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

Subcommittee No. 1

July 31, 1972

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

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

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

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

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

Criminal Trials; Preliminary Draft No. 1; July 1972

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Eliminate ORS 136.020.

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

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

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

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

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

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

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

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

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

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

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

The motion carried unanimously.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and increasing district court jurisdiction to $3,000 and made it effective July 1, 1973. Contemporaneously the legislature passed a resolution which would be on the November ballot to facilitate the six man jury.

Mr. Paillette further explained that as finally passed, Senate Bill 450, the district court bill, provided that it would become operative if a constitutional amendment providing for less than 12 man juries in courts inferior to the circuit court were approved by a vote of the people. The constitutional amendment, HJR 17, as it would appear on the ballot, allowed the legislature to provide by law for six man juries. That provision was not limited to inferior courts and therefore went beyond the scope of what was contemplated by SB 450 which was limited to inferior courts. He said it was impossible to forecast whether the constitutional amendment would be approved in November and, if passed, what the legislature might do at the 1973 session with respect to six man juries. The Commission could, if they chose to do so, take a position as to what they would like to do about the question and then ask the legislature to amend the Commission bill accordingly.

Senator Burns said the objective of the legislature was to eliminate the de novo appeal in district courts and that was the reason for the constitutional amendment to provide for a six man jury in minor court cases. He was in favor of that procedure but he said it did not speak to the issue of six man juries in circuit courts, Mr. Paillette remarked that six man juries in circuit courts could be the ultimate effect of HJR 17 if it were approved in November. Mr. Spaulding indicated he would be opposed to such a proposal.

Senator Burns asked that this problem be flagged for future consideration and following the November election, if HJR 17 passed, the Commission could consider the question prior to the 1973 session of the legislature. Mr. Paillette agreed that it was useless to speculate at this point as to the outcome of the election.

Section 7. ORS 136.220. Challenge of jurors for implied bias. Mr. Paillette observed that in section 7 editorial revisions would be required to change "indictment" and "information" to "accusatory instrument."

Chairman Chandler expressed objection to the antiquated term, "master and servant," as used in subsection (2). Mr. Spaulding said it was a term of art and was well understood. Mr. Milbank suggested "employer and employe" while Senator Burns thought it might be advisable to include a fiduciary relationship. Judge Crookham suggested that "principal and agent" should also be included in subsection (2). Senator Burns said that if the subsection were strictly construed, it would make a person exercise a peremptory in

a case involving a doctor and patient relationship. Mr. Spaulding noted that a debtor and creditor relationship was not included in the subsection.

Judge Crookham stated that under subsection (4) persons who had served on the grand jury should be excluded as a matter of law without a challenge. It would be impossible to say that such a juror would limit himself to the findings of fact on the evidence he heard at trial and not take into consideration anything he had learned about the case while serving on the grand jury.

Representative Cole agreed that there was no point in even going through the formality of calling such jurors from the panel. Mr. Paillette pointed out that it might not be known which jurors had served on the grand jury until the judge had completed his voir dire.

Judge Crookham asked if the section meant that when a challenge for implied bias was taken, it had to be allowed and was told by Mr. Paillette that that was the effect. Judge Crookham pointed out that it said only that the challenge may be taken but did not say it must be allowed. Mr. Spaulding said that could be corrected by substituting "shall be allowed" for "must be taken" in the opening paragraph.

Judge Crookham left the meeting at this point and returned during the discussion of section 14.

Senator Burns said that the debtor and creditor relationship was included in the civil code and he was of the opinion that the criminal procedure code should be parallel to that provision. Mr. Paillette replied that with the exception of those things that were peculiarly a part of criminal trials, he agreed that the grounds for implied bias should be much the same in the two codes.

Mr. Spaulding asked if the subcommittee should give some thought to a challenge for cause for relationship to the complaining witness. Many times the complaining witness had a substantial interest in a criminal case. After a brief discussion, Mr. Spaulding conceded it was probably impractical to try to get at that problem in this section because the challenge would have to be for actual bias determined by the court.

In response to a question by Senator Burns, Mr. Paillette indicated that the source of subsection (7) of section 7 was ORS 17.140, subsection (3).

Senator Burns moved that section 7 be amended to conform with all the requirements of and in identical language to ORS 17.140 with the addition of whatever parts of ORS 136.220 remained that were not included in ORS 17.140 and were not inconsistent therewith.

Mr. Spaulding pointed out that ORS 17.140 applied to "either party" whereas ORS 136.220 applied only to the relationship between the defendant and the juror. If the exact language of ORS 17.140 were adopted, it might not fit in that regard.

Mr. Paillette suggested that "victim" or "person injured by the offense" or some similar language could be employed in place of the reference to "either party" in ORS 17.140.

Senator Burns amended his motion to include the further directive that Mr. Paillette rewrite ORS 136.220 in accordance with his original motion in a manner consistent with the sense of ORS 17.140 and to include the suggestion just made by Mr. Paillette. As redrafted, it should include debtor and creditor relationships and interest plus the other relationships that had been discussed.

Section 8. ORS 136.230. Peremptory challenges. Chairman Chandler noted that "death or" had been deleted in section 8 and said the questions surrounding the death penalty had not been entirely laid to rest by the recent Supreme Court decision on that subject. Senator Burns pointed out that it was a moot question in Oregon because the 1971 legislature passed a boilerplate statute deleting all references to the death penalty from ORS. The reference in this section should have been deleted editorially by Legislative Counsel but was not.

Mr. Milbank said that in Marion County all peremptory challenges were made in writing and the jurors were told beforehand that they would not know who challenged them or why they were challenged. Discussion of this procedure indicated the majority of counties in Oregon challenged secretly and by slip, with the exception of Multnomah County where the attorney was required to announce his challenge in open court. Mr. Milbank suggested that the requirement be added to the statute that peremptory challenges shall be exercised in secret because open challenges sometimes made a great deal of difference to other jurors. Chairman Chandler said that the general practice was to have the bailiff pick up a piece of paper from each counsel table and the court required each side to write something.

Mr. Paillette stated that if the subcommittee wished to include such a requirement in the statute, it could be inserted in ORS 136.230 by amending the third sentence.

Senator Burns moved to amend the third sentence of ORS 136.230 to read:

> "Peremptory challenges shall be taken in writing by secret ballot as follows: . . . . "

His amendment also included the directive that a statement be added to the commentary to make it clear that the identity of the party making the peremptory challenge was not to be divulged. Motion carried unanimously.

ORS 136.240. Challenge of accepted juror. Representative Cole inquired as to the meaning of the phrase, "notwithstanding the juror challenged may have been theretofore accepted." In the situation where the jury had been accepted by the defense who still had some peremptories left and the other side challenged and dismissed one of the jurors, he asked if the defense could then challenge only the new juror if he could go back under that language and challenge one of the other jurors. Mr. Spaulding replied that he could go back only for good cause.

Mr. Paillette commented that ORS 136.240 was somewhat ambiguous in that it could be read to refer to a challenge for cause or it could be construed to mean that the attorney could go back and exercise a peremptory. Representative Cole was of the opinion that both sides should be able to exercise peremptory challenges up until the time both sides had accepted. Mr. Spaulding took the opposing view; he believed it was reasonable to require that once a side had accepted the jurors, they should not be able to go back again, one reason being that it would interfere with the orderly progress of the trial.

Mr. Paillette commented that for many of the statutes in the chapter under discussion there was no case authority. For that reason they had to be taken at face value because they had never been construed by the courts. It was his view that ORS 136.240 referred only to peremptory challenges and whether or not a peremptory could still be exercised. Mr. Spaulding added that the section had caused no trouble in the past. No amendment was made to the section.

Section 9. ORS 136.250. Taking of challenges; joinder by codefendants. Mr. Paillette explained that section 9 was a companion to the section allowing joinder of defendants. The staff had to find some type of formula that would be fair and equitable governing the exercise of challenges that would not require everyone to agree but would take into account some of the special problems that arose because the defendants were joined together. Mr. Paillette said he wanted to stress that there were ways of approaching the question of challenges other than that set forth in this draft and this section was fairly arbitrary as far as the number of challenges permitted was concerned.

Following a brief discussion, Senator Burns said that the questions inherent in section 9 could not be intelligently discussed until final action had been taken on section 5. He therefore moved that section 9 be submitted to the full Commission without recommendation and that the alternative methods of dealing with peremptory challenges to which Mr. Paillette referred be considered by the full Commission. Motion carried. Voting for the motion: Burns, Cole, Spaulding. Voting no: Mr. Chairman.

ORS 136.260, 136.270 and 136.280, set forth on page 20 of the draft, were approved by unanimous consent.

Section 10. ORS 136.310. Function of court; effect of judicial notice of a fact. Mr. Paillette outlined that subsection (2) of section 10 imposed upon the court a provision he believed to be consistent with case law. It would require the court to instruct on all lesser included offenses, whether or not there was a request for such instructions.

Chairman Chandler asked for a clarification of the meaning of the opening clause of the last sentence of subsection (1), "Whenever the knowledge of the court is by statute made evidence of a fact . . . . " Mr. Spaulding explained that the clause referred, for example, to physical laws of nature that everyone knew to be true. Mr. Paillette added that it was intended to cover situations where the court took judicial notice of certain facts where no proof was necessary.

Mr. Spaulding inquired as to the meaning of "reasonable and proper" as used in subsection (2). Mr. Paillette asked if Mr. Spaulding's point was that he believed the provision should be more stringent. It was his view that the court had the same responsibility to instruct on lesser included offenses, and the commentary cited State v. Andrews, 2 Or App 595, 469 P2d 802 (1970), in support of that contention.

Mr. Spaulding pointed out that sometimes the defendant requested the judge not to instruct on lesser charges. Most judges, however, refused to accept that motion and instructed anyway. Mr. Paillette advised that section 10 did not address itself to that problem.

Mr. Spaulding asked Mr. Paillette to explain what subsection (2) added and was told that it added a specific statutory requirement that the court must instruct, even though there had been no request for an instruction, when the court considered lesser included offenses reasonable from the evidence. It was important to remember also, Mr. Paillette said, that the section did not prohibit anyone from requesting instructions.

Mr. Milbank asked if section 10 included attempts and received an affirmative reply from Mr. Paillette.

Senator Burns moved approval of section 10. Motion carried unanimously.

Senator Burns asked Mr. Paillette if he was endeavoring in this draft to apply the provisions exclusive of any of the requirements of ORS chapter 17, the civil procedure code. Mr. Paillette replied that he was not and explained that a number of the sections in the draft incorporated the chapter 17 provisions. ORS 17.255, for example, was incorporated in ORS 136.330.

Mr. Paillette indicated that he was not enthusiastic about this statutory approach to criminal procedure rules, but it was necessary

to be realistic about how much could be accomplished in the time remaining. So many of the rules were included in chapter 17 that it would require a major rewrite to place all of them in the criminal code. He expressed the view that it was unfortunate that the statutes were set up as they were. He said there should be a civil code and a criminal code because the idea of trying to marry the two for evidentiary and other purposes was not a very satisfactory way of dealing with the subject.

ORS 136.320 through 136.545. Chairman Chandler moved to delete ORS 136.340 and 136.350. Senator Burns seconded and the motion carried unanimously.

Senator Burns noted that ORS 136.510 was not consistent with the present state of the law. His criticism was directed at the phrase, "specially provided in the statutes relating to crimes and criminal procedure." That statement should take into consideration the case law as well as the statutes, he said. Strictly construed, it could prohibit anyone from looking to case law.

Mr. Spaulding said the problem would be corrected by substituting "specifically" for "specially." Senator Burns so moved and the motion carried without opposition.

Senator Burns commented that the first sentence of ORS 136.520 was not exactly correct because it said a defendant was presumed innocent "until the contrary is proved" and the defendant did not have the burden to prove the contrary. Mr. Paillette noted that "reasonable doubt" was in the following sentence. Senator Burns said that was in addition to the primary burden, and it was his view that "beyond a reasonable doubt" should be added to the first sentence.

Mr. Milbank said that the presumption of innocence went with the defendant all the way through the trial and only ended when the contrary was proven to the satisfaction of the jury. The section did not mean that there was a place where the presumption stopped and the defendant was then presumed guilty until he proved himself innocent. He pointed out also that the standard jury instructions said that the presumption of innocence went with the defendant all the way.

After further discussion, the subcommittee decided to make no change in ORS 136.520.

Mr. Paillette commented that for the purposes of clarity the reference to the grand jury could be deleted from ORS 136.545 and written into ORS chapter 132 which dealt with grand juries. He believed it was more consistent to place the phrase, "shall not be admissible before the grand jury," in the grand jury chapter.

Senator Burns moved that that portion of ORS 136.545 referring to admissibility of evidence before the grand jury be moved to ORS chapter 132. Motion carried unanimously.

Senator Burns remarked that ORS 136.540 appeared to be unnecessary. He said the law of confessions and admissions had been substantially changed by case law. Following a brief discussion, the members agreed that it was unnecessary to codify Miranda in the section and that it served some purpose to retain the statutory statement. No change was made.

Section 11. ORS 136.550. Textimony of accomplice; corroboration. Mr. Paillette explained that a definition of "accomplice" had been written into section 11 consistent with the approach in the new criminal code where a person who was criminally liable for the conduct of another was defined. Indirectly, he said, the definition picked up the Oregon case law.

Mr. Spaulding noted that the section said an accomplice was a witness in a criminal action who was criminally liable and observed that a minor was not criminally liable if he was under the age of 18.

Mr. Milbank said a situation frequently arose where a group between the ages of 14 and 18 committed multiple burglaries. This provision would not allow the district attorney to charge the juveniles who were under 18 as accomplices to such crimes.

Representative Cole commented that that appeared to be the holding in State v. Winslow, 3 Or App 140, 472 P2d 852 (1970), which held that an accomplice was one who could be indicted and punished under the same statute.

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Mr. Spaulding asked how it would be possible to establish that the accomplice was criminally liable because he was not actually criminally liable until he was tried and convicted. Mr. Paillette replied that the definition in the criminal code did not require a conviction to make a person criminally liable; it just set out the bases for charging the person with the crime based on accomplice liability.

Mr. Paillette commented that ORS 161.155 and 161.165 did not attempt to deal with the procedural question of the juvenile. They looked at the acts of a person and whether or not by definition those acts constituted a crime.

Senator Burns asked how often a situation would arise where a juvenile could be charged as an accomplice. Mr. Chandler replied that it would arise fairly often in two types of situations. In burglaries and drug cases there were frequently a number of young people involved, some of whom might be from 18 to 21 and some of whom would be under 18.

Mr. Spaulding suggested that subsection (2) be amended to read:

"An 'accomplice' means a witness in a criminal action who is guilty of conduct which would, if he were an adult, make him criminally liable . . . . "

Senator Burns said he would oppose that amendment if it excluded the minor altogether. Mr. Spaulding asserted that was not his purpose.

Mr. Milbank said Mr. Spaulding's objection would be accomplished by making the language of subsection (2) of section 11 parallel with the language of ORS 419.476 (1) (a):

> " . . . an act which, if done by a minor, if done by an adult would constitute a crime . . . . "

Mr. Spaulding moved adoption of Mr. Milbank's proposal. Motion carried.

Section 12. ORS 136.605. Acquittal before presentation of defense. Chairman Chandler commented that it seemed to him that the defendant should move for acquittal after the state had presented its case. He saw no reason why he should have "another shot" at the state's case after he had put on his own case.

Mr. Spaulding replied that the same situation prevailed in a civil case. When the complainant rested, the defendant might move for a nonsuit. If the motion was denied, the defendant took a chance on helping the plaintiff's case when he put on his own evidence.

Senator Burns moved to approve section 12. Motion carried.

Section 13. ORS 136.610. General or special verdict; verdict to be unanimous. Senator Burns commented that there had always been a question in his mind concerning special verdicts in criminal cases. Mr. Spaulding said he had never seen one used, and Mr. Milbank said he hadn't either.

Senator Burns asked why the provision had been perpetuated and was told by Mr. Paillette that if there was a conspiracy case, there might be some doubt on the part of the jurors, although the reasonable doubt rules would probably take care of that situation.

Mr. Spaulding inquired as to the reason for requiring a 10 out of 12 verdict in murder but not in any other life imprisonment crime. Mr. Paillette replied that this was consistent with the Constitution. Also, when the Commission talked about this subject during the substantive revision in connection with the new definition of murder which included what was previously second degree murder, they discussed whether there was any intent to change the requirement for a unanimous verdict. At that time the Commission's view was not to make any change in that respect. He said murder was the only crime the unanimous verdict had been applied to, and the only other life imprisonment offense was treason.

Mr. Spaulding said that inasmuch as what used to be second degree murder was now murder, he could see no reason for requiring a

unanimous verdict for murder and not giving the same treatment to the other life imprisonment crime.

Senator Burns moved to approve section 13 with the reservation that he might want to move to reconsider the provision following discussion of the later sections of the draft dealing with special verdicts. Motion carried.

Section 14. ORS 136.620. General verdict on plea of not guilty; verdict on plea of former conviction or acquittal. Mr. Paillette advised that the only change in section 14 was to conform the language to that of the former jeopardy draft.

Mr. Spaulding noted that subsection (1) said that a verdict of guilty imported a conviction of the crime charged in the indictment and asked why a lesser included offense was omitted from that statement.

Bob Burns suggested that Mr. Spaulding's objection to the section could be corrected by amending it to read:

> " . . . is either 'guilty,' which imports a conviction of a crime charged under the accusatory instrument,"

Senator Burns expressed approval of the suggestion and said it would embrace a conviction of a lesser included offense.

Mr. Spaulding said that if it imported a conviction of a lesser included crime, it would also import an acquittal of the greater offense. Senator Burns replied that the two would be mutually exclusive. Mr. Paillette advised that Mr. Spaulding's statement also coincided with case law.

Mr. Milbank questioned the use of the verb "imports" as opposed to the verb "is." Mr. Paillette replied that the only reason "imports" was used was that it was the original statutory language.

Senator Burns then moved to amend section 14 to read:

> "A general verdict upon a plea of not guilty is either 'guilty,' of a crime charged in the accusatory instrument, or 'not guilty.'"

The motion included the deletion of subsection (2) of the section. Motion carried.

Judge Crookham returned to the meeting at this point. He asked if section 14 envisioned separate verdicts for each count of a multiple count indictment which was the present practice. The members agreed that the verdict forms should be separate but since the draft did not speak to that aspect, Senator Burns suggested the addition of a subsection (2) to provide for multiple counts.

Mr. Paillette advised that the draft on guilty pleas provided that the "kinds of plea to an indictment, information or complaint, or each count thereof, are:" That draft, therefore, recognized multiple count indictments and discussed them at some length in the commentary.

Judge Crookham suggested that in view of that provision it might not be necessary to add further language to section 14 of this draft but suggested that the commentary contain a statement that the Commission contemplated a separate verdict for each count in a multiple count indictment. The members agreed to this proposal and the Chairman so ordered.

ORS 136.630 through 136.851. Mr. Paillette noted that ORS 136.630 and 136.640 again dealt with special verdicts and he planned to make whatever editorial changes were necessary. Mr. Spaulding recalled that when the subcommittee had discussed special verdicts earlier, it was mentioned that they were not used as a practical matter. He asked Judge Crookham if that was correct. Judge Crookham replied that he had never used one in a criminal case but had used them in civil cases. His recommendation was to leave the provisions for special verdicts in the statute because they would be particularly useful if compulsory joinder were adopted. He said he could envision the need for them, especially in connection with conspiracy cases where there would be multiple joinders.

Chairman Chandler called attention to the provision of ORS 136.851 which said that the motion shall be heard within 28 days from the time of entry of the judgment. He said that sentence permitted the judge to sit on his hands and do nothing. Judge Crookham remarked that the same provision was in the civil code.

Mr. Spaulding pointed out that the 28 days only left two days for appeal. Judge Crookham suggested that the 28 days be cut to 15 in order to provide for a more meaningful amount of time in which to appeal. Representative Cole pointed out that the defendant under this section had seven days in which to file a motion, the state had seven days to respond and the 15 days suggested by Judge Crookham would then mean that there was only one day left for the motion to be heard and determined.

Judge Crookham proposed to cut the filing time to five days, cut the state's time to respond to five days and require the motion to be heard and determined in 10 more days so the total would be 20.

In accordance with this suggestion, Senator Burns moved adoption of the following amendments to ORS 136.851:

(1) In the sixth line, delete "seven" and insert "five".

(2) In the eleventh line, delete "seven" and insert "five".

(3) In the fourteenth line, delete "28" and insert "20".

Motion carried unanimously.

Section 15. ORS 10.110. Preparation of preliminary jury list, jury list and list of rejected prospective jurors in counties other than Multnomah County. Mr. Paillette observed that despite his reluctance to get involved in rewriting any part of the civil code, there was no way to get entirely around it inasmuch as ORS chapter 136 incorporated so many of the provisions of ORS chapters 10, 17, etc. Section 15 fell into this category and deleted the reference to "tax roll" in the statute relating to the preparation of jury lists to make it consistent with section 6.

Senator Burns was critical of the word "community" in the amended portion of the section and suggested that it be changed to "district." Chairman Chandler advised that jury lists were drawn from the county, not the district.

ORS 136.030. Senator Burns recalled that the subcommittee had earlier changed "county" to "district" by amendment to ORS 136.030 on page 8 of the draft. Judge Crookham advised that it was an inappropriate amendment because the issues were triable by county and not by district.

Senator Burns moved to rescind the motion whereby "county" was changed to "district" in ORS 136.030. Motion carried.

Section 15. Senator Burns moved to change "community" to "county" in the two places it appeared in section 15. Motion carried.

Judge Crookham asked if there was a general statute which said that in a home rule county which did not have a county clerk, the person assigned the duties of the county clerk should assume those duties when a statute made specific reference to "county clerk." Mr. Paillette said he believed that was taken care of by statute but he would check to make sure. If it was not, he would make that point clear in the commentary.

Senator Burns moved to approve section 15 as amended. Motion carried without opposition.

Judge Crookham asked if there was anything in the statute dealing with jury lists in Multnomah County that would require amendment to make it parallel with section 15. The subcommittee read ORS 10.120 and decided no change was needed in that respect.

Judge Crookham noted that in 1965 a provision was added permitting the use of computers in the selection of jurors in Multnomah County and suggested that if some of the other counties were getting close to

computerization, it might be advisable to add a similar provision for them to make the use of computers allowable but not mandatory. Judge Crookham's proposal was discussed briefly but no action was taken on it.

Section 16. ORS 10.135. Jurors to be from different portions of county; number of names on list. To avoid the arithmetical problems inherent in subsections (1), (2) and (3) of section 16, Mr. Spaulding suggested that those subsections be deleted and that the last sentence of the opening paragraph of section 16 be amended to read:

> "The jury list shall contain sufficient names to reasonably serve the needs of the courts."

Representative Cole stated that, as he recalled, this statute was amended in 1969 to reduce the number of persons required by statute to be on the jury list. Some of the smaller counties were apparently having difficulty in drawing enough names to meet the requirement in the former statute.

Chairman Chandler remarked that Mr. Spaulding's suggestion would in effect make the circuit court judge responsible for the size of the jury panel.

Mr. Paillette advised against amending the sections in the civil code unless it was absolutely necessary. Representative Cole agreed that unless there was a specific problem, they should not be revised.

Mr. Spaulding pointed out that the clause in subsection (1) of section 16, "if there is that number of names of qualified jurors on the assessment roll or the registration books," was incorrect because "assessment roll" had been deleted from ORS 10.110. Mr. Spaulding moved to delete the entire clause. Motion carried.

Representative Cole moved to approve section 16 as amended. Motion carried unanimously.

Section 17. ORS 10.300. Methods of drawing additional jurors to augment panel or jury list. Mr. Paillette explained that the amendment in section 17 was another conforming amendment.

Representative Cole moved approval of section 17. Motion carried.

Section 18. ORS 17.115. Challenges, definition and kinds. Mr. Paillette outlined that the amendment in section 18 was made to conform ORS 17.115 to section 3 of this draft.

Chairman Chandler asked why the right to challenge the panel was limited to criminal cases. He said there might be civil cases where a systematic exclusion would be a real problem to the defendant. Mr. Paillette replied that that was entirely possible, but he was

apprehensive about getting into the civil statutes at all and would certainly oppose making a major change such as the Chairman was suggesting. He said he had tried in this draft to limit amendments in the civil code to those changes that were absolutely essential to the criminal procedure code revision.

Representative Cole said that by stating what a challenge was in section 18, the statute in effect said that a challenge was an objection to a particular juror. Whereas the first sentence implied that the challenge in a criminal case was to the panel as a whole, the second sentence said it was to a particular juror. To solve this problem, Mr. Paillette suggested amending the second sentence of section 18 to read:

> "A challenge to a particular juror may be either peremptory or for cause."

Senator Burns moved to adopt the amendment set forth above. Motion carried.

Representative Cole moved approval of section 18 as amended. Motion carried unanimously.

Next Meeting of Subcommittee No. 1

Mr. Paillette said that one more draft had been assigned to Subcommittee No. 1 which was a revision of ORS chapter 135 and he anticipated that it would complete the work of the subcommittee. The members agreed to meet again on Tuesday, August 22, at 9:30 a.m. at a place to be determined by the Chairman at a later time.

The meeting adjourned at 4:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission