting for the motion: Burns, Cole, Spaulding. Voting no: Mr. Chairman.

Section 4. Following a recess, Judge Crookham arrived and the subcommittee reverted to discussion of section 4.

Chairman Chandler explained to Judge Crookham that he had raised a question in connection with section 4 because it implied that a jury must decide when former jeopardy existed and that such a finding was to be made after trial on that plea. He was of the opinion that this was too technical a subject for a jury to deal with. Judge Crookham said that in today's strange world of collateral estoppal he was not sure either that it was an entirely appropriate issue for a jury to pass upon. The issue, he said, was a question of law rather than a question of fact in any event.

Senator Burns asked how pleas of former jeopardy were handled at the present time and was told by Judge Crookham that in every such case he had handled the attorneys had stipulated to the facts and it had been disposed of as a question of law because there was usually no fact in issue. He said he could conceive of instances where there might be a factual dispute, and in those cases it might be appropriate to decide that factual part on a special finding.

Senator Burns asked if the issue was normally decided pre-trial and was told by Judge Crookham that it was, at least in Multnomah County. As a practical matter, he said, the issue had to be handled before the jury was impaneled or there would be another jeopardy problem.

Chairman Chandler asked if the problem would be cured by requiring that the matter be pleaded X number of days prior to trial. Judge Crookham asked if the subcommittee was trying to require the defendant to give up his right to have the jury determine questions of fact or if the attempt was to say that former jeopardy was a matter of law. Mr. Spaulding said he believed the statute should do both. Judge Crookham noted that the courts determined questions of fact on motions to suppress and asked if there would be any constitutional violation by empowering the judge to make former jeopardy a question of fact. Mr. Spaulding said he doubted that there would be but he did not feel competent to decide. It was, he said, somewhat comparable to issues of fact on a motion to suppress.

Judge Crookham said that the courts at the present time were not getting the pure double jeopardy question as they had always known it. Under State v. Brown they were getting all sorts of collateral estoppals as a result of Ashe v. Swensen.

Mr. Paillette advised that State v. Brown was essentially the same as the draft on former jeopardy except that the draft used the term "criminal episode" rather than "transaction."

Judge Crookham said that one answer to the problem might be to delete subsection (2) of ORS 136.010 and move it over to ORS 136.020. Senator Burns questioned the necessity of even retaining ORS 136.020. Everyone knew, he said, that an issue of law arose upon a demurrer and the section was not exclusive.

Mr. Paillette advised that the next draft this subcommittee would be considering would deal with the subject of arraignments. If the subcommittee wanted to make a change in the pre-trial procedure such as they were discussing, it could be dealt with in that draft and transferred over into ORS chapter 135. Chairman Chandler was of the opinion that the decision should be made today.

The Chairman then asked if there was general agreement in the subcommittee, one way or the other, that a plea of former jeopardy should or should not be an issue of fact. Mr. Spaulding said it would be nice and efficient to provide that the plea would be determined prior to commencement of the principal trial but his guess was that it really didn't matter much to a particular case whether it was called an issue of fact or an issue of law. Representative Cole agreed.

Senator Burns was of the opinion that the draft should specify that the plea should be made prior to the voir dire examination which would eliminate the second jeopardy question.

Chairman Chandler indicated that there were several ways of accomplishing that proposal:

(1) Eliminate subsection (2) of section 4.

(2) Move subsection (2) of ORS 136.010 to ORS 136.020.

(3) Eliminate ORS 136.020.

Senator Burns noted that presently a plea of former jeopardy was entered in order to put the district attorney on notice, somewhat similar to the alibi situation. It would be manifestly unfair to the district attorney, he said, to do away with the plea of former jeopardy and provide that where former jeopardy arose, it must be disposed of before trial.

After further discussion, Senator Burns suggested that section 4 be revised to read: "An issue of fact arises upon a plea of not guilty." Then add a new section which would be worded similar to section 3:

"Former jeopardy. (1) The defendant in a criminal action may challenge the accusatory instrument upon the grounds of former jeopardy.

"(2) A challenge upon the grounds of former jeopardy shall be made before the voir dire examination.

"(3) Notice of a challenge upon the grounds of former jeopardy shall be made by the defendant following his plea and not less than five days prior to the trial date."

Mr. Spaulding pointed out that the defendant would not challenge the accusatory instrument because the indictment was perfectly valid. His suggestion was to provide that at the time of the arraignment the defendant could plead guilty, not guilty or former jeopardy. If he pleaded former jeopardy, that issue would be tried first.

Judge Crookham said the problem was that the defendant should not be permitted to raise that issue after the jury was impaneled. The statute should make it clear that if he didn't raise the issue prior to voir dire, he could waive it like any other right.

Senator Burns asked if ORS chapter 135 provided for the three types of pleas and was told by Mr. Paillette that with the amendment to compensate for the change that was made by the Commission in negotiated pleas, that chapter would provide for the pleas of guilty, not guilty, former jeopardy and no contest.

Judge Crookham said that if subsection (2) were deleted from section 4, it would accomplish Mr. Chandler's objective of taking the determination of the issue of fact out of the hands of the jury and it would be even more clear if subsection (2) were transferred to ORS 136.020. Mr. Chandler warned that if that statement were added to ORS 136.020, it might create the problem of implying that a demurrer and a plea of former jeopardy were the only two issues of law whereas the section as presently drawn was not exclusive.

Senator Burns moved to strike subsection (2) and amend section 4 to read:

"An issue of fact arises upon a plea of not guilty."

The motion carried unanimously.

Senator Burns stated that his inclination would be to leave ORS 136.020 alone and to add another section stating something to the following effect:

"The issues raised by a plea of former jeopardy shall be disposed of by the court prior to the voir dire examination of the jury."

Mr. Chandler asked if that section should contain a time limit and was told by Senator Burns that he did not believe it was necessary inasmuch as the district attorney would be placed on notice by the entry of the plea.

Judge Crookham was apprehensive about leaving ORS 136.020 the way it was because it implied that a plea of former jeopardy was not a question of law inasmuch as the only specified question of law was a demurrer. He suggested that 136.020 be redrafted in broader language and that the reference to demurrer be deleted. If it were drafted to say that an issue of law included everything except questions of fact, it would place a big umbrella over the section rather than retaining the unnecessarily restrictive language of the present statute.

Senator Burns thought that would be the most desirable approach but it would raise a further problem in that many of the situations such as Miranda, Wade, motions to suppress, etc. were hybrids. If the big umbrella were placed over 136.020, it would then be saying that those situations were issues of law when in fact they were both issues of law and issues of fact. This consideration, he said, had prompted his earlier question as to the need for ORS 136.020. The subcommittee had already agreed that 136.020 was not an exclusive declaration. In view of Senator Burns' assessment, Judge Crookham agreed that it might be best to delete 136.020. Mr. Chandler summarized the effect of that proposal by saying that if ORS 136.020 were deleted, there would then be only one question of fact to be decided by the jury that was exclusively within the province of the jury and everything else would be a matter for the judge to rule upon subject to the prevailing case law.

Mr. Paillette said he would be opposed to attempting to enumerate all the issues of law in the statute and suggested that ORS 136.020 be deleted and that a statement be placed in the commentary to explain the reason for the deletion.

Senator Burns moved to delete ORS 136.020. Motion carried unanimously.

Mr. Paillette stated he would add an explanation to the commentary in order that the Commission would be apprised of the subcommittee's action and the reason for it.

Senator Burns asked if a section should be added relating to the protocol for disposition of a plea of former jeopardy. Judge Crookham replied that the only time limit that could reasonably be imposed would be to say prior to impaneling the jury or prior to voir dire. Mr. Spaulding suggested that the defendant be required to decide what kind of plea he was going to enter at the time of the arraignment.

Mr. Paillette pointed out that the amendment that would be proposed to ORS 135.820 which would be considered by this subcommittee at its next meeting would make that section consistent with the draft on plea bargaining. It would say that there are four kinds of pleas: guilty, not guilty, no contest and former jeopardy. Mr. Spaulding's suggestion was to add to that section that in the case of a plea of former jeopardy where the defendant also pleaded not guilty, the court shall then determine the issue raised by the plea of former jeopardy.

Mr. Chandler suggested that after the four pleas were listed, a subsection could be added to say that the plea of not guilty shall be decided by the trier of fact. That would still permit the defendant to plead not guilty by reason of former jeopardy and not guilty, and it would let the judge decide prior to the presentation of fact whether the former jeopardy plea was valid.

Mr. Paillette's suggestion was that instead of dealing with former jeopardy as a plea, it be dealt with as a motion to set aside the charge and made analagous to a motion to set aside the indictment. Mr. Spaulding commented that it did not make sense to him to set aside an indictment because of a defense to that indictment. Mr. Paillette next asked what would be wrong with providing for a motion to dismiss the indictment on the grounds of former jeopardy. The draft prepared by the staff, he said, wrote in a motion to dismiss as a statutory motion to conform with present practice because at the present time there were no statutory grounds for motions to dismiss. Some counties used motions to dismiss and also motions to quash, and they were handled the same as a motion to set aside.

Senator Burns expressed approval of Mr. Paillette's suggestion to provide for a motion to dismiss on the grounds of former jeopardy and Mr. Spaulding concurred. Chairman Chandler added that it should be made a bar to further prosecution when the court found in favor of the defendant and was told by Judge Crookham that such a provision would not be necessary because that was the constitutional requirement.

Senator Burns moved that the staff be directed to prepare language to be added to revised ORS chapter 135 providing for a motion to dismiss the indictment on the grounds of former jeopardy. Motion carried unanimously.

Following a recess for lunch the subcommittee returned to a discussion of the ORS sections set forth on page 11 of the draft. The same persons were present for the afternoon session as had attended the morning session.

Senator Burns moved that the staff make any editorial changes necessary in those sections rather than making each revision by individual motion. Motion carried.

ORS 136.080. Deposition of witness as condition of postponement. Senator Burns had two questions with respect to ORS 136.080: (1) would the Commission action on the discovery draft affect this section; and (2) should "deposition" be keyed to the perpetuation of testimony in order to protect objections. "Deposition," he said, might be too broad. Mr. Chandler replied that the section didn't appear to have any effect on the discovery draft.

Judge Crookham's concern centered on the Sixth Amendment right to confrontation but he said he assumed that requirement would be met by the confrontation at the time the deposition was taken. Mr. Spaulding remarked that the reason there had never been depositions in criminal

cases was because of the right of confrontation. Mr. Milbank advised that he had never taken depositions under this section.

Senator Burns asked Judge Crookham if anyone had ever applied to him for a postponement under this section and received a negative reply. Judge Crookham added that the section had apparently not caused any problems in 120 years. No change was made in the provision.

ORS 136.120. Discharge of indictment when prosecution is unprepared at time for trial. Mr. Chandler asked how often the situation came up under ORS 136.120 where the prosecution was unprepared for trial. Mr. Spaulding responded that it didn't come up often, but the section did apply some pressure on the district attorney to make him get ready in time. Judge Crookham agreed that the possible sanction in that statute might have some benefit.

Chairman Chandler asked at what point the judge was "of opinion that the public interests require the indictment to be retained for trial." Mr. Milbank replied that it would be applicable when the district attorney had done everything he reasonably could to get ready for trial but something came up that was beyond his control; for example, one of his witnesses was gone. Mr. Spaulding said it could also refer to a situation where the court could save the public from suffering because of the dilatoriness of the district attorney.

Judge Crookham noted that the 60 day rule would protect the defendant from undue incarceration in most instances that would arise under this section which would alleviate at least part of that hardship.

ORS 136.130. When discharge of indictment bars another prosecution for the same crime; judgment of acquittal. Judge Crookham recalled that there was another statute, ORS 134.140, that said a dismissal of a misdemeanor was a bar to further prosecution. There were many indictable misdemeanors and if the victim of one of those crimes was, for example, 14 years of age, the case would have to be brought by indictment in the circuit court. It appeared that there was a possibility of a conflict between ORS 134.140 and 136.130. Senator Burns advised that 136.130 did not speak to either a misdemeanor or a felony but said "any indictment."

Mr. Milbank pointed out that if "indictment" were changed in this section to "accusatory instrument," it could make a significant difference in its meaning by permitting the state to bring another charge on a misdemeanor after it had been dismissed.

Senator Burns asked why ORS 136.130 was needed. The substance of the section, he said, spoke to the discharge where the prosecution was unprepared for trial. Chairman Chandler commented that 136.130 did not actually speak to discharge where the prosecution was unprepared for trial; it just happened to follow that section. Mr. Paillette was of the opinion that 136.130 was meant to be read with 136.120. Mr. Spaulding took the opposite view that 136.130 was not necessarily meant

to be limited by 136.120. Judge Crookham agreed with Mr. Spaulding and pointed out that "dismissed" should be inserted in place of "discharged" because it was improper to say "shall order the indictment to be discharged."

Senator Burns moved to change "discharged" to "dismissed" in ORS 136.120 and 136.130 and to revise "discharge" to "dismissal" in 136.140. Motion carried unanimously.

Chairman Chandler pointed out that ORS 136.130 said that the court could direct the indictment to be dismissed and if he so directed, "judgment of acquittal shall be entered." Senator Burns was of the opinion that 136.130 was not in conflict with ORS 134.140, the dismissal statute referred to by Judge Crookham. Judge Crookham agreed that it was not in conflict but 136.130 had the effect of ignoring the dismissal statute because if the charge was an indictable misdemeanor and it was dismissed, it was a bar and the judge would have no way of having it resubmitted. He asked if the subcommittee wanted that result to obtain. He said he agreed with Mr. Milbank that the state should have only one shot at a misdemeanor and Mr. Spaulding concurred.

Judge Crookham observed that if the decision was to keep the bar on misdemeanors that obtained under the present law, it would follow that ORS 136.130 was only talking about felonies. Mr. Spaulding suggested that it should say so. Representative Cole said that would be accomplished by amending 136.130 to read, "If the court orders the felony indictment to be dismissed . . . . " Chairman Chandler said that the problem with that approach was that the new criminal code downgraded a number of former felonies to Class A misdemeanors and the question posed was whether that many more offenses should be included that were not triable when the indictment was dismissed because of a matter of form or for some other minor reason.

Senator Burns suggested that ORS 136.120 be amended to read to the effect that "when a defendant is called for trial and is ready and the district attorney is not ready and does not show sufficient cause for postponing the trial, the court shall order . . . . "

Mr. Paillette said his intention in 136.120 was to substitute "case" for "indictment."

Chairman Chandler explained that the objective the subcommittee was attempting to reach was to make the rule in ORS 136.120 apply only to felonies and Class A misdemeanors and to allow the court to throw out all other misdemeanors.

Senator Burns moved that ORS 136.120 be amended in accordance with the Chairman's statement, leaving the ultimate drafting to Mr. Paillette. The motion included the directive that the same treatment be given also to ORS 136.130 and 136.140. Motion carried.

Judge Crookham stated that ORS 134.140 should also be amended to make it parallel to the amendments just approved to ORS 136.120, .130 and .140.

Representative Cole asked if city attorneys were to be included in the definition of "district attorney." If so, these statutes would apply to municipal courts as well as state courts. Mr. Paillette replied that it was his understanding that the Commission wanted a general definition of "district attorney" to apply throughout the procedure code and that definition would include city attorneys.

Senator Burns moved that ORS 134.140 be amended to provide that dismissal was a bar to further prosecution only in the case of Class B and Class C misdemeanors and violations. Motion carried.

Section 6. ORS 136.210. Formation of jury. Senator Burns said he was not prepared to vote for section 6 for much the same reasons he had expressed earlier with respect to his opposition to joinder of defendants. His opposition was based on his experience with a similar provision in the federal court. Mr. Spaulding also expressed his objection to the section and said its only benefit was based on time and convenience, but it dealt out the question of justice.

Chairman Chandler commented that different judges handled the formation of juries in different ways. For several years, he said, he had watched Judge Foley ask eight or nine basic questions of the entire panel which reduced the time selection of the jury by about two-thirds. Mr. Spaulding pointed out that it was impossible for the attorney to find out in many cases whether he wanted to exercise a peremptory challenge without first talking to the particular juror. Judge Crookham agreed that the right to ask meaningful questions should not be taken away from the attorney.

Mr. Paillette pointed out that section 6 did not take that right away from the attorney but merely placed more control in the hands of the court. Judge Crookham replied that the court had all the control it needed at the present time if it wanted to exercise it.

Mr. Spaulding remarked that under existing law the courts could follow the procedure used by Judge Foley as described by Chairman Chandler, but section 6 was a direction to the court to take over and the attorneys could only ask questions if the court made an exception. He was critical of that procedure.

After further discussion, Senator Burns moved that section 6 be submitted to the full Commission without recommendation. Motion carried.

Representative Cole asked how the provision for a 12 man jury in section 6 would apply in district and municipal courts. Senator Burns explained that the last session of the legislature had passed a bill making district courts courts of record, eliminating the de novo appeal