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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

May 11, 1972

Minutes

Members Present: Judge James M. Burns, Chairman
Mr. Donald R. Blensly
Representative Norma Paulus

Excused: Mr. Donald E. Clark

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

Also Present: Mr. Gregg Lowe, Deputy District Attorney, Multnomah County
Mr. Robert Lucas, Columbia County District Attorney, representing the Oregon District Attorneys' Association
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure

Agenda:

The meeting was called to order at 1:30 p.m. by Judge James M. Burns, Chairman, in Room 315 State Capitol

Grand Jury and Indictments; Preliminary Draft No. 1; April 1972

Mr. Paillette indicated that at its meeting on April 8, 1972, Subcommittee No. 3 had progressed through section 10 of Preliminary Draft No. 1 on Grand Jury and Indictments.

Section 11. ORS 132.440. Powers and duties other than inquiry into crime. Mr. Paillette noted that section 11 amended ORS 132.440 to require the grand jury to meet at least once a year. Under the optional system, he said, it was conceivable, though unlikely, that a grand jury might not meet that often. If the powers of the grand jury to inquire into the conditions of the prisons and courts were to be retained, he recommended that a provision to this effect be included in the revision.

The second change in ORS 132.440 was the addition of subsection (3) requiring a report of inquiries to be made public. It would not change existing practice but would make the requirement statutory.

Mr. Blensly, in light of recent controversy over the extent of the powers of a grand jury to make inquiry into certain areas, asked the meaning of "the offices pertaining to the courts of justice" as used in subsection (1). Mr. Paillette said he interpreted the phrase to apply to all courts of criminal justice and, in reply to a further question by Mr. Blensly, added that, as he read the phrase, it would not include the Law Enforcement Council, Council of Governments or police departments. It would be difficult to argue that the Law Enforcement Council, for example, was a part of an office pertaining to the courts of justice, he said.

Mr. Blensly reported that district attorneys received many requests for grand jury investigations in widely diverse areas including narcotics, law enforcement and in one instance he had even been asked to investigate a school budget. If grand jury powers were not delineated, considerable discretion was left to the district attorney, and he asked if the subcommittee believed it would be desirable to either broaden or limit those investigative powers by statute. Mr. Paillette commented that if the members chose either course, it could be accomplished in two ways: (1) spell out what the district attorney may look into; or (2) delineate what he may not investigate. He pointed out, however, that section 11 did not refer to investigations of a crime; it was aimed at inquiries into prison and court administration.

Mr. Lucas said he was not aware of any problem that had been created by the present law and that he, as a district attorney, would not want to be given the power to investigate noncriminal conduct. He said he interpreted "courts of justice" to mean the courts and possibly the prosecutor's office and, while the statute might be subject to interpretation, that too had certain advantages.

Chairman Burns was of the opinion that it would be difficult to define what the district attorney could or could not investigate and suggested that the subcommittee not undertake that task. The other members concurred.

Section 12. ORS 132.510. Forms and sufficiency of pleadings. Mr. Paillette explained that the amendment to ORS 132.510 was housekeeping in nature and was designed to remove archaic language referring to forms of pleading. It was not meant to change the present intent of the statute which was that pleadings in criminal cases were entirely statutory.

Mr. Milbank said he and Mr. Hennings, Public Defender in Portland, had discussed this statute and Mr. Hennings would like to see it

amended to provide for additional motion powers on behalf of the defense in the nature of motions to make more definite and certain and motions to strike surplusage. Mr. Paillette advised that in the Tentative Outline for the Proposed Criminal Procedure Code, Article 8 had been set aside to cover the subject of pre-trial motions and the motions Mr. Milbank was discussing would be considered in connection with that Article.

Chairman Burns asked what the word "only" accomplished in section 12. Mr. Paillette replied that it was meant to replace all the words deleted by the proposed amendment. Chairman Burns indicated that "only" was all right when it referred to pleadings but it also modified the rules relating to the sufficiency of pleadings and by doing so might create problems. Representative Paulus commented that there were rules not set out by statute that could fall under this statute and suggested that "only" be deleted to avoid confusion.

After further discussion, Mr. Blensly moved to delete "only" from section 12. The motion carried unanimously.

Section 13. ORS 132.520. First pleading of state is indictment; contents. Section 15. ORS 132.550. Form. Mr. Paillette advised that section 13 was somewhat redundant in light of section 15 and suggested that the two sections be considered together. Section 15 set out a form to be followed in the indictment and appeared to include specifically the same provisions set forth in a more general way in section 13. He pointed out that subsection (2) of section 13 and subsection (7) of section 15 were apparently the same.

With respect to the definition of "indictment," Chairman Burns asked if it was intended that amendments to these statutes would be included to equate informations and complaints with indictments, assuming that the optional indictment/information system was ultimately adopted. Mr. Paillette replied that this was the intent and the subcommittee had discussed the advisability of defining a term such as "accusatory instrument" in the general definition section of the procedure code to include an indictment, information or complaint.

Mr. Lucas advised that the District Attorneys' Association had discussed this draft and their preference was to return to the original language in the opening paragraph of ORS 132.550, retain the form set forth therein, combine sections 13 and 15 by changing subsection (2) of section 13 slightly and in that manner continue to use the indictment form that most district attorneys were currently using.

Mr. Paillette asked why they wanted the form set out in the statute and was told by Mr. Lucas that the proposed section 15 was too specific, would increase litigation and would not simplify the procedure. An example of what might happen under the proposed section 15, Mr. Blensly said, was that the district attorney could sign the

form and forget to date it. Inasmuch as subsection (9) required both his signature and the date, the judge could throw the case out because the signature was not dated even though that date might not affect the rights of the defendant.

Mr. Lucas reported that if section 13 were retained, the district attorneys would like to see the last sentence changed to make it more consistent with the language of the motor vehicle code: " . . . in such manner as to be readily understood by a person making a reasonable effort to do so." That clause, he said, was of more recent enactment by the legislature and had been interpreted by case law.

Representative Paulus suggested that the opening sentence of ORS 132.550 be restored to its original form and that the revised subsections (1) through (9) be retained to make the section permissive rather than mandatory. Mr. Blensly expressed approval of this proposal.

Chairman Burns asked if there was anything wrong with requiring the date and signature of the district attorney. Mr. Lucas said the date added nothing because the document itself was dated and it would also be stamped with a filing date. Further, there was a question as to whether the date to be inserted should be the date the grand jury initially considered the matter or the date the foreman signed the indictment. Chairman Burns said he had always assumed the indictment was signed on the date it was returned, and Mr. Paillette stated that was the way the courts interpreted that date.

Mr. Blensly said the date the indictment was filed with the clerk of the court was the material date as far as the statute of limitations was concerned. The date the foreman signed or the date the district attorney signed was, in his opinion, immaterial.

Chairman Burns noted that ORS 131.130 said:

> "An action is commenced . . . when the indictment is found and filed with the clerk of the court . . . . "

What actually took place, the Chairman said, was that the deputy handed the indictments to the clerk of the court and at that time they would have a date on them. The clerk would then put a filing stamp on the document showing the date filed.

Representative Paulus was of the opinion that the defendant who was indicted had a right to know the date on which the indictment was returned as well as the date the witnesses appeared before the grand jury. Chairman Burns observed that the clerk of the grand jury took minutes and the defendant could inspect those minutes which would tell him the dates on which specific witnesses appeared.

Mr. Blensly pointed out that ORS 132.080 required the clerk to take minutes of the proceedings but did not require him to retain them nor was their a statute permitting their inspection. Mr. Lucas noted that the defendant had the right to challenge the operation of the grand jury under the decision in State v. McDonald, 231 Or 24, 361 P2d 1001 (1961), and if the defendant knew that one of the grand jurors was "stoned" or intoxicated on a particular day, as Representative Paulus had suggested, he could challenge the validity of the indictment on that ground.

Chairman Burns proposed that subsections (8) and (9) of section 15 be combined to read, "The date and signature of the foreman and the district attorney." Representative Paulus asked if it was necessary to retain "alternate foreman" in subsection (8) and was told by Mr. Paillette that a general provision would later be added to the revision to provide that "foreman" included "alternate foreman."

Mr. Lucas asked whether the date to be inserted on the indictment under the amendment proposed by the Chairman would be the date the foreman signed or the date the district attorney signed. Chairman Burns said it should be the day the grand jury turned the indictment over to the court. Mr. Blensly believed it should be the date the foreman signed the form after the indictment was returned.

Chairman Burns said that once the foreman signed the indictment, it should be turned over within minutes or hours to the court. Mr. Blensly asserted that there were circumstances where it was signed at 8:00 p.m. and it was impossible to file it until the following day.

Mr. Paillette suggested that the statute be amended to require the signature of the foreman plus the date and signature of the district attorney since the date the district attorney signed was the important date. Mr. Blensly held the contrary view; he believed the date the district attorney signed was immaterial.

Mr. Paillette asked what date was included at the present time under ORS 132.550 and it was apparent from the answers given that the practice varied from county to county ranging from the date on which the matter was presented to the grand jury for consideration to the date on which the indictment was filed with the court.

Representative Paulus was of the opinion that when the foreman signed the indictment, he should date it and the district attorney should also date the form at the time he endorsed it. Those dates, she said, would have no bearing on the filing date which was the material date so far as the statute of limitations was concerned. She said she failed to understand the objection to the requirement that the district attorney date the form when he signed it. Mr. Lucas replied that the requirement would only further complicate the procedure, and the date the district attorney signed was of no value whatsoever. Mr. Paillette indicated that uniformity was desirable.

After further discussion, Representative Paulus moved that subsections (8) and (9) of section 15 be combined to read:

"The signatures of the foreman and of the district attorney and the date on which each signed."

Motion carried.

The following amendments were then adopted by unanimous consent:

(1) Delete section 13.

(2) Substitute subsection (2) of section 13 for subsection (7) of section 15.

(3) Reverse subsections (3) and (4) of section 15.

(4) Amend subsection (4) of section 15 to read:

"(3) A statement that the grand jury accuses the defendant or defendants of the designated offense or offenses; and".

Mr. Lucas asked what effect subsection (5) would have on the aggregation aspect of the new criminal code when several thefts occurred in more than one county. If, for example, four credit card fraud charges occurring in four different counties were aggregated, he asked how the offense would be charged in one count.

Mr. Paillette questioned the feasibility of aggregating theft charges in four different counties for the purpose of one indictment.

Mr. Blensly said it would be considered as one offense because of the statute permitting aggregation to reach the total required to charge the defendant. In view of the statute permitting crimes committed in different counties to be charged in any one of those counties, he could see no reason why the one offense could not be brought in any one of the four counties. Chairman Burns commented that in that instance it would be necessary for at least one of the offenses to have occurred in the indicting county. He asked if there was anything in subsection (5) that would prevent the procedure described by Mr. Blensly, and the members agreed that there was not.

Mr. Blensly suggested that subsection (5) might be clearer if it were amended to read, "in the designated county or counties." No action was taken on his proposal.

The subcommittee then unanimously agreed to amend the opening paragraph of section 15 to read as follows, subject to any improvement in construction that Mr. Paillette might wish to make:

"The indictment shall contain substantially the following:".

ORS 132.530. Certainty required. Mr. Paillette indicated that question had arisen with respect to ORS 132.530 and its requirements as compared with the theft pleading provisions under ORS 164.025.

Mr. Milbank said that when he, as a defense attorney, demurred to an indictment at the present time, he followed the practice of citing ORS 132.520, 132.530 and 132.540 in the demurrer. It would be preferable, he said, to have one statement that was clear and concise, and under the amendments just adopted, he believed that had been accomplished. Chairman Burns commented that ORS 132.530 could therefore be deleted inasmuch as it added nothing to the amended section 15.

Mr. Blensly moved to delete ORS 132.530, and the motion carried unanimously.

Mr. Paillette asked for an expression of opinion from the subcommittee as to whether there was an incompatability between subsection (7) of section 15, either as amended or under the original version, as compared with ORS 164.025 on pleading theft which said:

> " . . . an accusation of theft is sufficient if it alleges that the defendant committed theft of property of the nature or value required for the commission of the crime charged without designating the particular way or manner in which the theft was committed."

Mr. Paillette added that the judges he had talked to concerning that provision had sustained ORS 164.025.

Mr. Blensly commented that to him the provision made sense on the various means by which theft was committed except in the area of receiving and concealing. That, he said, was an entirely different crime than the actual taking by theft and, as a matter of practice, he alleged receiving or concealing rather than theft because he did not believe the defendant was properly apprised of what he had to defend against if the indictment merely alleged theft. Mr. Paillette remarked that the legislature had said, in effect, that the defendant was properly apprised when they enacted the criminal code.

Chairman Burns remarked that whether ORS 164.025 stood up would be a question of constitutional law, and the appellate court, probably fairly soon, would decide that issue.

Section 14. ORS 132.540. Matters indictment must import; previous conviction not to be alleged; use of statutory language. Mr. Paillette explained that the only revision to ORS 132.540 was to add paragraph (g) with respect to the cause of death being unknown.

Mr. Lucas was of the opinion that paragraph (g) was ambiguous and the District Attorneys' Association had questioned whether it referred to the means of death or to the type of weapon utilized. Mr. Paillette replied that it was intended to refer to the means of death and the language was taken from State v. Schwensen, 237 Or 506, 392 P2d 328 (1964).

Chairman Burns asked why it was necessary to retain section 14 in view of section 15 in its amended form. Mr. Paillette answered that section 14 tied in with ORS 132.510 with respect to the rule by which the sufficiency of a pleading was measured.

Mr. Lucas said he thought it was a good section to keep because it pointed out that less specificity was required in an indictment than might otherwise be the case. He added that the District Attorneys' Association had recommended that paragraph (f) be deleted. Chairman Burns agreed that section 15 (7) contained the same provision.

Mr. Blensly advocated retention of paragraph (f) because the statutes should somewhere state that the act or omission charged as the crime was clearly and distinctly set forth.

Mr. Lucas commented that the last clause of paragraph (f) should perhaps be preserved because it contained a safeguard by forbidding the district attorney to allege prior convictions. Chairman Burns said that if that language referred to the old habitual criminal statute, there was no need for it. Mr. Paillette pointed out that in ORS chapter 166 there were a number of firearms statutes that were not affected by Senate Bill 40. Therefore, ORS 166.230, committing or attempting to commit a felony while armed, was still on the books and contained an enhanced penalty. In that event, Chairman Burns said, the language in ORS 132.540 referring to an enhanced penalty should be retained.

The subcommittee discussed paragraph (a) and decided it should be deleted because it was contrary to ORS 132.550.

Chairman Burns suggested that paragraph (b) also be deleted and that subsection (1) be amended to read: "The indictment is sufficient if it substantially meets the requirements of ORS 132.550 and the following:". That would tie the two sections together to show that compliance with both was necessary. Representative Paulus suggested that ORS 132.540 follow 132.550.

In response to Mr. Blensly's contention that paragraph (b) should be retained, Chairman Burns explained that if the indictment met the requirements of ORS 132.550, the indictment would necessarily have been found by a grand jury.

~~The following amendments to section 14 were adopted by unanimous~~ consent:

(1) Delete paragraph (a).

(2) Delete paragraph (b).

(3) Delete the first portion of paragraph (f) through "provided, that" and renumber it to read:

"(2) The indictment shall not contain allegations that the defendant has previously been convicted of the violation of any statute which may subject him to enhanced penalties."

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Chairman Burns asked whether the "cause of a death" in paragraph (g) should be changed to "means of death." He asked Mr. Lowe how an indictment was phrased at the present time when the means of death was unknown and was told that it read, "by means of an instrument, the more particular nature of which is unknown to the grand jury." Chairman Burns observed that the cause of death was a necessary allegation.

Mr. Paillette read from the Schwensen opinion:

"This court has stated on numerous occasions that if the cause of death is unknown to the grand jury and it is so stated in the indictment, the indictment complies with the requirements of the constitution and statutes in stating a crime. State v. Sack, 210 Or 552, 300 P2d 427."

The phrase, "cause of death," he said, was taken from that opinion.

Mr. Blensly submitted that inasmuch as there was case law on this point, it might only create problems to include this provision in the statute. Mr. Paillette agreed that Schwensen would govern but it seemed to him to be a good rule to place in the statute.

Mr. Blensly moved to delete paragraph (g), and the motion carried unanimously.

Chairman Burns then asked what subsection (2) accomplished and Mr. Blensly replied that it meant that the wording of the statute did not necessarily have to be followed. Mr. Lucas said there were many cases on that point, and the provision was helpful to the prosecutors.

The subcommittee agreed to retain subsection (2), the only revision being to renumber it as subsection (3).

ORS 132.560. Joinder of counts and charges; consolidation of indictments. Mr. Paillette noted that the commentary to ORS 132.560 was a counterpart of the commentary to section 1 (4) of the draft on Former Jeopardy.

Mr. Lucas advised that the District Attorneys' Association would like to see "same act or transaction" as used in subsection (2) of ORS 132.560 defined and expanded to allow the offenses to be aggregated. Chairman Burns asked Mr. Lucas if he had a specific proposal to accomplish his suggestion and received a negative reply. Mr. Barton, he said, was concerned about situations where he was limited in court because of the definition of "criminal episode." Mr. Blensly added that Mr. Barton's concern went to the definition of "transaction" which had generally been construed to mean that if there was evidence of another crime, it was part of the same transaction. Evidence of another crime had now been somewhat limited by the Supreme Court which held it could only be introduced if the evidence were virtually the same as the first crime and the crimes had to be so similar as to constitute a signature of the defendant. Mr. Barton had suggested that the definition of "transaction" be broadened for this reason.

The proposal of the District Attorneys' Association was further discussed and the subcommittee agreed that the commentary to the section containing an explanation of the Huennekens decision was sufficient.

Section 16. ORS 132.470. Necessity of stating presumptions of law and matters judicially noticed. Mr. Paillette explained that the only change in section 16 was to insert "or other accusatory instrument" which would, if necessary, be revised later when that term was defined in the general definition section. Chairman Burns observed that the only thing that needed to be done with this section, therefore, was to flag it for that purpose.

Section 17. ORS 132.580. Indorsement on indictment of name of witness before grand jury. Mr. Lucas said that the district attorneys had a number of objections to section 17. Basically, he said, this was a discovery statute and he questioned whether it would be needed at all if the procedure were adequately covered in the proposed discovery statutes. If it were to be retained, however, he proposed to insert "that returned the indictment" after "grand jury" in the second line of the text to make it clear that the statute referred to the last indictment. With respect to the last sentence of the section, Mr. Lucas proposed to amend that portion to provide that if a witness's name were omitted from the indictment inadvertently, the matter could be corrected by giving the defendant the omitted name at least five days prior to trial. He suggested the following language:

> " . . . without the consent of the court upon a showing that the error was inadvertent and was corrected by the state providing the name of the witness not so endorsed at least five days prior to the date of the trial."

Chairman Burns suggested it would be preferable to retain the last sentence of section 17 and add:

" . . . provided, however, that if the court finds that the name of the omitted witness was omitted by inadvertence and it was supplied to the defendant by the state at least X days prior to trial and that the defendant will not be prejudiced by the omission."

The Chairman's proposal would place the burden on the state to show to the satisfaction of the court that the defendant was not prejudiced by the omission and that he had been supplied with the name. He was uncertain, however, that five days, as suggested by Mr. Lucas, was the proper amount of time.

Mr. Paillette observed that the effect of Mr. Lucas' proposal would be to limit the scope of the McDonald rule which said that if the name was not on the indictment, the witness could not testify. Mr. Blensly said he believed there was other case law which went to the question of whether the defendant was prejudiced thereby and gave the court some discretion in the matter. He too questioned the necessity for retaining section 17 if an adequate discovery statute were enacted.

Mr. Milbank submitted that the proposed amendment to the statute was contrary to section 11, Article I, of the Oregon Constitution where the accused was entitled "to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

Chairman Burns said that at the present time when a name was omitted from an indictment charging a felony, the case was resubmitted. He asked Mr. Milbank if the defense bar could live with a provision such as he had suggested, providing the omitted name was supplied to the defendant a reasonable period before trial. Mr. Milbank replied that he could foresee instances where it could cause the defense some backtracking in a situation where the case was being built on a single witness and then it was suddenly discovered that a name had been omitted. Mr. Blensly commented that the alternative was to take the case back to the grand jury.

After further discussion, Chairman Burns suggested that section 17 be amended with the understanding that when it came before the Commission, the issue would again be discussed. The subcommittee agreed to amend section 17 substantially as stated by Chairman Burns to provide that the name would be given to the defendant at least ten days prior to trial and to require a finding by the court that the defendant was not prejudiced by the omission and, further, that the omission was inadvertent.

Mr. Blensly explained the purpose of the amendment requested by Mr. Lucas earlier to add "that returned the indictment" after "grand jury" in the first sentence of section 17. During an investigation of a series of arson cases in Yamhill County, he said, some 60 witnesses appeared before the grand jury. It was impossible to ascertain at that point exactly which witnesses would appear on a particular indictment because many of the cases were interrelated. Therefore, a new grand jury heard a limited number of witnesses on particular cases and they were the witnesses whose names were endorsed on the indictment rather than all 60 names.

Chairman Burns asked if the proposed amendment was aimed at specific cases where existing law had produced an adverse result and received a negative reply from Mr. Lucas. Chairman Burns asked if the proposal was intended to relate to the situation where the same matter was heard by successive grand juries, and Mr. Lucas replied affirmatively. The Chairman next asked if it referred to a situation where one indictment was returned and the matter was resubmitted to a later grand jury to obtain additional indictments. Mr. Lowe said it could be or it could relate to an investigation that began on one matter and the grand jury later heard some of those same witnesses on a different but related charge.

After further discussion, the amendment under discussion was approved.

Mr. Blensly suggested that "filed with" be inserted in place of "presented to" in the same sentence to conform the section to an earlier amendment in this Article. The subcommittee agreed and unanimously concurred in amending the first sentence of section 17 to read:

> "When an indictment is found, the names of the witnesses examined before the grand jury that returned the indictment must be inserted at the foot of the indictment, or indorsed thereon, before it is [~~presented to~~] filed with the court."

Mr. Milbank asked if this was the appropriate area to raise the question of hearsay testimony before the grand jury involving an officer who brings the written testimony of three other officers and reads it to the grand jury. He said this was a common practice in Marion County and asked if "a witness examined" in the last sentence of section 17 would cover that situation. The defense had no way of knowing that when only one officer testified, the grand jury had also considered the reports of three other officers. He suggested that one solution would be to require a footnote on the indictment giving the names of the officers whose reports were read.

Chairman Burns said that if the proposed discovery statute ~~contained sufficient breadth, this problem would be resolved in that~~ area, and Mr. Milbank concurred.

ORS 132.590. Effect of nonprejudicial defects in form of indictment. No change was made in ORS 132.590.

Section 18. ORS 132.620. Place of crime in certain cases. Mr. Paillette advised that the amendment in section 18 inserted sections 2 and 3 of the Venue draft in place of the existing law. Section 18 was approved as drafted.

Mr. Paillette next called attention to the existing statutes set out on page 32 of the draft to which no changes had been proposed.

ORS 132.640. Description of animal. Chairman Burns asked if ORS 132.640 would preserve the line of cases that spoke to classification of animals into such categories as "heifers" and "steers" and urged that they be exorcised. Mr. Paillette replied that this statute required description of an animal "by the common name of its class" and it was the courts, not the statute, that had caused the problem which concerned the Chairman. The theft of livestock statutes, he said, had been repealed by the new criminal code and that should solve the problem. ORS 132.640 would not perpetuate those decisions although they might be applicable in a cruelty to animal charge.

ORS 132.610. Time of crime. Mr. Milbank said he would like to see time made more certain so far as indictments were concerned. Chairman Burns commented that ORS 132.610 was chiefly concerned with alibi cases, and Mr. Milbank agreed. Mr. Lowe observed that usually the only occasion when the state could not be specific as to time was in a case where the victim was a young child who did not know the time.

After a brief discussion, Mr. Milbank conceded that in this case also the proposed discovery Article could solve the problem he had raised.

ORS 132.670. Defamation. Mr. Lowe asked why ORS 132.670 was necessary and was told by Mr. Paillette that the section originally referred to criminal libel. The new criminal code repealed the libel sections and substituted a general section on defamation. ORS 132.670 was therefore amended at the last session of the legislature to insert "criminal defamation" rather than "libel."

ORS 132.690. Perjury. ORS 132.690 was also amended at the last legislative session to conform to the new criminal code, Mr. Paillette said.

Chairman Burns permitted Mr. Lucas to return to sections considered earlier by the subcommittee to give him an opportunity to present certain suggestions made by the District Attorneys' Association.

Section 3. ORS 132.060. Oath or affirmation of jurors. Mr. Lucas asked why "by the court" had been inserted in section 3 and asked if this would preclude the clerk of the court from administering the oath. Mr. Paillette explained that the term was not intended to be limited to the judge. The old statute did not say by whom the oath was to be administered and the amendment was intended to clarify that point.

Chairman Burns asserted that "court" was intended to mean that the judge, the clerk, the bailiff and other immediate court attachés who have oath administering powers may administer the oath.

Section 6. ORS 132.110. Absence, disqualification or inability of juror. Mr. Lucas advised that the position of the District Attorneys' Association with respect to section 6 was that it should be possible for a juror to be temporarily absent without having to be discharged. For example, if someone had to leave early to go to a doctor or was perhaps an hour late arriving in the morning, it should not be necessary to go to the court to get that juror discharged or to request permission to proceed with less than seven. He proposed to allow the grand jury to proceed with at least five members present providing there was a temporary absence. In some counties, he said, when the district attorney was required to go to court to obtain permission to proceed with five members, it might mean that half a day would be wasted because the judge was not always available.

Mr. Paillette explained that section 6 had been substantially amended by the subcommittee at its meeting on April 8, 1972, and read a rough draft version of the section as amended.

Representative Paulus stated that Mr. Lucas' suggestion would raise an issue as to the person who would make the decision as to whether the juror's absence was temporary.

Mr. Blensly indicated that this subject was considered at considerable length at the April 8 meeting and at that time he had objected to permitting the absence of a grand juror on a temporary basis.

Mr. Paillette advised that the purpose of the amendments to section 6 was to clarify the ambiguity that existed in the present law as to whether a quorum was present when there were less than seven members and further to specifically allow the district attorney to proceed with five. Mr. Lucas agreed that this point needed clarification, but he contended that the procedure was being made more cumbersome for those small counties where a judge was not available at all times to grant his permission to proceed with less than seven present.

Chairman Burns observed that adoption of Mr. Lucas' proposal would create grounds resulting in additional court decisions when

defense attorneys found that their case went through the grand jury with only six members present and they could then assert that the juror's absence was more than temporary. Mr. Lucas proposed to delete the requirement for a temporary absence and provide that in any event the grand jury may proceed with five. Mr. Paillette's reaction to that proposal was that if it were adopted, it would be useless to require a seven man grand jury; it might just as well be five to begin with.

After further discussion, Representative Paulus indicated her preference for the section as drafted by Mr. Paillette, and Mr. Blensly expressed concurrence. It was unanimously agreed that the section would be submitted to the Commission without further revision.

Section 4. ORS 132.090. Presence of persons at sittings or deliberations of jury. Mr. Lowe indicated he had encountered situations where he wanted a federal prisoner to testify before the grand jury and the federal marshall would not allow the prisoner into the grand jury room unless accompanied by a guard. He asked if provision could be made for such a situation in ORS 132.090.

Representative Paulus pointed out that subsection (1) as amended made provision for "other special attendant" to be appointed to accompany the witness. Mr. Lowe thought that term probably referred to a nurse or other medical attendant. Mr. Paillette's interpretation was that the phrase was not intended to be limited to a nurse or medical attendant. The word "other," he said, did not modify "medical." If that had been the intention, the proposed statute would have stated "other special medical attendant." Chairman Burns agreed with Mr. Paillette's assessment that "other special attendant" would take care of the situation described by Mr. Lowe.

Pre-Trial Discovery; Preliminary Draft No. 1; March 1972

Mr. Paillette recalled that at its meeting on March 16, 1972, Subcommittee No. 3 had discussed Preliminary Draft No. 1 on Pre-Trial Discovery. At that time there was a representation made by the Attorney General's office that they would forthwith present a draft on this subject for consideration by the subcommittee. His attempts by telephone and by letter to secure the draft had thus far been unsuccessful. Mr. Paillette anticipated that pre-trial discovery would be a difficult area on which to reach agreement and the Commission's time schedule was such that they could ill afford to wait much longer to begin work on the subject.

Chairman Burns indicated that he would address a letter to the Attorney General calling this matter to his attention, and the members agreed that this would be an appropriate way to proceed.

The meeting was adjourned at 4:30 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission