October 3, 1972

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Judge Charles S. Crookham
Mr. John W. Osburn representing Attorney General Lee Johnson
Representative Norma Paulus
Mr. Bruce Spaulding
Representative Robert M. Stults

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

Also Present: Mr. Jim Hennings, Metropolitan Public Defender, Portland
Ms. Helen Kalil, Deputy District Attorney, Multnomah County
Mr. Keith Kinsman, Deputy District Attorney, Clackamas County
Capt. John E. Nolan, Chief of Detectives, Portland Bureau of Police
Mr. William Snouffer, Portland attorney, ACLU

The meeting was reconvened at 9:00 a.m. by Senator Anthony Yturri, Chairman.

Housekeeping Amendments Containing Conforming Amendments to Drafts Approved by Commission; Review of ORS chapters 134, 138, 139, 142, 145, 148, 149 and 151; and ORS 471.660 and 471.665

Mr. Paillette called attention to the package of "Housekeeping Amendments" in the members' notebooks consisting of 53 pages of amendments prepared by the staff chiefly for the purpose of conforming chapters of ORS to the drafts approved by the Commission. The members were also furnished with a packet containing ORS chapters 134, 138, 139, 142, 145, 148, 149 and 151 which had not been amended but which should be reviewed in connection with the procedural revision to make certain those chapters were consistent with the rest of the code. The two packages were considered together and the headings in these minutes, by means of reference to the Housekeeping Amendments, differentiate between those amendments and the ORS chapters presented to the Commission without amendment.

ORS chapter 134, Procedure in Criminal Matters Generally

ORS 134.010. Crimes subject to being compromised. Judge Crookham observed that ORS 134.010 was a compromise statute relating to the

situation where a defendant was held to answer on a misdemeanor. He said he had recently encountered a problem with this statute where the district attorney's office wanted to compromise the charge but it was a crime that could have been treated either as a felony or a misdemeanor. Question had arisen as to whether a crime that fell into the "either/or" category fitted into this statute. He suggested that the section be clarified to eliminate that problem.

Senator Burns said it seemed to him that an indictable misdemeanor could be compromised because if the case were disposed of by a conviction, the judge could sentence the person to a misdemeanor punishment. Judge Crookham said he was not proposing that the statute go beyond a Class C felony which was an indictable misdemeanor under the new criminal code.

Chairman Yturri suggested that ORS 134.010 be revised to include a Class C felony. Mr. Paillette proposed to amend it to read:

> "When a defendant is charged with a crime punishable as a misdemeanor for which the person injured . . . . "

Senator Burns moved the adoption of the amendment set forth above. Motion carried.

Mr. Chandler asked if the term "officer of justice" in subsection (1) of ORS 134.010 should be changed to a more standard term. Mr. Paillette replied that "peace officer" had been used consistently throughout the code.

Judge Crookham moved to delete "officer of justice" from subsection (1) of ORS 134.010 and substitute "peace officer." Motion carried.

ORS 134.020. Satisfaction of injured person; discharge of defendant. Judge Crookham moved to delete "indictment" in ORS 134.020 and substitute "accusatory instrument." Motion carried.

Mr. Snouffer pointed out that there were two possible ways to construe the phrase in ORS 134.020: "If the party injured appears before the court." Some judges took the position that if a written compromise were filed, that constituted an appearance; other judges required the complainant to actually appear physically before the court and at that time often chastised him for initiating the complaint and then dismissed the charges. He recommended the following language be deleted to permit the compromise to be submitted in written form: "appears before the court at which the defendant is bound to appear."

Judge Crookham moved the adoption of Mr. Snouffer's proposal.

Senator Burns commented that he would have no great objection to the motion. On the other hand, he believed the legislature had substantial reason for requiring the injured party to appear personally before the court. One of the greatest problems faced by any district court deputy was caused by people who wanted to issue a complaint against their spouses or against someone with whom they had been involved in a tavern fight and then when the case was set for trial, they didn't want to go through with it. One of the purposes of the statute was to bring them into court and chastise them. Mr. Spaulding added that it was also aimed at the situation where persons used the court as a collection agency.

Chairman Yturri said that even if Judge Crookham's motion were adopted, the court could still make the determination as to whether it was a waste of time to require the complainant to appear or whether to require him to come into court.

Vote was then taken on Judge Crookham's motion to delete "appears before the court at which the defendant is bound to appear" from ORS 134.020. Motion carried.

ORS 134.110. Delay in finding an indictment or filing an information. (Housekeeping Amendments, page 14.) Mr. Paillette advised that the staff's suggested amendment to ORS 134.110 anticipated that some allowance should be made in the statute for delay after bindover and it also made allowance for the filing of an information under the optional system. While it was not essential that the section be amended, he believed it would be clarified by the proposed revisions.

Mr. Hennings said it would create a problem to limit the section to a felony because there were certain misdemeanor crimes that had to be charged in the circuit court by indictment, an example being a crime against someone under the age of 16. The result of the amendment as proposed would be that a person could be arrested on a misdemeanor charge and held for more than 30 days whereas that would not be true if he were arrested on a felony charge.

Mr. Paillette said Mr. Hennings' criticism would be met by inserting "charged with a crime" in place of "charged with a felony." He pointed out that if the Commission's proposed constitutional amendment were adopted, it would delete reference to charging misdemeanors through the grand jury. The statute with respect to children referred to by Mr. Hennings would still remain, however, and the amendment he suggested would take it into consideration.

Judge Crookham said the same purpose would be accomplished if the original language of the section, "held to answer," were reinstated. Mr. Paillette replied that his purpose in amending that language was to avoid any implication, should the optional system be approved, that the district attorney had to return an indictment under this statute within 30 days if he decided after bindover to file an information rather than going to the grand jury.

Judge Crookham suggested that problem might be resolved by using the term "accusatory instrument" in place of "indictment." Mr. Paillette explained that the section was concerned with the more serious kinds of crimes that would go into the circuit court. It therefore required an indictment to be returned after a bindover within 30 days.

Senator Burns said it could also refer to an information. Mr. Paillette advised that the information question was one reason he had proposed the amendment, i.e., because the existing statute made no reference to an information.

Senator Burns proposed to reinstate the original language of the last clause of ORS 134.110 and to delete "charged with a felony."

Mr. Spaulding moved to adopt the amendment suggested by Senator Burns so the statute would read:

> " . . . file an information in circuit court within 30 days after the person is held to answer, the court shall order the prosecution to be dismissed, unless good cause to the contrary is shown."

Motion carried.

ORS 134.120. Delay in bringing defendant to trial. (Housekeeping Amendments, page 15.) Mr. Paillette explained that the amendments to ORS 134.120 were similar to those in the previous section.

Judge Crookham asked if there was a sanction attached to the section and was told by Mr. Paillette that the sanction was "the court shall order the accusatory instrument dismissed." Judge Crookham asked if that was a bar. Mr. Paillette said that question was answered by subsection (2) of ORS 134.140 which said that if it was a misdemeanor, it was a bar; if it was a felony, it was not. Judge Crookham asked if the Commission wanted to stay with that policy and received an affirmative reply from the Chairman and others.

Senator Burns moved to approve ORS 134.120. Motion carried.

ORS 134.130. Where there is reason for the delay. (Housekeeping Amendments, page 16.) Senator Burns moved approval of ORS 134.130. Motion carried.

ORS 134.140. Effect of dismissal. (Housekeeping Amendments, page 17.) Mr. Paillette explained that the amendment in subsection (2) of ORS 134.140 was consistent with the amendments previously adopted to ORS chapter 136 where references to felonies were amended to include Class A misdemeanors.

Senator Burns moved approval of ORS 134.140. Motion carried.

ORS 134.150. Dismissal on motion of court or district attorney. Mr. Paillette indicated that "indictment" would need to be deleted from ORS 134.150. Senator Burns suggested that it be amended by deleting ", after indictment," so it would read: " . . . order an action to be dismissed;". Mr. Paillette agreed that could be done or it could be amended by substituting "filing of an accusatory instrument" for "indictment." Chairman Yturri commented that he would prefer to follow Mr. Paillette's suggestion to relate the section to an accusatory instrument.

Judge Crookham was critical of calling a criminal prosecution "an action" as this section did.

Senator Burns moved to strike "an action, after indictment," and insert "the proceedings".

Representative Paulus suggested that "criminal" be inserted before "proceedings" in Senator Burns' motion. Chairman Yturri advised that if the person commenced a civil action, this section would be applicable but that would no longer be the case if Representative Paulus' suggestion were adopted.

Judge Crookham remarked that under this section the jurisdiction reposed in the circuit court because it spoke to the time following indictment. Therefore, if Senator Burns' motion were adopted, it would be applicable to other courts as well. Chairman Yturri was of the opinion that the provision should apply uniformly to all courts. Mr. Paillette observed that it did at the present time as a practical matter. Informations were dismissed by district and justice courts all the time.

Vote was then taken on Senator Burns' motion to amend ORS 134.150 to read:

> " . . . and in furtherance of justice, order the proceedings to be dismissed;"

Motion carried.

ORS 134.160. Nolle prosequi; discontinuance by district attorney. Mr. Chandler questioned the necessity of retaining ORS 134.160. Nolle prosequi was abolished a number of years ago, he said, so he could see no need to keep this section. Senator Burns replied that the section placed an affirmative duty upon the district attorney to prosecute and said he could not discontinue or abandon a prosecution for a crime except as provided in the preceding section.

Mr. Chandler said that in that case all the language prior to "the district attorney" could be eliminated, and he so moved.

Mr. Spaulding suggested also that "cannot" be changed to "may not" in the same section. Mr. Paillette was of the opinion that "cannot" was a better word, and Judge Crookham commented that "cannot" imposed a complete bar.

Mr. Blensly remarked that nolle prosequi was a common law action and if the statute did not say it was abolished, there might be some argument as to whether a district attorney could use it. Mr. Paillette said he didn't think there would be any problem in that regard so long as the statute stated that the district attorney could not discontinue or abandon except as provided in ORS 134.150.

Mr. Snouffer stated that a legislative abolishment of a prohibition reinstated a common law proceeding so it would be running a risk to delete the language proposed by Mr. Chandler's motion.

Mr. Chandler withdrew his motion.

ORS 134.510. Notice requesting early trial on pending charge. Judge Crookham noted that ORS 134.510 was limited to the Oregon State Penitentiary and the Oregon State Correctional Institution and suggested that it be broadened to cover other state penal institutions.

Senator Burns suggested also that "indictment, information or criminal complaint" be changed to "accusatory instrument." Mr. Paillette said it had not been revised because he did not see that it would accomplish anything inasmuch as all accusatory instruments were covered.

In answer to Judge Crookham's suggestion, Senator Burns proposed to revise the opening sentence to read: "Any inmate in the custody of the Corrections Division against whom . . . . "

Chairman Yturri asked if the person would always be in custody as opposed to being under the jurisdiction of the division.

Mr. Paillette pointed out that the statutes under consideration all dealt with persons who were confined. Their purpose was to provide relief for inmates who were actually locked up so they could get a speedy trial. If the purpose of the amendment that was being discussed was to include the women's correctional institution, he believed that institution was considered a part of the Oregon State Penitentiary for the purposes of this kind of statute and there was no need to mention it separately. Throughout ORS, he said, the language had traditionally been "Oregon State Penitentiary or the Oregon State Correctional Institution."

Mr. Chandler observed that for a number of years the women's institution was not separate, but that situation had been changed by the legislature although all the penal institutions were under the

Corrections Division. Judge Crookham was also of the opinion that the women's prison was a separate institution.

Senator Burns said that since there were a number of places in this chapter where the same problem would be confronted, the question should be resolved as to whether the women's penitentiary was or was not a part of the Oregon State Penitentiary.

Chairman Yturri asked if there was any reason why this statute should not be extended to all persons in the custody of the Corrections Division wherever they were. It would then include not only the women's penitentiary but also community centers, halfway houses, etc. Mr. Blensly replied that a person was in custody when he was out on parole, and this statute was not designed for that situation.

Chairman Yturri pointed out that the word "inmate" was used in the section as was "imprisonment" so that even if it were changed as he had suggested, it would still be clear that it was applicable only to those who were inmates, and at the same time it would be applicable to all inmates, including the women prisoners.

Senator Burns moved to delete "of the Oregon State Penitentiary or the Oregon State Correctional Institution" and insert "in the custody of the Corrections Division". Motion carried.

Tape 20 - Side 1

ORS 134.540. Presence of prisoner at proceedings. Judge Crookham noted that the same change should be made in ORS 134.540 as had just been made in ORS 134.510. He moved to amend subsection (1) of ORS 134.540 to read:

> "Whenever the presence of an inmate in the custody of the Corrections Division is necessary in any criminal proceeding . . . may issue an order directing the Administrator of the Corrections Division to surrender the inmate . . . . "

Motion carried.

Judge Crookham indicated that the same type of amendment should be made in subsection (2). Mr. Chandler replied that inasmuch as subsection (2) referred to an inmate removed "under this section," the phrase "from the penitentiary or correctional institution" could be deleted entirely and there was no need to substitute a reference to the Corrections Division. He so moved and the motion carried.

Judge Crookham noted that subsection (3) of ORS 134.540 said that if the inmate was convicted, he would be returned to the institution from which he was removed to serve his unexpired term and any additional term. The legislature did not have the authority to specify the institution where the person would serve his term and that language suggested it did.

To resolve that ambiguity, Mr. Chandler moved to amend subsection (3) of ORS 134.540 to read:

> " . . . the inmate shall be returned by the sheriff to the custody of the Corrections Division."

The balance of the subsection would be deleted by Mr. Chandler's motion. Motion carried.

ORS 134.550. Release of prisoner on bail prohibited. (Housekeeping Amendments, page 18.) Senator Burns moved to revise "bail" in ORS 134.550 to conform to the language of the Release of Defendants draft and to approve the section. Motion carried. Mr. Paillette advised that deletion of the words "on bail" would accomplish the intent of the motion.

ORS 134.560. District attorney to furnish certain documents. Senator Burns moved to delete "in the penitentiary or correctional institution" at the end of ORS 134.560 and to approve the section as amended. Motion carried.

ORS 134.605. Agreement on Detainers. Mr. Paillette advised that the staff had not proposed any amendments to ORS 134.605.

Senator Burns called attention to Article II (d) which defined "penal or correctional institution" and suggested that "or any other facility under the operation of the Corrections Division" be added at the end of that paragraph.

Mr. Osburn advised that the policy had been where detainers were lodged against individuals that they remained at one of the correctional institutions. They were generally not eligible for work release programs, halfway houses, etc.

Senator Burns moved to add an amendment to include the women's institution and other facilities under the control of the Corrections Division. Mr. Chandler was of the opinion that it was unnecessary to name the institutions and the amendment could be simplified by amending it to read: "under the control of the Corrections Division."

Judge Crookham moved to amend Senator Burns' motion by revising Article II, paragraph (d), of ORS 134.605 to read:

> " . . . shall mean any institution operated by the Corrections Division."

Motion carried.

ORS chapter 138, Appeals; Post-Conviction Relief

ORS 138.060. Appeal by state. Mr. Paillette advised that ORS 138.060 had been amended in connection with the Trials draft to delete subsection (2) on the grounds that there would no longer be a plea of former conviction or acquittal.

Mr. Blensly asked if "indictment" had been changed to "accusatory instrument" in that section and received an affirmative reply from Mr. Paillette.

Representative Paulus advised that ORS chapter 138 was carefully reviewed last year by Judge Schwab in connection with the amendment of the civil sections.

Mr. Osburn commented that the Commission was apparently satisfied that they knew what was meant by an "order made prior to trial dismissing the indictment." The question he raised was whether an order granting a motion to set aside was the same as an order dismissing the indictment. Mr. Snouffer advised that based on Oregon case law the two were not the same.

Mr. Osburn, in light of Mr. Snouffer's comment, moved to amend ORS 138.060 to include an order made prior to trial dismissing or setting aside the accusatory instrument. He added that he did not want to suggest that the state could take its appeal from the district court directly to the Court of Appeals so it would be necessary also to revise the language in the preamble to the section to make it read that the state may take an appeal from the circuit court to the Court of Appeals.

He then restated his motion to amend ORS 138.060 to read:

"The state may take an appeal from the circuit court to the Court of Appeals from:

"(1) An order made prior to trial dismissing or setting aside the [indictment] accusatory instrument;"

[No further change.]

Motion carried with Representative Paulus voting no.

Following a recess, Representative Paulus moved to reconsider the vote by which the Commission had adopted the amendment to subsection (1) of ORS 138.060. She explained that another statute specifically set out the reasons for setting aside an indictment and they related to inaccuracies in the presentment of an indictment. The amendment just approved by the Commission had not been adopted by the last session of the legislature because they decided that the proper

procedure was not appeal, but resubmission. The obvious question then was what would happen when the judge made an error and refused to resubmit, and the answer was that it was tough luck and the district attorney should tighten his procedures.

Mr. Blensly recalled a district attorney telling him of a case where the indictment was set aside and the issue was whether or not he could join certain actions. He was in a real quandary because if he did not appeal, then his only alternative was to go back and charge separate counts. In most cases the matter would just be resubmitted, but there were certain instances where it would be an important issue as to whether the district attorney could plead as he had attempted to plead initially. This was especially important under the proposed procedure code, he said, where there would be demurrers made on the basis of making more definite and certain.

Representative Paulus withdrew her motion because, she said, it was obvious that there were not enough votes to approve it.

ORS 138.145. Temporary retention at place of original custody of defendant under sentence of imprisonment. (Housekeeping Amendments, page 25.) Judge Crookham commented that since the legislature did not have the authority to designate the institution to which an inmate would be sent, ORS 138.145 should be amended to place the defendant in the custody of the Corrections Division.

Chairman Yturri indicated that this was the type of editorial amendment the staff could make, and the Commission by unanimous consent directed that whatever amendments were necessary to ORS 138.145 to correct the criticism made by Judge Crookham should be made by the staff.

ORS 138.160. Appeal by state as stay of judgment or order; release. (Housekeeping Amendments, page 26.) Chairman Yturri indicated that the revision in ORS 138.160 had been made to conform to the Release of Defendants draft.

Judge Crookham noted that, with one or two exceptions, up to the time of trial a defendant had an absolute right to bail. The situation under ORS 138.160 was in effect an interlocutory appeal, usually on a motion to suppress, and he asked if the Commission believed that at that point the defendant's status had changed sufficiently so that he should be denied the right to bail. The statute stated that it was discretionary as to whether he was to be released during that period of time and it was Judge Crookham's view that the defendant should still have the same right to bail that he had when he was indicted.

Mr. Paillette said that was the purpose of the amendment. He noted that "in the discretion of the court" had been deleted and that the reference to sections 1 to 12 of the Release of Defendants Article made it quite clear that he had a right to release.

It was the intention of the Commission that the reference to sections 1 to 12 of the Release of Defendants Article would govern in the situation referred to in ORS 138.160.

Mr. Chandler moved the approval of ORS chapter 138 as amended. Motion carried unanimously. Voting: Blensly, Burns, Chandler, Clark, Cole, Crookham, Osburn, Paulus, Spaulding, Stults.

ORS chapter 136, Trial

ORS 136.110, 136.290, 136.295, 136.720, 136.830, 136.840. (Housekeeping Amendments, pages 19 through 24.) Mr. Paillette explained that the amendments to ORS chapter 136 were made only to reconcile the statutes to drafts approved by the Commission.

Mr. Chandler moved to approve the Housekeeping Amendments to ORS chapter 136. Motion carried.

ORS 136.830. Order when evidence shows guilt; new indictment. Judge Crookham noted that "indictment" had not been changed to "accusatory instrument" in ORS 136.830 and asked if the Commission had made a blanket rule to make that change in every instance. Senator Burns replied that Mr. Paillette had been given discretion to make that type of revision wherever he considered it appropriate.

ORS chapter 139, Witnesses

ORS 139.040. Issuance of subpena by district attorney for witnesses at trial. ORS 139.050. Issuance by clerk for witnesses for defendant. ORS 139.060. Proceeding to obtain subpenas for more than five witnesses. Mr. Snouffer indicated that ORS 139.040, 139.050 and 139.060 set up a fairly restrictive mechanism limiting both the district attorney and the defendant to five subpenas in a criminal trial unless some fairly complicated motions and affidavits were approved by the court. He requested the Commission to consider either deleting that limitation or expanding the number of subpenas to something more reasonable than five.

Chairman Yturri asked Judge Crookham if the limitation created a problem. Judge Crookham replied that it was an unhandy procedure. The courts generally gave the district attorney an unfettered right to subpena witnesses but required the defense attorney to file a lot of papers. He agreed with Mr. Snouffer that it placed a burden on the defense that was not appropriate and suggested that the number be increased but still leave some restriction in the statute because of the possible financial implications. He said five was unrealistic, but ten would place the number in the de minimus category.

Mr. Clark expressed doubt that the statutes created enough problems to warrant changing them.

Ms. Kalil contended that it was unrealistic to set any number at all. In her opinion both sections were obsolete and unfairly tied the hands of both sides.

Mr. Spaulding said he had known of cases where the defense counsel had collected his fee by means of subpenaing unnecessary witnesses and having those fees turned over to him. Chairman Yturri responded that Mr. Spaulding's comment was reason enough to retain some kind of limitation in the statute, and Senator Burns agreed there should be some restraint.

Judge Crookham moved to amend ORS 139.040, 139.050 and 139.060 to provide for a limitation of ten witnesses to be subpenaed in place of five. Motion carried. Mr. Clark abstained from voting because, he said, he did not have sufficient information on the subject to cast an intelligent vote.

Mr. Paillette noted that ORS 139.060 was unnecessarily cumbersome and could be simplified by inserting "for good cause shown" and deleting some of the excessive language. Judge Crookham replied that the last two sentences worked to prevent abuse in this area and tended to give each side a certain amount of discovery on the other.

The Commission decided to make no further revision in ORS 139.060.

Mr. Chandler moved to approve ORS chapter 139 as amended with the understanding that the staff would make whatever revisions were necessary for style and to conform it to other chapters. Motion carried.

ORS chapter 141, Search Warrants; Search of Person; Interception of Communications

ORS 141.740. Records confidential. (Housekeeping Amendments, page 28.) Mr. Paillette explained that the amendment to ORS 141.740 conformed the section to the Pre-Trial Discovery draft.

Senator Burns moved to approve ORS 141.740 as amended by the staff. Motion carried.

ORS chapter 142, Stolen Property and Property Taken from Person in Custody

Mr. Paillette indicated that some of the sections in ORS chapter 142 would be repealed because of the provisions of the Search and Seizure draft dealing with seized property, among them ORS 142.010, 142.020 and 142.030.

ORS 142.080. Forfeiture of conveyances used unlawfully to conceal or transport stolen property. ORS 142.090. Seizure of stolen animals or other property being transported; proceedings against person arrested. Mr. Blensly indicated that a question had arisen with respect to a due process notice to the owner when an automobile was forfeited under the statute dealing with illegally transporting liquor and narcotics. He asked if the same question arose under ORS 142.080 on forfeitures of automobiles when a person unlawfully concealed or transported stolen property in a vehicle not belonging to him.

Mr. Paillette agreed that it did raise that problem. He was of the opinion that ORS 142.080 and 142.090 were poor statutes but the staff had not tried to change them simply because of time limitations. He had, however, attempted to deal with the problem of forfeiture of vehicles in drug cases because those statutes were used so frequently. Assuming the Commission approved of the proposed amendments in that area, he said similar provisions could be written into ORS 142.080. He concurred with Mr. Blensly that the statute lacked the basic elements of due process.

Mr. Blensly said a number of problems had also arisen under ORS 142.090 and it should either be deleted or revised so the district attorneys could use it.

ORS 142.990. Penalties. Judge Crookham moved that the penalty in ORS 142.990 be changed to a Class B misdemeanor. Motion carried.

Proposed Amendments to ORS 471.660 and 471.665

Inasmuch as the subject was being discussed at this time, Chairman Yturri directed that the Commission turn to the amendments prepared by Mr. Paillette dealing with seizure and forfeiture of automobiles. A copy of the proposal is attached hereto as Appendix A.

Mr. Paillette indicated that this subject had been discussed in subcommittee during consideration of the Search and Seizure draft and it was decided that since it was a specialized problem, it would not be dealt with under that Article. It had also been discussed by the Commission on previous occasions. In rewriting the sections, he said he had attempted to retain the basic sections, write more due process into them and make them more specific on the types of notification required.

The complaints that he had heard concerning these statutes were with respect to the innocent third party who owned the vehicle which someone else was using when he was arrested for possession of narcotics and the car was seized. Ultimately, most if not all of those people had their vehicles returned to them but in the meantime the car was impounded and stored and in order to get their car back, the innocent parties had to pay storage, towing costs, etc.

Mr. Paillette outlined that the amendments attempted to shift the burden from the innocent person, placing the burden on the state to make a showing that the person had some culpability in connection with the crime that resulted in the seizure in order for the vehicle to be held.

ORS 471.660. Seizure of conveyance transporting liquor. Mr. Paillette said it should be kept in mind that these statutes were drafted for use under the Liquor Control Act and had been incorporated by reference into the Narcotics and Dangerous Drugs Act.

Senator Burns moved approval of the amendments and suggested that the same type of amendments be added to ORS 142.080 and 142.090.

With respect to subsection (3) which talked about the owner of the vehicle, Mr. Blensly asked if any consideration had been given to cases where there was joint ownership or where legal title rested with a mortgage company or someone other than the registered owner. Mr. Paillette replied that the statute originally said that the vehicle or conveyance "shall be returned to the owner" and he had not tried to be more specific than that. He asked if a problem had been encountered in trying to determine the owner.

Mr. Blensly replied that it was a problem at the present time and it should be answered by this statute. His office, he said, had stayed away from situations involving joint ownership because there was no answer to the problem in the statute as to whether the wife had the right to come in and get the vehicle back when it was owned by her and her husband. Also, when the bank had legal title, a question arose as to whether the bank had the right to take the car or whether they were just lienholders.

Chairman Yturri commented that the court could make that determination.

Representative Stults noted that ORS 471.665 (1) said that "liens against property sold under this section shall be transferred from the property to the proceeds of the sale" which answered the lienholder problem.

Mr. Paillette explained that ORS 471.660 was concerned only with the seizure and the notification of the seizure. Assuming there was a conviction and then a forfeiture, ORS 471.665 then came into play and there were some other considerations there that were not present at the early stages. Assuming the registered owner had financed the car through a bank, the bank should not be particularly concerned about the seizure but they would be concerned about the forfeiture if it reached that stage.

Mr. Blensly asked why subsection (4) did not require that notice be sent to the last registered owner at the Department of Motor

Vehicles. Mr. Osburn replied that if the vehicle were a boat or an aircraft, the registration would not be on file with the Department of Motor Vehicles.

In reply to a question by the Chairman, Mr. Paillette explained that these amendments did not prevent the court from holding the vehicle just because someone moved for its return, but they did require a showing by the state.

Senator Burns asked if the defendant would have to pay the towing and storage charges and was told by Mr. Paillette that under subsection (7) if the court ordered the return of the vehicle, the movant would not be liable for those costs.

Mr. Osburn was concerned that the state might bring an in rem proceeding against the car in a civil case and at the same time the defendant might be moving in a criminal case. Mr. Paillette replied that the forfeiture proceedings under ORS 471.665 were meant to be considered in conjunction with ORS 471.660 which contemplated, the way he read the statute, a criminal proceeding and not a separate in rem proceeding.

Mr. Osburn next asked if the was an appeal from a forfeiture decision where the defendant was convicted and there was a forfeiture order subsequent to conviction. He said he was concerned about converting a criminal case into a civil case after conviction. Chairman Yturri replied that he could see nothing in the statute that would prohibit an appeal.

Mr. Osburn said his office had seen defendants urge that the state could not appeal an order releasing a vehicle after the defendant's conviction. The Chairman asked if any cases like that had been urged successfully and was told that there had not yet been a case where the issue was squarely raised.

Mr. Osburn was of the opinion that there should be one provision for forfeiture of vehicles which would work the same in every case -- liquor, narcotics, stolen property and livestock. Mr. Blensly suggested that ORS 142.080 could incorporate these provisions by reference, just as the Narcotics Act incorporated the liquor statutes by reference. Senator Burns agreed and added that he was inclined to believe they should be civil proceedings so each side would be accorded the right of appeal.

Mr. Paillette explained that these were criminal proceedings because the forfeiture was tied in directly with the conviction.

Mr. Blensly was of the opinion that a civil proceeding could be brought against a car; for example, "State of Oregon v. 1 1969 Cadillac automobile." Mr. Osburn commented that was the way the cases said it was supposed to be done.

Mr. Paillette pointed out that the amendments he had proposed made no change in the type of action that could be brought and his amendments made no attempt to deal with that problem. Mr. Blensly agreed that they made no chage in that regard but said his contention was that they should perhaps go farther in setting up the procedure.

Mr. Osburn said that ORS chapter 471 apparently contemplated that the proceedings would be part of a criminal case whereas the civil law said it was a separate in rem proceeding. His concern was that they should be the same and he recommended that they should be a civil proceeding.

Chairman Yturri asked Mr. Osburn if he would be willing to draft a statute which would provide a uniform procedure for all of these situations and he agreed to do so. Representative Paulus pointed out that these amendments were drafted to take care of specific abuses and if the Commission waited for Mr. Osburn's amendments, they stood a chance of losing the amendments. Chairman Yturri agreed that the proposal would not get into the final report if action were deferred. The Commission, he said, should decide whether they wanted to preserve the amendments in these two sections rather than go into the question of in rem proceedings. Since the amendments were confined to the specific problem of the innocent third party, his recommendation was that the Commission adopt the sections as amended and then go into the question of in rem proceedings later if time permitted.

Senator Burns recalled that the motion he had made with respect to these sections was to approve them and to authorize Mr. Paillette to incorporate this same type of language regarding the forfeiture procedure into ORS 142.080 and 142.090 to make them more definitive and to meet the objections raised by Mr. Blensly. That motion, he said, would meet the time element and permit the recommendation to be included in the final draft.

Mr. Paillette indicated that he could amend the two sections in ORS chapter 142 to include similar provisions. If the Attorney General or someone else wanted to propose a bill for a uniform forfeiture procedure including some kind of an in rem proceeding, there was nothing to prevent his doing so. However, it would be impossible to make the printing deadline for the final report if the Commission postponed action on these sections today. These statutes could be repealed entirely if the Attorney General wished to submit a separate bill substituting a uniform procedure.

Mr. Osburn agreed that his office could prepare a separate bill, but he wanted it understood that it would not be a negation of what the Commission was considering with respect to these two sections.

Judge Crookham noted that subsection (3) of ORS 471.660 required the vehicle to be returned to the sheriff on the day of trial. He said that could be an awkward time and he suggested that it should be at a time to be specified by the court. Chairman Yturri stated it might

raise a problem when the sheriff was unable to contact the court and Judge Crookham replied that since the matter was in the hands of the sheriff, it would be acceptable to require that it be delivered at a time to be specified by him. According to that subsection, he said, the sheriff was the one who would approve the bond.

Mr. Spaulding objected to that provision. Mr. Blensly commented that the court would know when the trial was set and would also know whether a vehicle had been seized and he was of the opinion that the court was the appropriate one to order the time when the vehicle was to be returned.

Mr. Clark remarked that when the decision was left to the sheriff, in reality it was the district attorney who would make the decision. Mr. Spaulding agreed and for that reason objected to leaving the decisions to the sheriff both as to when to return the vehicle and also as to the approval of the bond. Those should be decisions of the court, he said.

Following a brief discussion Mr. Spaulding moved to amend subsection (3) of ORS 471.660 to leave the approval of the bond and the date of return of the property to the court rather than to the sheriff. It would then read:

> " . . . approved by the court and conditioned to return the property to the custody of the sheriff at a time to be specified by the court."

Motion carried.

Judge Crookham noted that subsection (7) of ORS 471.660 absolved the movant from any liability for towing or storage charges. He asked who would be responsible for those charges. Mr. Blensly replied that it would be the agency that contracted with the towing company to handle the vehicle, i.e., the sheriff or the district attorney. Judge Crookham pointed out that if the sheriff seized the vehicle, he was acting in good faith, yet the costs would come out of his budget. Mr. Spaulding replied that the sheriff was no more innocent than the third party who knew nothing about the seizure. Senator Burns said the provision would ensure that there would be greater discretion employed in seizing vehicles. Mr. Blensly commented that the question was whether the defendant or the state should be paying for those services, and the Commission was in agreement that the contracting agency should pay the costs.

Vote was then taken on Senator Burns' motion to approve ORS 147.660 and 147.665 as amended. Motion carried unanimously.

Senator Burns next moved to incorporate the same procedure into ORS 142.080 and 142.090. Mr. Blensly asked if the intention was to do so by reference to the chapter 147 statutes, and Senator Burns replied that it was not. It would be easier to understand, he said, if the procedure were placed in the appropriate statutes. Motion carried.

ORS chapter 148, Special Law Enforcement Officers

Mr. Paillette indicated that he had requested the Governor's office to review ORS chapter 148 but they had no specific recommendations inasmuch as it was a chapter they had never used.

ORS 148.210 and 148.220. Appointment on premises of railroad or steamboat companies. Mr. Clark moved to delete ORS 148.210 and 148.220 on the ground that it was inappropriate to vest the power of the state in private agents when they represented a special interest. Throughout the revision, he said, the Commission had attempted to eliminate special interest statutes and it would be inconsistent on that basis to retain these two.

Senator Burns asked how far the jurisdiction of the railroad police extended and if they were given commissions as deputy sheriffs. Mr. Clark replied that they were not but they made investigations regarding thefts from railroad properties and their investigations were not confined to railroad property. Mr. Chandler commented that ORS 148.210 said they could make those investigations but they could not arrest off the railroad premises.

Senator Burns said that if Mr. Clark's motion carried, the railroad police, or anyone else the railroads wanted to hire to do their investigations, could still make whatever investigations they considered necessary.

Vote was taken on Mr. Clark's motion to delete ORS 148.210 and 148.220. Motion carried with Mr. Chandler among those voting no.

ORS 148.010. Power of Governor to employ special agents. Judge Crookham noted that ORS 148.010 was limited to "the Oregon State Penitentiary" and should be amended to conform to the rest of the code by referring to "inmates" and to the "Corrections Division." By unanimous consent Mr. Paillette was directed to make the necessary amendments to accomplish that purpose.

ORS chapter 149, Rewards

Mr. Blensly commented that ORS chapter 149 was quite restrictive regarding rewards. He said he had seen one or two cases where he thought it would have been appropriate for the county to have authority to give rewards for information on narcotics cases. In some areas of the state the practice was to procure private funds in some manner to provide a source of funds for rewards of that type and he questioned the legality of such devices when they were not actually authorized by statute. The Chairman was of the opinion that they would be illegal if not authorized by statute.

ORS 149.040. Election of sheriff of other county to receive reward. Mr. Chandler moved to delete ORS 149.040. He said the general practice was that most police departments prohibited officers from accepting rewards offered, and it was inappropriate for the statute to say that the sheriff could receive rewards when the state police and city police officers could not. Motion carried.

ORS chapter 151, Public Defenders

Mr. Paillette outlined that he had asked Gary Babcock, State Public Defender, to review ORS chapter 151 and he had no recommendations for amendment.

ORS 151.010. Office of county public defender created by county; appointment; recommendation by circuit court; termination of office. Mr. Hennings distributed an amendment he proposed to ORS 151.010, subsections (1) and (2):

> "(1) The Board of County Commissioners of any county may provide County Public Defender services by:
>
> "(a) Contract with an attorney or group of attorneys, or
>
> "(b) Creation of an office of County Public Defender and appointment of a County Public Defender as provided in ORS 151.010 to 151.090.
>
> "(2) Such contract provision or creation of office of County Public Defender and appointment of a County Public Defender shall be subject to the approval of a majority of the County Circuit Court."

Mr. Chandler was critical of the provisions of subsection (2) of Mr. Hennings' proposed amendment. For one thing, the meaning of "county circuit court" was unclear and for another he thought it was a poor system to require circuit court approval of the appointment of the public defender.

Judge Crookham pointed out that under the present system the court appointed counsel for indigent defendants and that was really what the amendment was concerned with. Mr. Clark added that if the court had nothing to say about the appointment and disapproved of it, the judge might decide he wouldn't assign the public defender to any of his cases.

Mr. Chandler said the circuit judge should not be naming the lawyer who practiced before him unless he named all of them including the district attorney. His position was that if the county commissioners were going to establish the office and pay for it, they should be given authority to fill the office.

Mr. Chandler then moved to delete subsection (2) of Mr. Hennings' proposed amendment.

Mr. Hennings explained that the amendment was intended to give the counties more control and more authority should the office of regional public defender be created. He added that he personally was a believer in the contract system. Chairman Yturri asked Mr. Hennings who he believed should approve the appointment. Mr. Hennings said that since the county commissioners were paying for it, they should set the office up and draw up the contracts. However, as Judge Crookham pointed out, appointed counsel was appointed by the circuit judge at the present time.

Representative Paulus agreed with Mr. Chandler that circuit court judges had no business approving the appointment of a public defender.

If the public defender were appointed without his approval, Chairman Yturri inquired of Judge Crookham what authority he would have to forbid the public defender to represent a defendant in his court. Judge Crookham answered that he could appoint private counsel to represent each defendant. He believed the proposal was not an inappropriate way to insure professional competency and it also served as a check. It did not give the courts untrammeled power to appoint, but it did give them a veto, he said.

Representative Cole asked if Mr. Chandler's motion to delete subsection (2) of the amendment was intended to reinstate subsection (2) of the present statute. Mr. Chandler replied that the intent was to delete subsection (2) in both cases. Vote was then taken on Mr. Chandler's motion and it carried. Voting for the motion: Burns, Chandler, Cole, Osburn, Paulus, Stults. Voting no: Blensly, Clark, Crookham, Spaulding, Mr. Chairman.

Mr. Chandler moved to adopt subsection (1) of Mr. Hennings' proposed amendment and to approve the existing subsections (3) and (4) of ORS 151.010. Motion carried with Judge Crookham voting no.

Captain Nolan inquired if the section assumed that the public defender must be an attorney and the Commission was in agreement that it did.

The Commission recessed for lunch and reconvened at 1:00 p.m.

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Judge Charles S. Crookham
Mr. John W. Osburn representing Attorney General Lee Johnson
Mr. Bruce Spaulding
Representative Robert M. Stults

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

Others Present: Mr. Jim Hennings
Mr. Keith Kinsman
Mr. William Snouffer

Vice Chairman Burns reconvened the meeting at 1:00 p.m. and presided until the Chairman's return during the discussion of ORS chapter 161.

ORS chapter 145, Prevention of Crime and Security to Keep Peace

Mr. Paillette explained that ORS chapter 145 covered three subjects, one dealing with public officers (ORS 145.010 to 145.060), one with peace bonds (ORS 145.120 to 145.600) and from ORS 145.610 to the end of the chapter were the statutes containing the 1971 version of the Governor's bill to deal with disturbances on campuses and public property. The staff's recommendation was that the peace bond statutes, ORS 145.120 through 145.310, be repealed.

Judge Crookham noted that subsection (1) of ORS 145.010 should be deleted. Mr. Osburn inquired as to the necessity of retaining any of that section. Senator Burns said that subsection (3) should be retained if ORS 145.020 through 145.060 were not going to be repealed.

Mr. Chandler questioned the constitutionality of ORS 145.020. Mr. Paillette advised that ORS 145.020 had been amended by the last session of the legislature to make it consistent with the riot provisions in the criminal code.

Judge Crookham was critical also of ORS 145.050.

Mr. Chandler moved to delete subsection (1) of ORS 145.010 and also to delete all the statutes relating to peace bonds in accordance with the staff's recommendation. Motion carried.

Mr. Blensly pointed out that ORS 145.040 would need some revision inasmuch as ORS 145.210 and ORS 145.230 had been repealed by adoption

of Mr. Chandler's motion. Senator Burns explained that ORS 145.040 had also been repealed by the motion just adopted since it too related to peace bonds.

Judge Crookham moved to delete ORS 145.050. Motion carried.

Mr. Clark moved to delete ORS 145.010 through 145.060. Senator Burns explained that ORS 145.060 was an enabling provision for an interstate compact and should be retained. Mr. Clark withdrew his motion.

ORS chapter 156, Proceedings and Judgment in Criminal Actions

ORS 156.010. Criminal procedure statutes govern generally. (Housekeeping Amendments, page 33.) Mr. Chandler moved approval of ORS 156.010 as amended by the Housekeeping Amendments. Motion carried unanimously.

ORS 156.030. Complaint is deemed an indictment to determine sufficiency. (Housekeeping Amendments, page 34.) Mr. Paillette said there were a number of statutes in ORS chapter 156 and also a few in ORS chapter 157 which caused him concern because he was not certain how they should be handled. They dealt, he said, with justice courts, and he had been particularly concerned about ORS 156.030. If the references to forms of complaints and informations that had been approved by the Commission were enacted, they would be incorporated into this statute. Under the approach taken throughout the code of using the term "accusatory instrument," there wouldn't be any question about their application to these sections. However, justices of the peace were so accustomed to using and referring to ORS chapters 156 and 157 to find out what procedure to follow that he thought there was a sound reason to retain them although they should be updated so as not to be inconsistent with other revisions made in the code.

Senator Burns asked if the Commission wanted to eliminate ORS chapters 156 and 157 and draw a boilerplate statute referring the justice courts to the procedural code. Judge Crookham replied that he would be opposed to that course without a great deal more study.

Mr. Chandler moved to approve ORS 156.030 as amended with the addition of "necessarily" between "not" and "legally" in the commentary to take care of the few justices of the peace in the state who were lawyers. Motion carried unanimously.

ORS 156.210. Judgment on plea of guilty or conviction. (Housekeeping Amendments, page 35.) Mr. Chandler moved adoption of ORS 156.210. Motion carried without opposition.

ORS 156.220. Form of entry of judgment of conviction. (Housekeeping Amendments, page 36.) Mr. Chandler moved approval of ORS 156.210. Motion carried unanimously.

Release of defendants in justice court. (Housekeeping Amendments, page 37.) Senator Burns explained that this was a new section on release of defendants by justice courts. Mr. Paillette advised that the purpose of adding this section was to state specifically that the Release of Defendants Article was applicable to justice courts and to insure that there would be no confusion on that point.

Mr. Chandler moved to approve the addition of the proposed section to the code. Motion carried.

ORS 156.610 Criminal procedure in district courts generally. (Housekeeping Amendments, page 38.) Motion carried to approve ORS 156.610.

ORS 156.620. Challenge of jurors. (Housekeeping Amendments, page 39.) Mr. Paillette explained that the amendment to ORS 156.620 was an attempt to make sure that the procedure would be the same in justice courts as in other courts under the changes the Commission made to the other sections dealing with challenges.

Mr. Chandler moved to approve ORS 156.620. Motion carried.

Tape 20 - Side 2

ORS 156.130. Demand for and selection of jury. ORS 156.160. Necessity of prepayment of trial fee; payment thereof. Mr. Paillette called attention to two sections in ORS chapter 156 that did not appear in the Housekeeping Amendments packet -- ORS 156.130 and 156.160. He asked the Commission to give some consideration to the question of retaining the provision requiring that a jury trial must be demanded.

Senator Burns said he believed the defendant should be required to affirmatively demand a jury trial in justice court providing that provision was not in conflict with the Constitution.

Judge Crookham said this question posed a very practical problem because there were thousands of prosecutions each year of this type under the Uniform Traffic Citation Act. Senator Burns said many of them were violations where the constitutional right to a jury trial would not be involved.

Mr. Paillette indicated that his only purpose in bringing up the matter was to make sure that the Commission was aware of the problem. No action was taken.

ORS chapter 157, Appeals in Criminal Actions; Writ of Review

ORS 157.020. Who may appeal; appealable judgments and orders. Judge Crookham called attention to ORS 157.020 which was the appeal statute applying to either justice or district courts. A problem had been raised in his court as to whether the section was exclusive and particularly whether paragraph (d) gave the plaintiff or the state the

right to appeal an order suppressing evidence made prior to trial. The district attorney's office had gone two ways, he said. When they lost the motion to suppress, they appealed to the circuit court and then went back down to the trial court if there was a reversal. In other cases when they lost the motion to suppress, they would go on through and if they won and the matter went to the circuit court, the motion to suppress was heard all over again.

Senator Burns asked Judge Crookham if he was suggesting that the right to appeal should be abrogated and received a negative reply.

Mr. Paillette indicated that at one of the Commission meetings this subject was discussed and the question was resolved. Senator Burns said his recollection was that it was considered in conjunction with Senate Bill 450 which was passed by the last session of the legislature. It would abolish de novo appeals and would thereby resolve the question raised by Judge Crookham.

Mr. Blensly moved to amend ORS 157.020 to conform to the amendment made to ORS 138.060 to include an order made prior to trial dismissing or setting aside a complaint or information. Mr. Paillette indicated that there would be no motions to set aside a complaint or information under ORS 157.020 because there were no statutory grounds for doing so. All the grounds for setting aside an indictment, he said, were peculiar to the grand jury and did not attach to informations and complaints. Mr. Blensly withdrew his motion.

ORS 157.050. Appeal as stay of proceedings; release on appeal. (Housekeeping Amendments, page 40.) Judge Crookham asked if he was correct in assuming that under ORS 157.050 a person had a right to bail and bail was not discretionary as it was in the situation where the defendant appealed from the circuit court to the Court of Appeals. Mr. Paillette confirmed Judge Crookham's assessment of the section.

Mr. Blensly said there was a good reason for having the statute the way it was written when there was provision for a trial de novo but suggested the Commission might want to reconsider it if there was to be no trial de novo. In that circumstance perhaps the defendant should be entitled to bail as a matter of right.

Mr. Hennings commented that all the bail did was stay the proceedings.

Following a brief discussion, Mr. Chandler moved to approve ORS 157.050 as amended by the Housekeeping Amendments. Motion carried.

ORS chapter 161, Crimes and Punishments; General Provisions

ORS 161.465. Duration of conspiracy. (Housekeeping Amendments, page 41.) Mr. Chandler moved to approve the conforming amendments in ORS 161.465. Motion carried.

Miscellaneous Amendments to ORS chapters 162, 341, 352, 426, 484 and 506. (Housekeeping Amendments, pages 42 through 53.)

Mr. Chandler moved to approve pages 42 through 53 of the Housekeeping Amendments which included amendments to the following sections: ORS 162.135, 341.300, 352.360, 426.080, 426.530, 426.570, 484.010, 484.020, 484.040 and 506.526.

Mr. Clark asked if the reference to "bail" in ORS 484.010 on page 50 of the Housekeeping Amendments should be changed. Mr. Paillette replied that a bail schedule was in effect with respect to traffic offenses, and the staff made no effort to delete references to bail in the traffic area.

Vote was then taken on Mr. Chandler's motion. Motion carried unanimously.

Preliminary Provisions; Preliminary Draft No. 1; September 1972

Section 1. General definitions for Criminal Procedure Code. Mr. Paillette indicated that some of the definitions in section 1 had been discussed and approved previously, one example being the definition of "district attorney." Also, "ultimate trial jurisdiction" had been discussed in connection with the Search and Seizure Article but the term was not defined at that time. The definitions in the section were his suggestions for attempting to clarify some of the terminology used in the code. In addition, there were other definitions that had already been approved by the Commission which would appear in this section in the final draft, one example being the definition of "accusatory instrument."

Subsection (1) attempted to define "arraignment" which was referred to in the Release of Defendants draft. He said it was probably not essential that it be defined but was a definition which should at least be considered and was similar to the one in the New York Procedure Code. The term, he said, was not defined in existing law.

Mr. Osburn commented that it seemed strange to refer to an arraignment as being an occasion on which the defendant appears "for the purpose of having the court acquire and exercise control" over him. He said he had always thought of an arraignment as the time when a person was brought before the court or appeared there voluntarily for the purpose of having the charge formally read to him.

Chairman Yturri commented that in the proposed procedure code there was already a statement as to what occurred at an arraignment, and that being the case, he questioned the necessity of including this definition.

Following a brief discussion, Senator Burns moved to delete subsection (1) of section 1. Judge Crookham seconded and the motion carried unanimously.

With respect to the definition of "bench warrant" in subsection (2) Senator Burns asked if the term was defined in the criminal code and received a negative reply from Mr. Paillette.

Mr. Blensly moved to amend subsection (2) to read:

" . . . a defendant in the action who has previously appeared before the court upon the accusatory instrument . . . . "

Motion carried.

Mr. Paillette explained that the definition of "correctional facility" in subsection (3) was intended to clear up any doubt that the definition in the criminal code as that term was defined in ORS 162.135 also applied to the procedural code.

With respect to the definition of "criminal action" in subsection (4), Chairman Yturri said that he had noticed several places in the code where "action" was used without being preceded by the word "criminal." Judge Crookham noted that subsection (5) defined "criminal proceeding" as being part of a criminal action.

Mr. Paillette advised that these definitions were important because of section 2 concerning the applicability of provisions of the new code. As defined, the main thing was the action and the proceeding could be a part of the action; for example, a motion to suppress or a motion to return or restore property.

In response to a question by Senator Burns, Mr. Paillette explained that the purpose of defining "warrant of arrest" in subsection (9) was to clearly distinguish it from a bench warrant.

Definition of "inmate." Judge Crookham asked if it would be desirable to define "inmate" in the general definitions section. The term was used a number of times, he said, and the Commission apparently had in mind that it meant someone who was in actual physical secure custody. Mr. Blensly was of the opinion that the word had a clear meaning, and Mr. Chandler concurred that in the sense in which it was used throughout the code, there was little doubt as to its meaning.

Mr. Snouffer asked if "inmate" included someone who had been transferred to a federal institution or someone in a work release facility or halfway house so long as he was in custody, and the Commission was in agreement that this was their intent.

Judge Crookham moved to approve section 1 as amended. Motion carried.

Section 2. Applicability of provisions to actions occurring before and after effective date. Senator Burns moved to approve section 2. Motion carried.

Section 3. Parties in criminal action. Mr. Chandler moved to approve section 3. Motion carried.

Section 4. Commencement and disposition of criminal action. Mr. Paillette explained that the purpose of section 4 was to tie up what the Commission was attempting to accomplish by use of the term "accusatory instrument."

Judge Crookham suggested that it might be necessary to go one step further for the purpose of tolling the statute and require not only the filing but the issuance of some sort of process. The question he raised was whether some form of service or attempted service was an integral part of the commencement of a criminal action.

Mr. Paillette indicated that the draft on Time Limitations generally provided certain time limitations for prosecutions of different crimes and then went on to provide in section 2:

> "A prosecution is commenced when a warrant or other process is issued, provided that the warrant or other process is executed without unreasonable delay."

He explained that this provision was for the purpose of the statute of limitations only. Chairman Yturri commented that the two drafts should be parallel in that respect.

Mr. Paillette observed that he thought the functions being served by the two statutes were substantially different and he did not mean to create an ambiguity between section 4 of the Preliminary Provisions and the statute of limitations because section 4 was not meant to be a statute of limitations section.

Judge Crookham was of the opinion that commencement should be the same for all purposes. Chairman Yturri replied that since there was a statute with respect to the statute of limitations, he could not see where it made any difference when the commencement was deemed to have commenced under section 4.

Mr. Paillette explained that section 4 was really an extension of the definition of "criminal action," but it was so lengthy that rather than including it as a part of the definition in section 2, he had made it into a separate section.

After further discussion, Mr. Spaulding moved to delete section 4 in its entirety. Mr. Chandler seconded and the motion carried.

Section 5. When departures, errors or mistakes in pleadings or proceedings are material. Mr. Paillette indicated that section 5 was a restatement of ORS 131.030.

Mr. Chandler moved to approve section 5. Motion carried.

Revised Outline of Proposed Oregon Criminal Procedure Code

Mr. Paillette called attention to the revised outline, a copy of which is attached hereto as Appendix B. In compiling the outline, he said he had attempted to place the provisions in chronological order so they would appear in ORS in the order in which they would take place in a criminal proceeding. One of the big differences between this outline and the tentative outline prepared at the beginning of the revision project was that it picked up some of the existing statutes that had either been amended in a minor way or had not been revised at all and added them to the code so they would be in some kind of logical order. He had discussed the matter of moving statutes that had not been amended with the Legislative Counsel who had assured him that chapter numbers could be reassigned to maintain the chronological sequence.

Mr. Spaulding moved to approve the revised outline. Motion carried.

Final Draft and Report; Printing Schedule

Mr. Paillette indicated that in putting together the final draft it was almost inevitable that he would discover something that had been overlooked. He said that if he came across an amendment that appeared to be necessary, he would make the amendment and mail it to the Commission members for approval.

Chairman Yturri suggested that if such a mailing were made, the staff should include a stamped self-addressed envelope together with a form for the members to check their approval or disapproval of the proposed amendment. Furthermore, if no returns were received within a reasonable time, Mr. Paillette could assume that the amendments were approved.

Mr. Paillette outlined that he hoped to begin submitting the initial drafts to the printer within two weeks. As nearly as he could determine it would take about six weeks for the final draft to be printed. The format and style would be similar to the substantive criminal code but there would be more amendments to existing statutes than appeared in the first code. He indicated that the printing would cost approximately $12,000 and he would try to arrange for a mailing from the Oregon State Bar to all the lawyers in the state as was done with the substantive code. The report, he said, should be available for distribution the latter part of November or the first week in December.

Mr. Paillette said that 4,900 copies of the substantive code were printed and asked if the Commission would recommend printing a like

number of the procedure code. Chairman Yturri was of the opinion that the number should be increased to 5,500 or 5,800.

Mr. Hennings suggested that the plates not be destroyed following the printing so that reprints could be made later. Copies of the final draft of the substantive code were extremely rare, he said, and there was a great need to have them reprinted. Mr. Paillette advised that the plates of the substantive code had not been destroyed and were on file with the State Printer. The Commission had discussed the feasibility of a reprint sometime ago and had rejected the idea. One reason was that the money the Commission set aside for printing the report was spent on the initial printing and, secondly, a reprint would involve a rewrite to incorporate the amendments made by the legislature.

Mr. Hennings said the report was the only source of commentary and the new lawyers who graduated each year were at a disadvantage without it. Mr. Paillette replied that was a continuing problem. Other states that revised their codes encountered the same problem and it was impossible to keep supplying the new lawyers with codes indefinitely.

Chairman Yturri suggested that the Oregon State Bar could have the commentary reprinted since the plates were still available.

Next Meeting of the Commission

Mr. Paillette said there were still some loose ends that the Commission should take up toward the end of November which would not be included in the basic criminal procedure bill. They included questions dealing with electronic eavesdropping, recommendations by the League of Oregon Cities, recommendations by the Corrections Division on ORS chapter 169 dealing with jails, a proposed bill by the State Medical Examiner and obscenity.

The Chairman directed that the staff contact the members at a later date to determine a specific time for the next meeting.

The meeting was adjourned at 2:30 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission

CRIMINAL LAW REVISION COMMISSION

(September 1972)

Proposed Amendments to ORS 471.660 and 471.665

(Seizure of conveyance transporting liquor or narcotic or dangerous drugs)

ORS 471.660 is amended to read:

471.660. (1) When any [sheriff, constable, police officer or any] peace officer [of the law] discovers any person in the act of transporting alcoholic liquors in violation of law, or in or upon any [wagon, buggy, automobile, water or aircraft, or other] vehicle, boat or aircraft, or conveyance of any kind, he shall seize any [and all] alcoholic liquor found therein, take possession of the vehicle or conveyance and arrest any person in charge thereof.

(2) [Such] The officer shall at once proceed against the person arrested, under the Liquor Control Act, in any court having competent jurisdiction, and shall deliver the vehicle or conveyance to the ~~sheriff~~ of the county in which such seizure was made.

(3) If the person arrested is the owner of the vehicle or conveyance seized, it shall be returned to [the owner] him upon execution by him of a good and valid bond, with sufficient sureties in a sum double the value of the property, approved by the sheriff and conditioned to return the property to the custody of the sheriff on the day of trial.

(4) If the person arrested is not the owner of the vehicle or conveyance seized, the sheriff shall make reasonable effort to determine the name and address of the owner. If the sheriff is able to determine the name and address of the owner, he shall immediately

notify the owner by registered or certified mail of the seizure and of the owner's rights and duties under ORS 471.660 and 471.665.

(5) A person notified under subsection (4) of this section, or any other person asserting a claim to rightful possession of the vehicle or conveyance seized, except the defendant, may move the court having ultimate trial jurisdiction over any crime charged in connection with the seizure, to return the vehicle or conveyance to the movant.

(6) The movant shall serve a copy of the motion upon the district attorney of the county in which the vehicle or conveyance is in custody. The court shall order the vehicle or conveyance returned to the movant unless the court is satisfied by clear and convincing evidence that the movant knowingly consented to the unlawful use that resulted in the seizure. If the court does not order the return of the vehicle or conveyance, the movant shall obtain the return only as provided in subsection (3) of this section.

(7) If the court orders the return of the vehicle or conveyance to the movant, the movant shall not be liable for any towing or storage costs incurred as a result of the seizure.

(8) If the court does not order the return of the vehicle or conveyance under subsection (6) of this section, and the arrested person is convicted for any offense in connection with the seizure, the vehicle or conveyance shall be subject to forfeiture as provided in ORS 471.665.

ORS 471.665 is amended to read:

471.665. (1) The court, upon conviction of the person arrested under ORS 471.660, shall order the alcoholic liquor delivered to the commission, and [, unless good cause to the contrary is shown by the owner,] shall, subject to the provisions of subsection (3) of this section, and the ownership rights of innocent third parties, order a sale at public auction by the sheriff of the county of the property seized. The sheriff, after deducting the expense of keeping the property and the cost of sale, shall pay all the liens, according to their priorities, which are established by intervention or otherwise at such hearing or in other proceedings brought for that purpose, and shall pay the balance of the proceeds into the general fund of the county. No claim of ownership or of any right, title or interest in or to such vehicle that is otherwise valid shall be held [valid] invalid unless the [claimant] state shows to the satisfaction of the court, by clear and convincing evidence, that [he is in good faith the owner of the claim and] the claimant had [no] knowledge that the vehicle was used or to be used in violation of law. All liens against property sold under this section shall be transferred from the property to the proceeds of the sale.

(2) If no person claims the vehicle or conveyance, the taking of the same and the description thereof shall be advertised in some daily newspaper published in the city or county where taken, or if no daily newspaper is published in such city or county, in a newspaper having weekly circulation in the city or county, once a week for two weeks

and by handbills posted in three public places near the place of seizure, and shall likewise notify by mail the legal owner, in the case of an automobile, if licensed by the State of Oregon, as shown by his name and address in the records of the Motor Vehicles Division of the Department of Transportation. If no claimant appears within 10 days after the last publication of the advertisement, the property shall be sold and the proceeds, after deducting the expenses and costs, shall be paid into the general fund of the county.

(3) In the case of any boat, vehicle or other conveyance seized pursuant to ORS 167.247 for violation of a narcotic or dangerous drug criminal statute, the boat, vehicle or other conveyance may, in the discretion of the seizing law enforcement agency, following conviction of the person arrested but prior to public auction, be claimed by the seizing law enforcement agency by giving timely notice to the sheriff of the county in which the seizure was made, that the seizing law enforcement agency intends to retain the boat, vehicle or other conveyance for official use. On receipt of notice of such claim, the sheriff shall determine the expense of keeping the boat, vehicle or other conveyance, and all the liens. The seizing agency may then pay the total of the expenses and liens to the sheriff of the county in which the seizure was made. The sheriff shall pay all the liens, according to their priorities, and all other expenses incurred in the seizing and keeping of the boat, vehicle or other conveyance. Upon payment of the liens and expenses, the boat, vehicle or other conveyance shall be delivered to the possession of, and title to the conveyance shall rest in, the seizing agency. The seizing agency then shall put the boat, vehicle or other conveyance to official law enforcement use.

CRIMINAL LAW REVISION COMMISSION
(September 1972)

PROPOSED OREGON CRIMINAL PROCEDURE CODE

Revised Outline

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY
(Proposed ORS chapter 131)

1. General Definitions
2. Preliminary Provisions
3. Applicability of Provisions
4. Time Limitations
5. Jurisdiction
6. Venue
7. Former Jeopardy

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 2. INVESTIGATION AND PREVENTION OF CRIME
(Proposed ORS chapter 132)

1. Prevention of Crime by Public Officers
2. Exclusion of Persons from Public Property
3. Special Law Enforcement Officers
   (ORS chapter 148)
4. Rewards (ORS chapter 149)
5. Stopping of Persons
6. Detention and Interrogation
   (ORS 133.037)

ARTICLE 3. COMMENCEMENT OF ACTIONS
(Proposed ORS chapter 133)

1. Grand Jury
2. Accusatory Instruments
   a. Indictment
   b. Information
   c. Complaint

PART II. PRE-ARRAIGNMENT PROVISIONS (Cont'd)

ARTICLE 4. ARRESTS AND RELATED PROCEDURES
(Proposed ORS chapter 134)

1. Citation in Lieu of Custody
2. Reasonable Cause as Basis for Arrest
3. Arrest Under a Warrant
4. Arrest Without a Warrant
5. Fresh Pursuit
6. Procedures Following Arrest and Before Preliminary Hearing
7. Disposition of Property of Person in Custody

ARTICLE 5. SEARCH AND SEIZURE
(Proposed ORS chapter 135)

1. General Provisions
2. Search and Seizure Under a Warrant
3. Search and Seizure Incidental to Arrest
4. Search and Seizure by Consent
5. Emergency and Other Searches and Seizures
6. Inspectional Searches
7. Disposition of Things Seized
8. Evidentiary Exclusion
9. Interception of Communications

ARTICLE 6. EXTRADITIONS
(Proposed ORS chapter 136)

1. Uniform Criminal Extradition Act (ORS chapter 147)

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 7. ARRAIGNMENT AND RELATED PROCEDURES
(Proposed ORS chapter 137)

1. Arraignment Procedures
2. Right to and Appointment of Counsel
3. Preliminary Hearings
4. Discharge or Commitment of Defendant

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS (Cont'd)

ARTICLE 8. RELEASE OF DEFENDANTS
(Proposed ORS chapter 138)

1. Releasable Offenses
2. Release Decision
3. Release Agreement
4. Conditional Release
5. Security Release
6. Forfeiture and Apprehension
7. Release Decision Review; Release upon Appeal
8. Penalties

ARTICLE 9. PLEADINGS AND RELATED PROCEDURES
(Proposed ORS chapter 139)

1. Defendant's Answer Generally
2. Types of Plea
3. Time of Entering Plea
4. Plea Agreements; Guilty Pleas
5. Pre-Trial Motions
6. Demurrers
7. Compromise

ARTICLE 10. SPEEDY TRIAL PROVISIONS
(Proposed ORS chapter 140)

1. Delay as Grounds for Dismissal
2. Prosecution of Prisoners
3. Agreement on Detainers

ARTICLE 11. PRE-TRIAL DISCOVERY
(Proposed ORS chapter 141)

1. Applicability of Provisions
2. Disclosure to Defendant
3. Other Disclosure; Special Conditions
4. Disclosure to the State
5. Time of Disclosure
6. Property Not Subject to Discovery
7. Effect of Failure to Comply with Discovery Requirements
8. Protective Orders

PART IV. CRIMINAL TRIAL PROVISIONS

ARTICLE 12. CRIMINAL TRIALS
(Proposed ORS chapter 142)

1. General Provisions
2. Selection of Jury
3. Scheduling of Trial
4. Conduct of Trial
5. Verdict and Judgment
6. Motion in Arrest of Judgment; New Trial

ARTICLE 13. WITNESSES
(Proposed ORS chapter 143)

1. Attendance of Witnesses Within the State
2. Compelling Witnesses
3. Uniform Act to Secure Attendance of Witnesses
4. Competency of Certain Witnesses

PART V. POST-TRIAL PROVISIONS

ARTICLE 14. JUDGMENT; PAROLE AND PROBATION BY COURT
(Proposed ORS chapter 144)

1. Judgment and Sentencing
2. Aggravation or Mitigation
3. Term and Place of Confinement
4. Post-Judgment Procedures
5. Effects of Felony Conviction
6. Execution of Judgment
7. Probation and Parole by Court

ARTICLE 15. APPEALS AND POST-CONVICTION RELIEF
(Proposed ORS chapter 145)

1. Appeal by Defendant
2. Appeal by State
3. Post-Conviction Relief

PART V. POST-TRIAL PROVISIONS (Cont'd)

ARTICLE 16. BOARD OF PAROLE; WORK RELEASE; EXECUTIVE CLEMENCY
(Proposed ORS chapter 146)

1. Administration
2. Parole Process
3. Termination of Parole
4. Work Release Program
5. Out-of-State Supervision
6. Reprieves, Commutations; Pardons; Remission of Penalties

ARTICLE 17. PUBLIC DEFENDERS
(Proposed ORS chapter 146)

1. County Public Defender
2. Status and Duties
3. State Public Defender
4. Authority and Responsibilities

[NOTE: This outline does not include an Article on Investigation of Deaths and Injuries, now located in ORS chapter 146. It is anticipated that this will be covered by a separate bill prepared by the State Medical Investigator.]