Tape 3 - Side 1 - 447 to end
Side 2 - 1 to 477 (begins on p. 9)

OREGON CRIMINAL LAW REVISION COMMISSION

Twenty-fifth Meeting, October 29, 1971

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Senator Wallace P. Carson, Jr. (Present for afternoon session only)
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Justice Edward H. Howell (Ex-officio)
Attorney General Lee Johnson
Representative Leigh Johnson
Mr. Frank D. Knight
Representative Norma Paulus
Representative Robert Stults

Excused: Senator John D. Burns, Vice Chairman
Mr. Bruce Spaulding

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter (Present for morning session only)
Mr. Bert Gustafson, Research Counsel

Also Present: Mr. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Charles Burt, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Willard Fox, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Robert Lucas, Chairman, Oregon District Attorneys Association Criminal Law Revision Liaison Committee; member, Bar Committee
Mr. Donald R. Blensly, ODAA Liaison Committee
Mr. Kurt Engelstad, Criminal Justice Coordinator for Multnomah County

Agenda:

Senator Anthony Yturri, Chairman, called the meeting to order at 9:30 a.m. in Room 315 State Capitol.

Introductions

Chairman Yturri welcomed the newest members of the Commission: Representative George Cole, Representative Leigh Johnson, Representative Robert Stults and Justice Edward H. Howell representing the Supreme Court as an ex-officio member of the Commission. He informed the members that Judge Herbert Schwab, Chief Judge of the Court of Appeals, would also be serving as an ex-officio member but was unable to be present today. At a later point in the meeting Chairman Yturri introduced the new staff member, Mr. Bert Gustafson, Research Counsel.

Mr. Paillette pointed out that the Oregon State Bar Committee on Criminal Law and Procedure and the Oregon District Attorneys' Association had appointed special criminal procedure liaison committees to follow the work of the Commission, and members of those two committees were present at today's meeting.

Judge Burns introduced Mr. Kurt Engelstad, Criminal Justice Coordinator for Multnomah County.

Mr. Chapin Milbank, incoming Chairman of the Oregon State Bar Committee on Criminal Law and Procedure, indicated that the only function of the Bar committee this year would be to follow and contribute to the work of the Commission and then to recommend to the September session of the Oregon State Bar their approval or disapproval of the work accomplished by the Commission in the area of criminal procedure. He noted that one of the committee's prime interests was pre-trial discovery and a special subcommittee had been appointed to work on that area of the law.

Approval of Minutes of Commission Meeting of July 2, 1971

Judge Burns moved that the minutes of the Commission meeting of July 2, 1971, be approved as submitted. Mr. Chandler seconded and the motion carried unanimously.

State Criminal Jurisdiction; Preliminary Draft No. 2; October 1971

Mr. Paillette advised that the two drafts on today's agenda together with the draft on Former Jeopardy, which would be before the Commission at its next meeting, would comprise all of Article I, Preliminary Provisions, except for a definition section to be inserted at the conclusion of the procedural revision when it could more easily be determined what terms needed to be defined.

Section 1. Jurisdiction; generally. Section 1, Mr. Paillette said, set out the general provisions under which the state would have jurisdiction for prosecuting violations of the state criminal laws. The draft did not materially change the concept of territorial applicability contained in ORS 131.210 through 230 except that it did

attempt to state under what circumstances the State of Oregon would have legal jurisdiction to prosecute in the area of inchoate crimes as well as the more difficult areas concerning crimes consisting of more than one element when one or more of those elements occurred outside the state. The draft, he said, was based on recommendations in the Model Penal Code and the Michigan and Illinois penal codes.

Mr. Paillette pointed out that "conduct," as used in section 1, was defined in the new substantive criminal code as "an act or omission and its accompanying mental state" and "criminal liability" was covered by an entire Article in that code.

Subsection (1) dealt with conduct or result. An example of the applicability of subsection (1) would be a homicide where the act was committed outside the state and resulted in a death within the state. This set of circumstances involved the conduct which ultimately resulted in the death, and the result would be the thing Oregon would be concerned with in that particular instance.

Subsections (2), (3) and (4) concerned inchoate crimes. Subsection (2) would be applicable to an attempt occurring outside the State of Oregon that did not result in a completed substantive crime. Under the new criminal code an attempt was defined as a "substantial step" toward the commission of an offense so that subsection (2), together with the new definition of "attempt," provided a broad base for applying the jurisdiction of the State of Oregon to that particular kind of conduct.

Subsection (3) referred to a conspiracy to commit an offense. In contrast to the approach to conspiracy under the substantive code which did not require an overt act, the draft, in determining the jurisdiction of the state, would require an overt act and the overt act would have to occur within the state. This approach, he said, was traditional with respect to conspiratorial conduct for jurisdictional purposes.

Subsection (4) was the opposite side of the coin and would pertain to an attempt, solicitation or conspiracy to commit a crime outside the State of Oregon. Even though there was no plan to commit a crime in this state, Oregon could nevertheless prosecute for the inchoate crime.

Subsection (5) dealt with omissions to perform a duty; one of the most common would be a nonsupport offense.

An example of the applicability of subsection (6), Mr. Paillette said, would be with respect to absentee voters where specific requirements were imposed upon an absentee voter who applied for permission

to cast such a ballot. A false statement made in an application for an absentee ballot is punishable in the State of Oregon as perjury even though the actual statement was made outside the state. Fraudulent income tax reports furnished another example of a situation where a person could be prosecuted, tried and punished in the State of Oregon for an act committed outside the state. Subsection (6) would require the particular statute relating to the offense to contain an express prohibition against certain kinds of conduct committed outside the state.

Mr. Paillette indicated that Subcommittee No. 1 had discussed and recognized the fact that section 1 laid a very broad base for state criminal jurisdiction and possibly went beyond existing law. The subcommittee decided, however, that the section recognized legitimate interests that Oregon should have in protecting its citizens.

Attorney General Johnson asked why subsection (3) required an overt act to occur within the state in the case of a conspiracy while there was no such requirement for an attempt. He said there might be an instance where persons conspired outside the state to commit, for example, an insurance fraud and under this subsection it would be necessary to wait until they committed an overt act in Oregon before they could be stopped.

Mr. Paillette replied that the subsection was concerned with conduct occurring entirely outside the territorial limits of the state except for the overt act. He said the Model Penal Code pointed out that it had universally been the rule with respect to applying state jurisdiction that the state had no interest until some act had occurred inside the state.

Chairman Yturri said he saw no reason why conspiracy should attach if three people in another state planned to rob an Oregon bank but never entered Oregon to carry out the plan. The first time the conspiracy would be likely to come to the attention of the authorities would be after the conspirators had committed an overt act.

Judge Burns cited a hypothetical case where persons conspired to burn down a farmhouse in Vancouver and file a false proof of loss. The conspiracy was carried out in the State of Washington but the proof of loss was filed in the Portland office of the insurance company. Until such time as that proof of loss was filed in Portland, he was of the opinion that Oregon had no business prosecuting that conspiracy.

Mr. Johnson contended that there should be no distinction made between prosecuting for an attempt and prosecuting for a conspiracy. Professor Platt pointed out that there was a basic distinction between

attempt and conspiracy. Conspiracy, he said, moved the line closer to innocent conduct than did the crime of attempt and the Commission had deliberately made it easier to commit conspiracy than to commit attempt by adopting the requirement of the attempt statute that the activity must be a "substantial step" strongly corroborative of criminal activity.

Mr. Johnson cited a hypothetical case where clear evidence was obtained that a group of persons in Chicago were going to get together in Oregon for the express purpose of inciting a riot at the American Legion Convention. Under the proposed provision it would be necessary to wait until they came to Oregon before they could be prosecuted. Mr. Chandler pointed out that the mere act of entering the state would constitute an "overt act" in that circumstance.

Chairman Yturri pointed out that if Illinois had a statute similar to the proposal under discussion, Illinois would have jurisdiction over that conspiracy under subsection (4).

Judge Burns asked if the traditional definition of "overt act" would be considered applicable for purposes of this section and received an affirmative reply from Mr. Paillette.

Mr. Lucas expressed agreement with Mr. Johnson's point of view that jurisdiction should not be limited so far as a conspiracy was concerned. If the conspiracy occurred in Portland, he said, the conspirators could be prosecuted in Oregon but if they crossed the river and conspired in Vancouver, they could not.

Chairman Yturri replied that a line had to be drawn somewhere when considering jurisdiction. He was of the opinion that it was basic that Oregon should not assume jurisdiction unless an overt act actually occurred within the state.

Judge Burns commented that without the requirement for an overt act, the statute would create constitutional problems so far as jurisdiction was concerned. Mr. Burt expressed agreement and pointed out that unless an overt act did occur in Oregon, the state would be usurping the powers of the federal government to attempt to prosecute for a conspiracy outside the state when the event never transpired.

Mr. Chandler pointed out for the benefit of those who were attending the meeting for the first time that the Commission made a basic policy decision at one of its very early meetings that the general guidelines for revision would be the Model Penal Code of the American Law Institute tempered by whatever peculiar needs Oregon

might have. Section 1, he said, was an ALI section and it didn't seem to the subcommittee which considered it that it did any great practical or potential damage to anything which was now the practice in Oregon.

Mr. Johnson moved to amend subsection (3) by deleting the following language: "and an overt act in furtherance of the conspiracy occurs within this state". Motion failed. Voting against the motion: Judge Burns, Chandler, Clark, Cole, Representative Johnson, Paulus, Stults, Mr. Chairman. Voting for the motion: Mr. Johnson, Knight.

Judge Burns moved to adopt section 1 without amendment. Motion carried unanimously with the same ten members voting.

Section 2. Jurisdiction; exceptions. Mr. Paillette explained that section 2 set out two exceptions to the bases for jurisdiction. Subsection (1) contained a two-pronged provision that general jurisdiction of the state would not apply if the results set forth in both paragraphs (a) and (b) occurred. The subsection would leave an "out" for the legislature to deal with specific kinds of conduct irrespective of whether such conduct was or was not a crime in another jurisdiction.

Subsection (2) would be an exception if causing the result was an element of the offense and would apply to conduct occurring outside the state that would not be an offense in that state unless the defendant intentionally caused the result within this state.

Section 2, Mr. Paillette said, was drawn from the Model Penal Code. It attempted to anticipate possible conflicts between state laws and was talking about culpability on the part of the defendant. Even though the defendant might be in a jurisdiction where his conduct would not be a crime there, such as gambling or dueling, if he caused a result within this state which was a crime in Oregon, Oregon would then have jurisdiction.

Judge Burns said he found it difficult to understand subsection (1) because of the way paragraph (a) was worded. Mr. Paillette explained that subsection (1) was stating an exception to an exception, in effect, and suggested that the clause in paragraph (b) beginning with "unless" be moved up into the introductory sentence of section 2 so that it would read:

> "Unless in the statute defining the offense a legislative intent clearly appears to declare the conduct criminal, regardless of the place of the result, subsection (1) of section 1 of this Article does not apply if:"

Mr. Knight moved to adopt the proposed amendment. Motion carried unanimously.

Mr. Johnson questioned the need for "specified" in paragraph (a) and also suggested that "likelihood" might be a better word than "danger" in that paragraph. He said he was uncertain of the meaning of "danger." Mr. Paillette responded that "danger" meant "likelihood," "reasonable chance" or "reasonable possibility." A number of terms could be substituted, he said.

Mr. Clark requested a specific example of how section 2 would apply. Mr. Paillette explained that the section was saying that the State of Oregon was not concerned about what the defendant did in another jurisdiction if the act would not be a crime in that jurisdiction unless the Oregon legislature felt the conduct was so contrary to the interests of the State of Oregon that they declared that act punishable in Oregon courts.

Judge Burns said an example would be to assume it was legal to duel in Washington. The defendant did so, shot his opponent in the process and the injured one was taken to a Portland hospital where he died. Section 2 meant that the legislature would have the power to say that even though dueling was legal in Washington, if it caused a death in Oregon, Oregon could punish that act.

Professor Platt expressed the view that it was valuable to retain the concept of section 2 because the Commission started out with the premise of attempting to reduce the number of crimes and to lessen the impact of overcriminalization. By not defining certain conduct as crimes, it would be going against the Commission's basic policy not to punish in this state that which was not defined as criminal in another state.

Judge Burns moved to adopt section 2 as amended. Motion carried unanimously. Voting: Judge Burns, Clark, Cole, Mr. Johnson, Representative Johnson, Knight, Paulus, Stults, Mr. Chairman.

Section 3. Jurisdiction; criminal homicide. Mr. Paillette said that section 3 would concern a situation where someone was shot in Washington, came across the border and died in Oregon or, conversely, was shot in Oregon and died in Washington. He noted that the first draft of section 3 used the Model Penal Code language, "bodily impact," in place of "conduct" in subsection (1). The subcommittee believed "bodily impact" was too restrictive and might cause some confusion in, for example, the poisoning of a victim where there would be no bodily impact as such. "Conduct," he said, was a word of art because it was defined in the substantive criminal code.

In this connection, Mr. Paillette said he had received a letter from Mr. R. P. Smith, Umatilla County District Attorney, which read:

"The minutes of your September 13 meeting indicate you changed proposed Article 3, Section 3, Subsection 1, by

substituting the word 'conduct' for the words 'bodily impact'.

"I think you may have unintentionally subtracted from the purpose of Section 3. Section 1, Subsection 1, gives Oregon jurisdiction if the defendant's conduct producing the death is within the State of Oregon. 'Bodily impact' gives additional jurisdiction; i.e. where the conduct is without the state, and the death is without the state, but the receipt of the injury occurs within the state area. After the change, the draft says in effect '...he is criminally liable if: Either the conduct that is an element of the offense, (Sec. 1 (1)); or, 'the death of the victim', (Sec. 3 (1)); or, 'the conduct causing death', (Sec. 3 (1)) occurs within this state. The first and third are clearly redundant.

"Taking the example suggested to the committee, if a person from without the state mailed a box of poisoned chocolates to someone in Portland, who ate a couple of chocolates, drove to Vancouver and died, the change precludes prosecution in Oregon.

"Another example would be a man shot just inside the state line, who falls dead just the other side: If the word 'conduct' is used, he apparently could not be charged in Oregon if he fired from without the state. These are, of course, extreme examples, but then any criminal homicide across a state line is unusual.

"Perhaps 'receipt of injury' would solve the poison ingestion problem without eliminating the intent of 'bodily impact'."

Chairman Yturri requested Mr. Paillette's opinion of Mr. Smith's comments. Mr. Paillette said he agreed that the use of the word "conduct" was redundant so far as section 1 (1) and section 3 (1) were concerned. He did not entirely agree, however, that the draft created the problem Mr. Smith suggested inasmuch as the draft said "either the death of the victim or the conduct causing death constitutes a 'result'" for the purposes of Oregon's jurisdiction.

Judge Burns pointed out that the Illinois code said "physical conduct" and he suggested that term would take care of a poison case, or a suffocation, neither of which might be covered by "bodily impact."

Representative Paulus commented that "physical" might be a poor word to insert into the draft becauses cases could arise in the future where death was caused by more sophisticated means, such as vibrations

or concussions. Judge Burns was of the opinion that such a death would fall under the category of "physical conduct."

Judge Burns moved that subsection (1) be amended to read " . . . either the death of the victim or the bodily interference causing death constitutes a 'result' . . . . " This language, he said, would take care of the poison chocolate situation referred to in Mr. Smith's letter.

Tape 3 - Side 2

Mr. Knight commented that if this language were adopted, the draft would say that if someone stood in Washington, shot a gun across the state line and killed someone in Oregon, that crime should be prosecuted entirely in Washington because the bodily interference occurred in Washington.

Judge Burns pointed out that if a person stood in Oregon, fired into Nevada and killed a Nevada citizen, he could be prosecuted in Oregon under subsection (1) of section 1. There was nothing in the proposed language in section 3 to withdraw that provision, he said. Mr. Knight did not agree. He though section 3 would say that the death was not a result of the act and therefore it could not be prosecuted in Oregon.

Justice Howell expressed a lack of enthusiasm for use of the term "bodily interference" and felt it was no improvement over "conduct" as used in the draft.

Vote was then taken on Judge Burns' motion to amend subsection (1) of section 3 by substituting "bodily interference" for "conduct." Motion failed.

Representative Paulus asked if the word "body" as used in subsection (2) would include an arm, a leg or a head and asked if the finding of a part of a body would support a prosecution. Mr. Knight pointed out that there had been cases where an arm or leg was found in one state or county and other parts of the body in another state or county.

Mr. Paillette commented that this point had caused no problem in the past, and he was of the opinion that it would only create a problem to add "part of a body" to the subsection. He pointed out that the only purpose of section 3 was to set up prima facie evidence that the person died in Oregon.

After several suggestions for amendment, all of which were refuted, Representative Stults commented that to amend the section would create more problems than it would solve. He moved to adopt section 3 as drafted. Motion carried. This action was subsequently reconsidered.

Judge Burns asked that the commentary to section 3 reflect the fact that the Commission construed the section to include the conduct that R. P. Smith believed it did not cover in his hypothetical situation concerning the chocolates. The Commission was in agreement that

the pertinent part of Mr. Smith's letter should be referred to in the commentary and further agreed that the revision made by the subcommittee in changing "conduct" to "bodily impact" was not intended, nor should it be construed, to preclude prosecution in Oregon of a person who committed a crime similar to the hypothetical case of mailing poisoned chocolates into the state.

Mr. Knight suggested that the commentary also reflect that the term "body" was intended to refer to any remains of a body that might be left after the body itself had deteriorated after a period of time. Chairman Yturri said that the part of a body should refer to those portions which were normally necessary to sustain life -- in effect, the head, the torso or the skeleton. Mr. Knight was concerned with situations where there would be only enough of the body left that it would be possible to tell a death had occurred.

After further discussion, Justice Howell pointed out that the Commission was taking an inconsistent position by adding to the commentary the remarks under discussion. They had adopted section 3 to refer to a "body" and were now trying to read into the record something less than a body. If the statute were adopted by the legislature as proposed by the Commission, the legislative intent would then clearly be a body and not a portion thereof. He noted that the New York statute said "a victim's body, or part thereof,".

Mr. Paillette again reminded the members that the statute under consideration was not attempting to establish proof that a criminal homicide had been committed but rather that it was prima facie evidence that the death occurred in Oregon if the body was found in that jurisdiction.

Mr. Knight moved that section 3 be reconsidered for the purpose of adding ", or a part thereof," after "body." Motion carried.

Mr. Knight next moved that subsection (2) of section 3 be amended to read "If the body, or a part thereof, of a criminal homicide victim . . . . "

Mr. Paillette pointed out that New York was the only one of the new codes that used that type of language. Illinois said "the body" as did the Model Penal Code and Michigan. He opposed the motion.

Judge Burns observed that whenever the legislature created presumptions or rules of evidence that did not have a rational basis, constitutional problems were created. If the tip of a finger were found in Oregon, he said he suspected there would be a serious question as to whether the legislature could constitutionally make that portion of a body prima facie evidence in a murder case. Jurisdiction was an essential and constitutional element to an Oregon criminal prosecution, he said.

Mr. Burt commented that whether "body" or "part of a body" was used was unimportant because the section was creating a presumption. It was entirely possible, he said, to support a homicide prosecution when no body was found at all.

Vote was then taken on Mr. Knight's motion to insert ", or a part thereof," after "body" in subsection (2) of section 3. Motion carried. Voting for the motion: Clark, Mr. Johnson, Representative Johnson, Knight, Paulus. Voting no: Judge Burns, Cole, Stults, Mr. Chairman.

Mr. Johnson then moved to adopt section 3 as amended. Motion carried unanimously with the same members voting.

Section 4. Jurisdiction; definition. Mr. Paillette read section 4 and explained that it was merely a definition of the term "this state."

Mr. Knight questioned the meaning of "legislative jurisdiction" as used in section 4 and explained that he had encountered some problems with this term in Benton County where Camp Adair Air Force Base was located and also with respect to national forests so far as the amount of legislative jurisdiction Oregon had, if any, over those lands. Mr. Paillette advised that section 4 recognized that there would be federal jurisdictional exceptions, one example being Indian reservations.

Mr. Knight observed that under present law, even when Camp Adair was operating as a military base, the State of Oregon had concurrent jurisdiction with the military on that base. If an offense occurring on the base involved military personnel, the military handled the prosecution; if it involved civilian personnel, the state prosecuted. As he understood section 4, Oregon would be abdicating any jurisdiction in that situation.

Mr. Chandler disagreed with Mr. Knight's interpretation of section 4, and stated that the only place the State of Oregon would be abdicating exclusive jurisdiction would be on an Indian reservation. The intention of the subcommittee, he said, was to make the section inapplicable to Indian reservations and to waters outside the jurisdiction of the state.

Chairman Yturri asked Mr. Paillette what the word "legislative" added to the section and was told that it indicated that section 4 referred to statutory enactments of this state. For example, in ORS chapter 488 there was specific reference to the waters of this state with respect to boating offenses.

Chairman Yturri remarked that the state would still have jurisdiction if the word "legislative" were deleted. As drafted, he said, the section might be imposing a restriction that was not intended.

Representative Stults noted that both Michigan and the Model Penal Code used the term "legislative jurisdiction."

Mr. Paillette advised that section 4 was concerned with the authority and the ability of the state to apply its laws. He disagreed that the state was abdicating any power whatsoever by use of the word "legislative."

Mr. Fox suggested that the section be amended to read " . . . the land and water and the air space above the land and water of the State of Oregon." This would broaden the jurisdiction, he said.

Chairman Yturri asked if there existed any situation where Oregon had entered into an agreement with the federal government, under the terms of which Oregon acquired jurisdiction over a certain area or a certain type of offense, wherein there was no legislative reference whatever to that situation. Mr. Knight replied that in some instances the federal government had adopted exclusive jurisdiction of an area over certain federal lands, and in those situations the state clearly had no jurisdiction. For instance, at Tongue Point the Oregon police could not go on that land at all, under an Attorney General's opinion, unless they were acting as deputy U. S. marshals, because the federal government had exclusive jurisdiction. In other instances -- national forest lands and Adair Air Force Base -- there was concurrent criminal jurisdiction. Chairman Yturri asked how that concurrent jurisdiction came about and was told by Mr. Knight that unless the federal government had specifically taken exclusive jurisdiction, under the interpretation of the present law, the state had concurrent jurisdiction.

Mr. Chandler said the only two places he knew of in the state where the federal government retained exclusive jurisdiction were the Warm Springs and Umatilla Indian reservations.

Judge Burns pointed out that the only way an act became a crime in the State of Oregon was by an act of the legislature and he therefore saw no problem at all in the use of the word "legislative." Mr. Knight contended that the state was abdicating jurisdiction by saying that "this state" did not mean those areas where Oregon did not have legislative jurisdiction. Several members expressed disagreement with Mr. Knight's interpretation of the section. Mr. Paillette concurred that Mr. Knight was not reading the section correctly; it was entirely possible, he said, to have "legislative jurisdiction" without passing a law.

Mr. Johnson commented that the word "legislative" added nothing to the section and moved that it be deleted.

Justice Howell indicated that Mr. Gustafson had pointed out to him that if the proposed amendment were adopted, the section would in effect say that the State of Oregon had jurisdiction in the state in which it had jurisdiction.

After further discussion, vote was taken on Mr. Johnson's motion to delete "legislative" from section 4. Motion failed.

Judge Burns moved that section 4 be approved as drafted. Motion carried. Voting for the motion: Judge Burns, Chandler, Clark, Cole, Mr. Johnson, Representative Johnson, Knight, Paulus, Stults, Mr. Chairman. Voting no: Knight.

The Commission recessed for lunch at this point and reconvened at 1:15 p.m.

After completing discussion of the draft on Venue, Mr. Knight moved to reconsider section 4 of the draft on State Criminal Jurisdiction for the purpose of amending it to read:

> "As used in this Article, 'this state' means the land and water and the air space above the land and water of the State of Oregon except where such crime is by law cognizable exclusively in the courts of the United States."

Motion failed.

Venue; Preliminary Draft No. 2; October 1971

Section 1. Place of trial. Mr. Paillette explained that subsection (2) of section 1 contained new statutory language stating present case law and provided that if a person didn't like the venue, he must express his objections or they would be waived.

Section 2. Place of trial; special provisions. Section 2, Mr. Paillette said, was a long section, and while this might have certain disadvantages from the standpoint of future amendment, it nevertheless increased the proposed statute's comprehensibility by including all of the special provisions and exceptions in one section.

Subsection (1) contained nothing new and said that if the elements of an offense occured in two or more counties, trial may be held in any of the counties concerned.

Under subsection (2) if a person were shot in one county and died in another, the trial could be held in either county.

Subsection (3) dealt with offenses commenced outside the state and completed inside the state.

Subsection (4) concerned crimes committed on a body of water. This section, Mr. Paillette said, caused some difficulty in the subcommittee because of the word "nearby." The subcommittee was unable to find a more precise term and decided to see if the full Commission could find clearer language.

Subsection (5) was directed at situations where a crime took place in a moving conveyance. It said that trial could be held in any county through which the conveyance had passed.

Subsection (6) was similar to present law and said that if an offense was committed on a boundary or within a mile thereof, trial could be held in either county.

Subsection (7) dealt with larcenous crimes and provided that trial could be held in any county which exerted control over the stolen property.

Mr. Paillette said Professor Platt had reminded him that subsections (8) and (9) were discussed in connection with the draft on inchoate crimes during the revision of the substantive code. At that time the Commission decided that these two provisions more properly belonged in the procedural area with respect to which county prosecution for an attempt, conspiracy or solicitation would be held.

Subsection (10), as a result of amendments made by the subcommittee, contained a substantial change from the existing venue statute relating to nonsupport actions. The present statute had built into it the requirement that venue can only be laid in the county in which the dependent has resided for 60 days. Under the new proposal venue could be laid for a nonsupport prosecution irrespective of how long the dependent child had resided in a particular county. Proof of failure to provide support would still be necessary but for venue purposes the 60 day requirement would no longer apply.

Judge Burns asked for an example of the applicability of subsection (3) which involved the phrase "the interest protected by the criminal statute in question is impaired." Mr. Paillette said it would apply, for instance, if there was a conspiracy outside the state to bribe an official in Multnomah County. Venue would then lie in Multnomah County for prosecution of the defendant for an act which took place outside the state. Even though the bribery money was paid to the official while he was in Seattle, he could be prosecuted in Multnomah County.

Chairman Yturri inquired if there would be a conflict between subsections (4) and (6) where a river constituted the boundary between counties. Mr. Chandler replied that it would make no difference because the offense could be prosecuted in any county that bordered the river.

Mr. Paillette pointed out that ORS 131.380 read " . . . an action therefor may be commenced and tried in any county bordering on such bay, lake, river or other water opposite the place where the crime was committed." "Opposite," he said, was not a clear term and the subcommittee had tried to indicate that if a crime were committed on a boat

on a lake bordered, for example, by Klamath and Deschutes Counties, the interest of Klamath County in prosecuting a crime committed a few hundred yards from the shore bordering Deschutes County should not be as great as the interest of Deschutes County in prosecuting the crime.

Mr. Chandler advised that the subcommittee had been particularly concerned with the prospect of a boat going down the Columbia River where the crime was not discovered until the boat reached Astoria. It seemed more logical to prosecute in Clatsop County in that event than in, say, Pendleton. Judge Burns commented that "nearby" seemed to limit the statute; it would, he said, apply to a narrow set of circumstances when confined to a boat going down the Columbia or Willamette River. He said he disliked the "opposite" language of the present statute but suggested that it be amended by simply referring to any county bordering on the water and deleting the "opposite" clause.

Judge Burns said the venue provisions reflected two policy considerations:

(1) The defendant's right to be tried in a particular county. In "sticky" situations, he said, this right was somewhat abrogated.

(2) Unseemly competition between district attorneys should be avoided when a crime was committed that could be prosecuted in one or the other county. A statute alone could not prevent such competition; rather it was necessary to depend upon the discretion and good judgment of the district attorneys involved.

With respect to the first policy consideration, Judge Burns said the statute should speak with more certainty with respect to which county the defendant has a right to be tried in and if the crime was committed on a lake bordered by Klamath and Deschutes Counties, either county should be able to try the case. By the same token, if a crime was committed on a boat while the boat was traveling down the river, any county touching the river should be able to bring that prosecution.

Mr. Chandler said the reason the subcommittee had inserted "nearby" was that a man could get shot off the coast of Astoria and the district attorney in Pendleton could bring charges against the defendant.

Attorney General Johnson was also disturbed by the term "nearby." If a crime was committed on the river off the coast of Astoria, he asked if "nearby" would be construed to mean that the case could be tried in Columbia County. Mr. Chandler replied that it was not the subcommittee's intention that it could. He also pointed out that the existing statute, ORS 131.380, used the language "any county bordering on" and this seemed to pose two problems, namely, the Pacific Ocean

and the Columbia River. A crime committed in Curry County could be brought in Clatsop County under the present statute. "Nearby" attempted to limit that type of situation.

Representative Cole added that another reason the subcommittee was concerned with this section and inserted the word "nearby" was because 99% of the offenses on the Columbia River and the Pacific Ocean were arrests for fishing violations and those should be cited into a county somewhere near the spot where the violation took place.

Mr. Johnson contended it was absurd to include a word such as "nearby" which could not be defined. He moved to strike "nearby" from subsection (4) of section 2. Motion failed.

With respect to subsection (2) Mr. Knight asked if he was correct in assuming that a trial could be held in either county in a situation where a person was shot in Lincoln County and was brought to the hospital in Corvallis where he died. He was told by the Chairman that his assumption was correct.

Mr. Knight next referred to subsection (10). Assuming a dependent child was in a particular county when an indictment was returned and a charge made on a criminal nonsupport action, if the mother then took the child and moved to another county, he asked if the time of the crime alleged in the indictment would be applicable even though the dependent child had later moved to another county. Mr. Paillette replied that the proposed statute referred to the time of the offense and added that there was no intent on the part of the subcommittee to change that aspect of ORS 131.360. The only thing the subcommittee was attempting to do was to remove the 60 day residency requirement.

Judge Burns asked what was meant by the phrase "exerts control" in subsection (7) and Mr. Paillette replied that it referred to anyone having custody of stolen property, receiving stolen property or transporting it into another county. It referred, he said, to a physical control over the property.

Judge Burns next read from subsection (8): " . . . any county in which any act or agreement . . . is committed." He asked how it was possible to commit an agreement. Mr. Johnson pointed out in connection with that same subsection that in a conspiracy, venue would lie wherever the overt act was committed, and by combining inchoate offenses in one subsection, the venue on conspiracy had been limited. As he read subsection (8), he said the only county where jurisdiction would attach on a conspiracy charge was the county where the agreement was made and not where the overt act was committed because it said "any act that is an element of the offense" and an overt act was not an element of a conspiracy.

Judge Burns disagreed with Mr. Johnson's assessment of the section. An overt act may be an element of the offense of conspiracy, he said; by showing the activities of the conspirators, in most cases the district attorney would be demonstrating the existence of the agreement and the agreement was what had to be proved.

Mr. Johnson suggested that subsection (8) be divided into two parts -- one dealing with attempt and solicitation and the other with conspiracy. Mr. Paillette commented that it would do no harm to the intent of the draft to split subsection (8) into two parts.

Judge Burns then moved that the staff be directed to redraft subsection (8) of section 2 so as to have one subsection covering attempt and solicitation and another covering conspiracy. Motion carried.

Chairman Yturri asked if subsection (10) would permit a mother and her child who had been living in Benton County and who was not receiving her support payments to file a complaint for nonsupport in Marion County by stopping there while she was enroute to Multnomah County to reside. Mr. Paillette replied that it would allow such a circumstance to occur and added that he had opposed the deletion of the residency requirement in subcommittee.

Mr. Clark moved to approve section 2 subject to the amendment of subsection (8). Motion carried unanimously.

Section 3. Place of trial; doubt as to place of crime; conduct outside of state. Mr. Paillette reported that the main purpose of section 3 was to make sure that nothing was overlooked so far as venue was concerned.

Mr. Clark moved that section 3 be approved. Motion carried.

Section 4. Change of venue. Mr. Paillette indicated that sections 4 through 12 discussed changing the place of trial. Section 4, he said, contained no provisions different from those in existing law.

Judge Burns moved approval of section 4. Motion carried.

Section 5. Motion for change of venue; when made. Section 5, Mr. Paillette said, stipulated that a motion for change of venue could be made when the case was at issue. Senator Carson asked why it was necessary to wait that long. Judge Burns replied that when the plea was entered, it was then an issue of fact; this, he said, made no change from existing law.

Representative Cole asked if the statute would be applicable to justice of the peace courts. Judge Burns replied that the present

statute related to circuit and district courts only, and Mr. Paillette added that there were other statutes dealing with venue in justice of the peace courts.

Mr. Johnson asked if the draft contained a limitation as to when the motion for change of venue could be made. He suggested that section 5 be amended to say that the motion had to be made at the time of the plea or at least that a limitation be placed on the time within which the motion could be made. As he read the section, the motion could be made at any time -- even during the middle of the trial.

Judge Burns suggested that the proposed statute require the motion to be made within five days following the time the case was put at issue unless the court for good cause ordered an extension of time. As a practical matter, he said, courts by local rule could do exactly that, and it was presently being done in Multnomah County.

Mr. Johnson then suggested that section 5 be amended to require the motion to be made within five days following the entry of the plea or, at the court's discretion, at any time prior to trial.

Justice Howell said he was opposed to the proposed five day requirement and suggested that "may" be changed to a mandatory "shall" and that the time limit be set at not later than the time when the case is at issue upon a question of fact.

Mr. Knight commented that it was ordinarily the jury that the defendant felt would be prejudiced so there was no pressing reason for granting a change of venue until the pre-trial motions had been taken care of. If the motions were made after the venue was changed, the district attorney in the original county would have to travel to the court where the trial would be held in order to make even a motion to suppress.

Judge Burns remarked that the average change of venue motion was based upon prejudicial publicity and that situation was known to the defendant's attorney at the time he entered his plea. Section 7, which permits change of venue for other reasons, would be applicable to other situations which might come to the defendant's attention after the time of entry of the plea. He expressed the view that it would be wise to have some limited time period in section 5 beyond the time when the plea was made.

Mr. Chandler stated that section 7 was the "Sherman County section." In the last 15 years, he said, there had not been a trial held in Sherman County, there were no lawyers practicing in that county, the judge was at The Dalles, and by general agreement the defendant always moved for change of venue. Judge Burns replied that would be a circumstance known to the defendant at the time he entered his plea.

Mr. Chandler asked what the result would be if Justice Howell's suggestion were adopted. He wanted to know if the statute would then require the district attorney, as Mr. Knight feared, to go to Klamath County from Bend, for instance, every time he wanted to argue a demurrer. In regard to that same point, Mr. Johnson asked whether it was better to have the judge who would try the case hear the pre-trial motions or whether the judge in the commencing county should hear them.

There was some discussion on this point. Mr. Johnson then suggested that one way to handle the problem was to first decide which motions were to be heard before the plea was taken and then decide where they were to be heard. Judge Burns expressed agreement and proposed that this policy matter be by-passed at this time and reconsidered when the Commission discussed the timing and making of other motions. Mr. Paillette advised that the outline for the Procedure Code contained an Article set aside for pre-trial motions, and the motion for change of venue could be dealt with at the time that Article was considered.

The Commission agreed that section 5 would be left as drafted for the time being with the understanding that it would be reconsidered at a later time.

Section 6. Change of venue for prejudice. Mr. Paillette advised that section 6 used some new language taken from the Federal Rules of Criminal Procedure set out on page 23 of the draft. Basically, it was existing law except for the excerpt from the Federal Rules -- "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial."

Mr. Chandler pointed out that the subcommittee had raised a question concerning the necessity for a constitutional amendment. Mr. Paillette said that question permeated this entire draft but basically related to section 6, since section 6, and also section 4, allowed only the defendant to move for a change of venue. There was an apparent conflict between ORS 131.400, which indicated that "either party" may have the place of trial changed once, and Article I, section 11, of the Oregon Constitution which provided that "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed . . . . " This draft was limited throughout to a change of venue by the defendant. The subcommittee did not take a position as to whether it was desirable to allow the state to have a change of venue and there were no Oregon cases cited under the existing statute. However, State v. Black, a 1929 case, held that where the defendant objected to a change of venue and the state wanted a change, it was error to grant the change of venue over the defendant's objections. The feeling of the subcommittee was that this matter

should be discussed to give the Commission an opportunity to decide whether they wanted to propose a constitutional amendment to permit the state to have a change of venue in certain instances. Another way to handle the matter would be to write a statute providing that "either party" could request change of venue and then take a chance that it would be upheld in the courts.

Mr. Knight expressed the view that the state should have as fair a trial as the defendant and if the state was prejudiced by community feeling, the people should be permitted to move for change of venue.

Mr. Chandler explained that section 6 was changing the present statute to conform to State v. Black and if the draft were to be rewritten to allow either party to move for change of venue, then that change should be tied in with a proposed constitutional amendment.

Chairman Yturri asked for a consensus of opinion from the Commission as to whether the state should be permitted to move for a change of venue. The majority was opposed to such a provision.

Mr. Chandler moved approval of section 6. Motion carried with Mr. Knight voting no.

Section 7. Change of venue in other cases. Mr. Johnson moved that section 7 be approved. Motion carried unanimously.

Sections 8 through 12. Transmittal of court papers and conveyance of a defendant to the new location. Mr. Paillette explained that sections 8 through 12 were a restatement of existing law and had to do with transmission and filing of transcripts and papers, expenses of the change and conveyance of the defendant.

Section 10. Expenses of change; taxation as costs. With respect to section 10, Mr. Paillette indicated he had pointed out to the subcommittee that a provision in the new criminal code should be taken into account when considering what the defendant could be charged for. The draft made no change from the existing statute, but subsection (2) of section 80 of the new criminal code read:

> "Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law."

Mr. Paillette noted there was some conflict between the proposed section 10 and the above cited section because if it was assumed that

the defendant needed a change of venue in order to get a constitutionally guaranteed fair trial, it didn't follow that he could be assessed costs for that change. The provision had been included in the draft, he said, only because it was in existing law. It could be retained with the thought that the courts could decide whether change of venue costs could legitimately be taxed against the defendant.

Judge Burns commented that the costs taxed against the defendant normally were the special costs regularly incurred in a criminal trial and expressed the view that the costs of change of venue should not be taxed against him. He suggested that section 10 should provide that if the costs and expenses of the action minus the expenses of the change of venue were not recovered from the defendant, the commencing county shall recover them and further provide that the commencing county shall repay the trial county for the costs and expenses of the change itself which, he said, would be relatively minimal.

After further discussion, Judge Burns moved that section 10 be amended to make it clear that the costs and expenses which are to be recovered from the defendant would not include the expenses of the change of place of trial. The balance of section 10 would remain unchanged, namely, that the originating county shall pay the trial county for everything the trial county spends that it doesn't collect from the defendant. Motion carried.

Mr. Paillette asked Judge Burns if the intent of his motion would be accomplished by deleting the first clause of the last sentence of section 10: "If the costs and expenses are not recovered from the defendant,". He received a negative reply.

Justice Howell stated that ORS 156.100 provided for taxing costs against the defendant and recommended that an exception be added to that statute to make it read "Except for the costs involved in the change of venue . . . . " Chairman Yturri concurred but was of the opinion that the change should be made in both ORS 156.100 and section 10 of the draft.

Mr. Johnson asked if the same considerations should apply to a motion for a change of venue made on grounds of prejudice as to a motion on grounds of convenience. Chairman Yturri replied that he could not see where there would be a constitutional question involved in a motion for change of venue on grounds of convenience of witnesses or other parties.

After further discussion, Chairman Yturri proposed to separate the two situations:

(1) Where change of venue was necessary to insure a fair and impartial trial, costs would not be taxed against the defendant.

(2) Where change of venue was for convenience of witnesses and others, costs would be assessed.

Mr. Paillette said so far as drafting was concerned, these provisions could be incorporated by reference in section 6 relating to change of venue for prejudice, where there would be no costs taxed, and section 7 could provide that costs would be taxed when change of venue was for the convenience of parties and witnesses.

The Commission was in agreement that these amendments should be made and the Chairman so ordered. He also reminded Mr. Paillette to flag ORS 156.100 for conforming amendment.

Section 11. Attendance of defendant at new place of trial. Mr. Paillette advised that section 11 made no change from ORS 131.460.

Section 12. Conveyance of defendant in custody after change of venue. Section 12, he said, was basically the same as ORS 131.470 except for the insertion of new language to conform to the regional jail concept provided for in the substantive criminal code, namely, that the defendant was to be delivered "to the custody of the executive head of the correctional institution of the county where he is to be tried."

Mr. Johnson moved adoption of sections 11 and 12. Motion carried unanimously.

Mr. Chandler moved to approve the venue draft subject to amendments and redrafting of sections 5 and 10. Motion carried.

Staff Report on General Commission Activities

Next meeting. Mr. Paillette said the Commission had earlier decided that the Commission meetings would be scheduled to coincide with the regular monthly meetings of the Emergency Board. Inasmuch as no Emergency Board meeting was scheduled for November, he asked if the members could attend a meeting on Friday, November 19. It was tentatively agreed that the Commission would meet on that date at 9:30 a.m. and if a change became necessary because of a special session of the legislature or for some other reason, Mr. Paillette would so advise the members.

Justice courts. Mr. Lucas asked if the Commission planned to overhaul any part of the Procedure Code as it applied to justice courts. He expressed the view that it would be advisable to have the same statutes for justice courts as for other courts in many of the procedural areas.

Chairman Yturri replied that so far as venue was concerned, the subcommittee had decided not to make any changes with respect to

justice courts inasmuch as the existing statute provided that change of venue could be accomplished in the same manner as in civil cases in circuit courts. The Commission would, however, take justice courts into consideration when working on other areas of the Procedure Code.

General information. Mr. Paillette advised that Preliminary Draft No. 2 on Former Jeopardy was ready for Commission action and would be taken up at the next meeting. Search and Seizure, Preliminary Draft No. 2, was now being typed and would be distributed to members probably within the next week. This will be the next area to be considered in subcommittee. Other areas presently being worked on by the staff are Stop and Frisk and the subject of Negotiated Pleas.

The meeting was adjourned at 3:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission