Tapes #64 and 65
#64 - Both sides
#65 - Side 1

OREGON CRIMINAL LAW REVISION COMMISSION
Room 315 Capitol Building
Salem, Oregon

February 22, 1969

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Eighth Meeting, February 22, 1969

Minutes

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Senator John D. Burns
Representative Wallace P. Carson, Jr. (delayed)
Representative David G. Frost
Representative Douglas Graham
Representative Harl H. Haas
Mr. Frank D. Knight
Senator Berkeley Lent
Mr. Bruce Spaulding (excused from afternoon session)
Mr. Robert Y. Thornton (delayed)

Absent: Mr. Robert Chandler
Mr. Donald E. Clark

Staff: Mr. Donald L. Paillette, Project Director

Reporters: Professor George M. Platt, University of Oregon School of Law

Also Present: Mrs. Lucy Schafer, Lebanon
Justice Gordon Sloan
Dr. Daniel V. Voiss, Director, Delaunay Institute for Mental Health, Portland, Oregon
Members of Criminal Justice Research Associates:
Mr. Walter Evans, Chief U. S. Probation Officer for the State of Oregon, Portland, Oregon
Mr. Palmer Lee, U. S. Probation Officer, Portland, Oregon
Mr. Jack Wiseman, Deputy Director, State Board of Parole & Probation, Salem, Oregon
Members of District Attorneys Association Criminal Law Revision Committee:
Mr. Donald R. Blensly, Yamhill County District Attorney
Mr. Lou L. Williams, Columbia County District Attorney

The meeting was convened by the Chairman, Senator Anthony Yturri, at 9:45 a.m., Room 315, Capitol Building, Salem.

Chairman Yturri announced that Judge Burns had guests at the meeting and asked him to introduce them to the Commission members.

Judge Burns advised that an organization known as Criminal Justice Research Associates had recently been formed. The membership includes, among others, correction people, parole and probation officers and a number of faculty people from the Oregon College of Education at Monmouth. Judge Burns reported that the group had had a couple of meetings and that he had invited some of the members to attend the Criminal Law Revision Commission meeting. He introduced: Mr. Walter Evans, a member of the board of the organization and Chief U. S. Probation Officer for the State of Oregon; Mr. Jack Wiseman, Deputy Director, State Board of Parole and Probation; and Mr. Palmer Lee, U. S. Probation Officer. Judge Burns felt that the new group could very well provide some valuable research and other resources particularly in the field of sentencing. He noted that this would be welcomed by the Commission.

Chairman Yturri extended a welcome to these gentlemen on behalf of the Commission and advised them that the Commission would look forward to receiving their assistance sometime in the near future.

Approval of Minutes of Meetings - November 21-22, 1968; January 18, 1969

Chairman Yturri noted that the members had received copies of the minutes by mail and unless there was an objection, they would not be read.

Senator Burns moved the adoption of the minutes as submitted and Judge Burns seconded the motion. The motion carried unanimous?

Additional Funds

Senator Burns explained that some federal funds are available through the Safe Streets Act of 1968 and informed the members that about two weeks previously Chairman Yturri and he had met with Mr. Branchfield, the Director of the Crime Control Coordinating Counsel, and with two people from the Law Enforcement Assistance Office in Washington and noted a Regional Law Enforcement Assistance Office will be set up in San Francisco at the end of the year. Senator Burns advised that a certain amount of money had been allocated for the State and it will be channeled through the Crime Control Coordinating Counsel. He informed the members that the Commission is in the process of applying for some of these funds but advised that the Commission was supposed to be an "action" group and the money available this year is "planning" money. He thought that the longer they had talked together, the more he thought the state and federal representatives were convinced there was merit in the Commission's program and that time was important since the Commission's life will expire in 1971. The Commission representatives were told that there was a contingency fund in the office of the Law Enforcement Office and that it contained several hundred thousand dollars which can be released for worthy projects at the discretion of the director. The Commission is now in the process of making an application for some of those funds

and Senator Burns thought it possible that the Commission would get some money from that source--money that could be used to obtain more drafting help.

Chairman Yturri added that he had just received a letter from Mr. Roderic Gardner, Director, Law Enforcement Planning, and in it he stated that in this fiscal year Oregon would be eligible for $202,000 in action grants between now and June 30th. In the following year Congress is expected to appropriate at least $300,000,000.

Forgery and Related Offenses: Preliminary Draft No. 2; November 1968

Chairman Yturri asked Senator Burns to lead the discussion of the Forgery Draft since it had been considered by his subcommittee.

Senator Burns replied that he would like for Mr. Paillette to begin the discussion on the draft. He informed the Commission that subcommittee No. 1 had considered P.D. No. 1 on Forgery at its meeting on November 15, 1968.

Mr. Paillette observed that Forgery and Related Offenses is one of the larger single Articles that subcommittee No. 1 worked on and stated that it was the last major Article in the section on crimes against property.

Mr. Paillette noted that the Forgery Draft generally follows the New York Revised Penal Law.

Section 1. Forgery and related offenses; definitions

Mr. Paillette noted that the definitions in this section would apply throughout the entire Article, not only with respect to forgery but with respect to related offenses. The definitions attempt to set out comprehensively the terms that are used throughout the draft.

Mr. Paillette pointed out that subsection (7) to "utter" was a new definition. He referred to the commentary and read: "'Written instrument' includes every kind of writing or other article that may be the subject of forgery." He pointed out that "written instrument" does not mean only the paper document but is intended to include any type of article, document, or paper that contains written or printed matter or its equivalent. He further defined the term by stating that "'Written instrument' means any paper, document, instrument or article..., used for the purpose of reciting, embodying, conveying or recording information or constituting a symbol or evidence of value, right, privilege or identification," and noted this would include such things as credit cards, coins and stamps. Mr. Paillette explained that the grade of forgery is dependent upon the type of written instrument that is either falsely made or falsely completed or falsely altered.

Judge Burns referred to the definition of "utter" and asked if the other codes, New York and the MPC, have a definition of "utter".

Mr. Paillette replied that they did not. The idea had been, he said, to try to formulate a definition for a term that has been used over a long period of time and that has come to have certain fixed meanings. He thought there might be codes that do define the term, but he was not aware of them.

Judge Burns wondered if anything was actually accomplished by the use of such words as "circulate" and "disseminate" which appear in sub (7). He thought it was probably a good idea to keep it as broad as possible but he was not sure these two words had any particular meaning different from the others in the subsection.

Senator Burns observed that the real essence of the crime of uttering is tendering. He recalled that P.D. No. 1 did not have "uttering" and ORS 165.115, the present statute, provides something that the first draft did not have so the definition of "utter was included and it was put in the degrees.

Chairman Yturri asked what had been discussed in subcommittee in respect to "circulate" and "disseminate".

Senator Burns answered that there had been no discussion on this. He felt that Judge Burns had a valid point; he could not foresee an instance where the language questioned would be appropriate.

Judge Burns thought that if there was a type of transaction that ought to be made the subject and would not be caught up with the other wording, the language should be retained. He did not suppose retaining it would do any real harm.

Section 2. Forgery in the second degree.

Mr. Paillette stated that section 2, Forgery in the second degree, defines the basic forgery offense. The draft provides for two ascending degrees of forgery; this follows the patterns in previous drafts of other crimes. It starts with the basic definition and then it is enhanced, in this case by the type of document or written instrument that is forged. He informed the members that the section was taken from New York, §170.05.

Mr. Paillette pointed out that the crime of uttering had been incorporated into the basic definitions in the proposed draft whereas the New York code places uttering in with possession of a forged instrument. He remarked that the penalty provisions are the same under the New York draft for either crime so there is not really a substantial difference between the drafts.

The drafters had felt that in connection with the existing statutes, that placing uttering in with the basic crime of forgery rather than with possession was a good step to take.

Senator Lent referred to the language "with intent to injure or defraud" and noted that the commentary stated that the intent to defraud was what was needed at common law and he asked why "to injure" was being added.

Mr. Paillette replied that this was retained from ORS 165.105.

Senator Lent asked if it was possible that they could be getti into something not in context of forgery; could they be getting int something such as libel here? He posed the example of someone falsely making, completing or altering a written instrument for the mere purpose of blackening someone's name--this would be the injury intended.

Chairman Yturri commented that the New York text read: "with intent to defraud, deceive or injure another,..".

Mr. Paillette did not recall that the language "to injure or defraud" had ever caused any particular problem in the Oregon cases up to now. He noted that in respect to forgery that what was usually being discussed was property fraud. He added, however, that obtaining property is not an element of the crime.

Senator Lent noted the language "falsely make a written instrument" and posed a situation where someone changed a will with the purpose, only, of making it seem that the maker of the instrument had said something about someone else that was not true. There would be no intent at all to get any property or anything else; the intent would be to simply injure someone's good name. Would such a case come under this section of the proposed draft?

Chairman Yturri was of the opinion that it would be forgery.

Mr. Paillette thought it would be forgery in the first degree if a will were involved. He referred to subsection (6) to "falsely alter" a written instrument.

Senator Lent thought the instance would be forgery under the language of the draft but wondered if that was the intent.

Senator Burns pointed out that the instance would be forgery under ORS 165.105, also, and under the MPC.

Professor Platt thought that Senator Lent's point was a good one in that it should be remembered that forgery was a theft crime. He noted that it has traditionally been treated as a separate crime. The MPC comments that it had

seriously thought of eliminating the crime of forgery entirely and incorporating it into the crime of theft. Professor Platt thought that the kind of alteration of a will hypothecated by Senator Lent ought not to be a forgery as it is not theft. He thought that if there were any possibility that the changing of a will would result in criminal prosecution that perhaps the definition proposed should be narrowed. He felt the remedy in such a case would perhaps be civil, some kind of a tort action. He stressed the importance of not expanding this particular kind of crime which he really thought was not needed, anyhow.

Senator Burns stated that if the essence of forgery was theft, following this to its logical conclusion, this would all be covered under the draft on Theft by Deception and this draft would be unnecessary. He did not feel, however, that the essence of forgery was theft; he thought it was a fraudulent offense.

Professor Platt thought that there was a good basis for having a separate crime--merely on tradition if nothing else.

Mr. Paillette advised that this was the thinking in the MPC.

Senator Yturri asked what the offense would be under present statutes.

Senator Burns noted there was a criminal libel but he thought that the manner in which "injure or defraud" has been conditionally used doesn't make them necessarily mutually exclusive. He was reluctant to have it go into the record as a part of legislative history that some court might go into and use as a basis for determining legislative intent, that the hypothetical case posed by Senator Lent and Chairman Yturri was what the Commission meant. He would hate for a decision to be based on the assumption that the Commission said that that would be forgery as he was not sure that it would be forgery.

Mr. Knight noted that one of the sections that the forgery draft replaces is ORS 165.145, Transmission and delivery of false and forged messages. This would be sending any messages by telegraph or otherwise with the intent to deceive, injure or defraud any individual, partnership or corporation. Almost everywhere the term "defraud" is used, he observed, the language is "injure and defraud" and here is added the language "deceive."

Mr. Paillette was sure that existing law was not being changed by the proposed draft and he did not feel that the law was being expanded.

Professor Platt agreed but noted that they did not know what the word "injure" means in the cases and because it is now existing law would not mean that there might not be a problem with existing law, too, in this situation.

Senator Burns noted that the Oregon cases which Mr. Paillette researched were enumerated on page 4 of the draft and they seemed to hold that the requisite intent was the intent to defraud and, that being the case, it would seem to him that it had grown with the word "injure" as synonymous with "defraud".

Chairman Yturri felt that if the language were left out and the matter came up later, there would be inquiry as to why the Commission left it out and it could be said that the Commission changed in some manner the nature of the crime unless the commentary shows quite clearly that the Commission did not intend to do it. While there have not been any cases in Oregon yet that have interpreted what "injure" means, he did not feel that the Commission should delete the language because the Commission assumed it was synonymous with "defraud." There might be a situation arise, he said, where "fraud" is not present but "injure" is and the court would then say that was not intended to be covered any longer.

Mr. Paillette advised that it was felt in subcommittee that this language, which is existing statutory language, should be retained with respect to the intent element.

Judge Burns observed that the Michigan code does not use the word "injure"; it simply uses "Intent to defraud" but defines this as "A purpose to use deception....or to injure someone's interest which has value..." Even though the word "injure" is left out in the Michigan code, he thought there was still the thought of injury in the comprehensive term "to defraud."

Representative Frost asked if the subcommittee had a purpose in leaving out the word to "deceive" which appears in the New York statute. He thought that in talking about "defraud" you carry with it a lot of excess baggage from the common law. He added that he noted there was no definition of "defraud" in the statute and he did not see in the commentary any court definition other than what he assumed was the common law definition.

Senator Burns thought the language was probably taken out because of Theft by Deception which has already been approved.

It was the consensus of the members to leave the word "injure" in the definition for the present and to look at the rest of section 2 and at section 3.

Mr. Paillette advised that regarding section 2, he had noted in the commentary a couple of Oregon cases, State v. Swank and Dougharty v. Gladden, and said that Professor Linde in 1959 had raised the question of whether these two cases created a problem with respect to forgery and uttering and whether or not they might be two different crimes as a result of the cases. The draft, he said, attempts to clarify this issue by making forgery a single crime; in other words, it could be committed by making, completing or altering a written instrument or by uttering.

Judge Burns cited a case where an individual goes up to a counter and attempts to cash a check and is arrested. If the signature is proved not to be that of the purported maker, he can be taken on the charge of uttering, traditionally. Normally, he continued, forgery is not charged because it might be pretty hard to prove that he, himself, forged the check. He understood from the draft, however, that if you could prove that the individual both forged the document and uttered it, that you would not charge him on two counts of the crime.

Mr. Paillette agreed--he would be charged on one or the other.

Senator Burns advised that later on the members would see that a new crime had been included--criminal possession of a forged instrument, which gets to the person who does not quite get to the counter with the check.

Section 3. Forgery in the first degree.

Mr. Paillette stated that this takes the basic crime as set out in section 2 and would make it a more severe crime if the written instrument forged happened to be any of those set out in subsections (1) through (5). In regard to Oregon law, there was no intent to change existing statutory coverage with respect to the types of documents covered now by ORS 165.105. The proposed definitions in sub (1) and (2) are different as they are extended a little over what is existing statute. Subsection (3) sets out the types of documents presently set out in ORS 165.105.

Mr. Knight asked if checks were considered to be under sub (3) as a "...commercial instrument or other document..."

Mr. Paillette answered, "Yes."

Mr. Knight asked if there was any particular reason why the word "check" was left out.

Mr. Paillette answered that it was felt they were covered by the language Mr. Knight had quoted and noted the definition goes on to say "or other document which does or may evidence, create, transfer, alter, terminate, or otherwise affect a legal right, interest, obligation or status." The subcommittee felt this was broad enough to include checks.

Mr. Knight noted that the present forgery and uttering statute includes the word "check". He felt it should be clear in the commentary that it was felt the definition included checks so that it could not be argued later that the language was taken out and so was not meant to cover checks.

Judge Burns referred to subsection (2) of section 3 and asked what was intended to be covered by the phrase "or other instruments representing interests in or claims against any property or enterprise." Judge Burns explained his question by stating that

he had the impression that stocks and bonds are pretty well recognized categories but he said there are a number of other types of interests. He wondered if it was intended to cover other types of shares of property or enterprises and if so, is there not some danger of the court invoking the rule of ejusdem generis?

Chairman Yturri mentioned debentures or warrants and asked if they would be commercial instruments. He did not think they necessarily would. He added that the first part of subsection (2) did not bother him, it was just the language "or enterprise" that did. He wondered what particular meaning the language had.

Mr. Paillette answered that "enterprise" was intended to cover business or commercial enterprises.

Chairman Yturri wondered if the definition should not so specify if that was what was meant. He asked if New York or the MPC used this language.

Mr. Paillette replied that the language in the draft was taken from New York.

Judge Burns read from the MPC language "...or part of an issue of stock, bonds or other instruments representing interests in or claims against any property or enterprise."

Senator Burns did not recall any discussion in the sub-committee specifically with respect to "enterprise." He did recall a long, lengthy discussion about "public records." Mr. Spaulding agreed with the statement.

Judge Burns thought that if there were types of documents along the line of stocks and bonds that are intended to be covered that this is an area where it is helpful to parties in litigation and the courts later on to have an illustration given of the type of thing to which this language could well apply.

Chairman Yturri noted the Michigan law said "Part of an issue of stock, bonds or other instruments representing interests in or claims against a corporate or other organization or its property."

Judge Burns asked if an interest in a condominium would be covered by the language.

Mr. Paillette noted that the New York commentary did not comment specifically and Judge Burns noted the same applied to the MPC commentary.

Senator Burns reviewed the situation by noting that the draft divided forgery into two degrees; first saying a person would

be guilty of forgery in the second degree if in the intent to injure or defraud he falsely makes, completes, or alters a written instrument or utters a written instrument which he knows to be forged. In first degree forgery there is an attempt to categorize the crime by the type of instrument forged. Senator Burns said he was certainly not wedded to the use of the word "enterprise" and thought it was probably picked out of the MPC. He noted their commentary was silent in respect to this.

Senator Burns noted that forgery in the first degree was covered very broadly in the proposed draft; so broadly that he wondered what was left to be covered by second degree forgery.

Representative Frost noted that one thing would be the doctors prescriptions in the New York statute which is under third degree.

Mr. Paillette agreed, pointing out that the proposed draft combined two sections into one. He thought that Judge Burns' example regarding condominiums could possibly come under sub (3) of section 3.

Judge Burns agreed that it very well might. He asked if there was a definition of "commercial instrument."

Mr. Paillette said there was not, only of "written instrument

Chairman Yturri felt that subsection (2) of section 3 should in some way be related to something of value or a business or corporate deal. He thought a hunting expedition planned by a group could be called an "enterprise."

Senator Burns read the definition of "enterprise" from Webste dictionary: "The carrying on of projects, the participation in undertakings."

Chairman Yturri again read the language in the Michigan statute.

Senator Burns said that what the subcommittee had wanted was to get at five categories: first, for the government securities and coins, etc.; second, business instruments; third, deeds, wills. commercial instruments, checks; fourth, public records; fifth, the official public documents. There is no question, he continued. but what the intent of the subcommittee was to limit section 2 to business related, oriented, instruments of crime.

Justice Sloan suggested the use of the language "commercial entity" or "person". He noted that "person" throughout the code was intended to include any kind of enterprise or business or thing that is functioning and he thought the same kind of thing could be done with "entity".

Chairman Yturri observed that "person" had already been defined as including corporations. He thought the language "property or person" could be substituted for "property or enterprise."

Senator Burns moved that section 3, subsection (2) be amended by inserting the word "person" after "property or" and deleting "enterprise". The motion carried unanimously.

Senator Lent referred to subsection (5) and asked if the word "officially" was intended to modify both "issued" and "created"

Mr. Paillette replied that it was intended to modify both.

Judge Burns also referred to subsection (5) and asked what types of things issued would be covered by the subsection; i.e., would a press release be covered? He observed that these are certainly officially issued by public information officers, public relations men.

Mr. Paillette said this would go back to the definition of "written instrument." He recalled that there had been a long discussion in subcommittee on public servant type documents.

Mr. Spaulding read from the definition of written instrument "used for the purpose of reciting, embodying, conveying or recording information...which is capable of being used to the advantage or disadvantage of some person." He thought the press release would come under this and Chairman Yturri agreed.

Judge Burns advised that Multnomah County now has a monthly publication which is certainly a written matter used for the purpose of conveying information which "is capable of being used to the advantage or disadvantage of some person." He asked if this would fall within subsection (5) of section 3. Mr. Spaulding and Chairman Yturri thought that it would. Judge Burns stated that he was not so sure that this should be forgery in the first degree.

Chairman Yturri referred to the Michigan code and read some of the examples of items listed as being covered: trapping licenses, certificates of motor vehicle department, (he noted these were all separate statutes) certificate of financial responsibility. warehouse receipt, cream test report, oil production report, forester's report...He noted that these examples were listed by Michigan as being under first degree forgery.

Representative Frost thought that the problem came within the definition of "written instrument", the part of it reading "used for the purpose of reciting, embodying, conveying or recording information or." He thought they were talking about a crime against value and thought if this language were taken out so that the definition read "constituting a symbol or evidence of value,

right, privilege or identification" that it would take it completely out of the press release field; the governor's message field, etc. The definition as amended by Representative Frosts's suggestion would then read: "'Written instrument' means any paper, document, instrument, or article containing written or printed matter or the equivalent thereof, whether complete or incomplete, constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person."

Mr. Paillette observed that, as in the past, the attempt had been to hold down the number of degrees of a crime in this draft; what had been separate degrees in New York and Michigan were combined and put into one degree. The "public record" now is included as part of the basic forgery section in the CRS.

Senator Burns advised that what they were trying to get at was the problem raised in the Brantley case where there was a forged certificate of nomination. This had been discussed at length by the subcommittee at the October 18, 1968, meeting.

Representative Frost this would fall under the language, "right, privilege or identification,".

Judge Burns noted the Brantley case involved a certificate of nomination and it was held not to be a public record.

Senator Burns thought the case would then fall within section 3, subsection (5) and Mr. Paillette agreed. Senator Burns informed the members that originally subsection (4) of section 3 had read: "A public record, or an instrument filed or required or authorized by law to be filed with a public office or public servant; or" and in subcommittee they had deleted all the language except "A public record; or" and tried to reach the situation that was prevalent in the Brantley case in subsection (5). He thought, however, that perhaps Representative Frost's idea was a good one.

Mr. Spaulding was reluctant to take all of that language out as it might apply to second degree and Senator Burns agreed. He did think, however, that the language in subsection (5) section 3 was too broad for first degree.

Judge Burns thought that if it were taken out and the commentary showed that it was not the intent to not make it a crime but merely to shift it, it would be covered by section 2 automatically.

Senator Burns thought there was another point, too. It would not preclude a district attorney from filing an information charging the defendant with first degree forgery on the theory that it was a public record and, if it failed to measure up to the level of being a public record, as was shown in the Brantley case, it would come within the lesser included as second degree.

Judge Burns moved to delete subsection (5) of section 3 and to have the commentary appropriately show that it is not the intention of the Commission to say that it does not constitute a crime but rather that those acts would come under section 2, Forgery in the second degree. The motion carried unanimously.

Senator Burns thought that before going on to section 4 that it would be appropriate to discuss forged prescriptions as he thought there was a policy decision to be made with regard to them. He stated that this was discussed to great length in the subcommittee and that he had intended to write to the Oregon Medical Society to take it up with their counsel but had not done so. Senator Burns observed that some of the codes make forged prescriptions first degree forgery but as he read it, it would not come under first degree forgery in the proposed draft.

Mr. Paillette noted that the discussion held in the subcommittee covered this important area and read from the minutes of that meeting. (See pp. 6-9, Minutes of Subcommittee No. 1, October 18, 1968).

Representative Graham asked if this was not covered in some other section of the law.

Chairman Yturri replied that it was now covered in another section--for just narcotics.

Representative Graham asked if the question now was whether or not dangerous drugs should be included.

Chairman Yturri said it was whether or not all prescriptions should be covered.

Mr. Knight asked if prescriptions would fall under the proscription to "injure or defraud?"

Senator Burns felt that there was a possibility that an intent to injure would be present.

Judge Burns asked if this was the sort of thing that should be left in the narcotics section or, if it is desired to expand it to cover penicillin, etc., to put it in the medical code.

Representative Graham noted that there are regulations that control, too; he cited those controlling the pharmacies and the pharmacists.

Senator Burns observed that the pharmaceutical regulations apply to regulating the pharmacy and the sanction is applied toward the seller; whereas, the attempt in the draft is to apply some sort of sanction against the procurer. He noted that in each of the codes examined, New York, Michigan, Connecticut, Illinois, the trend seems to be toward embracing forged prescriptions within forgery.

Representative Graham said that he could see where something could be developed where a supplier of some types of pep pills to kids could forge a prescription to obtain a narcotic or some other dangerous drug and then utilize that to obtain money. It seemed to him that it would be advantageous to include it here.

Mr. Paillotte pointed out that a forged prescription for a dangerous drug or narcotic is covered under ORS 475.100, but the discussion in the subcommittee was aimed at other types of prescriptions. The subcommittee did not know whether there was enough of a problem with respect to prescriptions for a non-dangerous drug, not narcotics, to warrant including them in forgery.

Chairman Yturri inquired about some of the new drugs where they do not know what the effects will be.

Mr. Spaulding commented that the prosecutor might have a difficult time proving whether or not a drug is dangerous.

Judge Burns asked if this was a function of the forgery sectic

Chairman Yturri replied that the draft was covering every other type of forgery, altering and changing and he wondered why this should be left out.

Senator Burns asked if it would be the altering of a written instrument?

Senator Lent thought it would be necessary to go back to section 2, which gets the "intent" into it; this section would first have to be violated.

Senator Burns agreed and said that is why some codes specifically include prescriptions. They get around the language in section 2 by categorizing this type of instrument.

Judge Burns asked if there was an evil in someone forging a prescription for Chloromycetin or some of the new wonder drugs.

Mr. Spaulding felt there was certainly a good reason for keeping people from getting those drugs without the prescription from the person authorized to issue it--because of the possibility of danger.

Judge Burns asked if this was not the reason we have the various state and federal health authorities.

Mr. Spaulding thought these agencies would categorize those drugs requiring a prescription but there is nothing to protect the prescription itself.

Senator Lent asked if the actor could not be held under section 4, Criminal possession of a forged instrument in the

second degree. He thought all that would be necessary would be for someone to possess the altered instrument knowing it to be forged and with intent to utter same. The intent in section 4, he said, does not seem to be to defraud or injure.

Mr. Knight thought it would have to be something that was capable of injuring or defrauding when it was uttered or it would not come within the criminal proscription of a forged instrument.

Mr. Robert Thornton arrived at the meeting.

Senator Burns did not think it would have to and Senator Lent did not think this would carry through. Senator Lent referred to the definition of a "forged instrument" which read " a written instrument which has been falsely made, completed or altered." He felt that if someone had such an instrument and knew it to be a forged instrument and intended to utter it, he would be guilty under section 4.

Representative Frost thought that the definition of "written instrument" would cover the problem of the prescription.

Senator Lent was of the opinion that prescriptions were covered in section 4.

Representative Frost noted that the language defining a "written instrument" included "a symbol or evidence of value, right, privilege..." and he asked if an individual has a right to buy a prescription drug without a prescription--or is it a privilege to buy?

Chairman Yturri thought it was probably a privilege and he thought it would be covered. He thought perhaps Senator Lent and Representative Frost were right and there was no problem.

Judge Burns was reluctant to say there was something here that would make it a crime to forge a prescription for penicillin when it is not known that that is an evil, either to the individual or a third party.

Chairman Yturri thought there was a potential there, though.

Senator Burns thought it lent itself to many kinds of problem such as black marketing of prescriptive medicine and thought the reason this particular crime is beginning to appear in first degree forgery in revised codes is because of the greater incidenc in the use of drugs.

Representative Graham thought that somecne had had the wisdom to say the pharmacist could not sell; they had had the wisdom to know that the drugs were dangerous and therefore they could not be sold without some authority having control. He admitted that

the draft was from the opposite viewpoint, that of the buyer; but thought there had been wisdom in requiring control through the seller. Regarding the question of whether penicillin was evil or not, he did not think "evil" itself was the question; it was dangerous without the proper knowledge. The question is, he continued, whether someone should be in jeopardy if he attempts to obtain these things, even though he may have the knowledge that it may be harmful.

Senator Burns thought that Senator Lent had probably clarified the problem for the Commission because he thought that prescription would probably come within section 4, possession. He thought that if the medical profession had reason for providing that only licensed doctors prescribe drugs, then it would seem that for some layman to forge a prescription, for whatever reason, would constitute a possible danger to public good and he thought the Commission had a policy decision to make to determine whether or not an act of this nature is sufficiently against the public good to be designated a crime. He recalled that Mr. Spaulding had made the point in connection that there are many holes in the narcotic drug section now with the rising number of new drugs. Senator Burns thought this illustrated that even in that broad an area, there are things that are not covered.

Representative Frost thought there was flexibility there already. The State Board of Pharmacy has to determine whether or not a drug is a dangerous drug. He pointed out that asperin misused was a dangerous drug. Representative Frost felt that the flexibility should be left where it now is by determining if it is dangerous enough to require sanctions. He thought it was in the draft right now; that it was a matter of accepting it, not including it.

Chairman Yturri said the commentary should show that it is the intention of the Commission that section 4 is "possession", that it does constitute second degree and that it is the intention of the Commission that prescriptions be included.

Mr. Knight asked if this was under the definition of a "written instrument?"

Chairman Yturri replied, "Yes." He noted that where there was no alteration, where a prescription is written and signed by the person writing the prescription, there would be no forged instrument but the individual could be cited for practicing medicine without a license.

Senator Burns thought this would come within forgery because it would be "falsely making," and referred the members to section 1 (4).

Judge Burns did not think it would fall within subsection (4) because it would be an authentic creation of the person signing the prescription.

Mr. Knight noted it would be a crime under section 2 to utter the forged prescription if there is intent to injure and defraud. He wondered about the case in the event the druggist was not defrauded, where the person uttering the forged prescription paid in full for the drugs obtained. He thought under section 4 of the proposed draft that possession of any type would have to be possession of a forged instrument that would be capable of defrauding if passed; otherwise, possession would not be a crime.

Chairman Yturri stated that under the definitions it would be included with "written instruments" and the definition of "forged instrument" means "falsely made, completed or altered." He was of the opinion that it would be included.

Senator Burns said if a prescription were written and signed by someone designating himself "doctor" when, in fact, he was not a doctor, that this would be covered under obtaining property under false pretenses, or attempting to, and that would be a criminal proscription.

Mr. Spaulding commented that this would still be an attempt to defraud.

Senator Lent thought that what was involved was the question of how severely a punishment it was intended to give these people. He thought the mere possession of the forged instrument would be covered by section 4, Criminal possession of a forged instrument in the second degree, which, he noted, was not comparatively a very serious thing. The possession of the instrument with the intent to utter would be within section 4 which does not go into the "intent to injure or defraud." The only intent requisite is the intent to utter the instrument.

Mr. Knight asked if this would make it a crime to possess something when it would not be a crime to utter it or do anything with it.

Senator Lent agreed that it would not constitute forgery because of the different intent necessary.

Judge Burns referred to section 3 sub (4) and asked if there was presently a statutory definition of "public records."

Senator Burns stated that it was defined in ORS 192.005 (5). He felt that the definition would carry over and added that the subcommittee specifically stated this in their minutes.

Representative Frost was still concerned about the definition of "written instrument" contained in section 1. He thought that it brought up, again, the press release situation by the use of the language "...used for the purpose of reciting, embodying, conveying or recording information." He noted that there is no reference here to "defraud or injure" and assumed it meant simply

"possessing." He observed that the forged instrument is one just "falsely made, completed or altered." Representative Frost said he still wondered if they were not talking, basically, of a value crime rather than a straight deception crime.

Senator Lent posed the situation where an individual might have an instrument that looks like a press release in his pocket and intends to utter the instrument. This would not gain the actor anything of value, it would not be taking anyone's property and yet he could be prosecuted under the language of the draft because it is that broad.

Representative Frost again stated he thought the problem arose with the language talking about just embodying information or recording information or conveying information. He thought the rest of the language in section 1 sub (1) gets at what he felt the Commission was talking about and that is "value, right, privilege or identification" capable of being used.

Mr. Paillette said in respect to the definition of "written instrument" that the New York commentary on that indicates that they were attempting to define instruments that might be subject to forgery in the broadest possible terms; so they purposely used this kind of language. He read from the New York commentary:

> "This conforms to the common law principle that forgery can be committed with respect to 'any writing' which may 'be the means of defrauding another'. Apparently inadvertently, the former Penal Law's forgery Article considerably restricted the subjects of forgery. Since, on the one hand, it did not define them in general fashion and, on the other, created numerous specific crimes applicable to certain designated instruments, its crime of forgery was held to be narrower than the common law offense in this respect and to embrace only those instruments explicitly specified in the substantive provisions. The revised provision restores the breadth of the common law crime by encompassing every document or other item susceptible of deceitful use in a forgery sense which is 'capable of being used to the advantage or disadvantage of some person'."

Mr. Paillette added that in following New York, the drafting attempt had been the same, to make it a broad definition. As New York pointed out, he thought it did restore the common law approach.

Section 4. Criminal possession of a forged instrument in the second degree.

Professor Platt said that section 4 raised the very interesting point with respect to inchoate crimes that he felt the Commission ought to look at. Possession is incomplete criminal

conduct, he said; it is an inchoate crime. The MPC in section 5.06, the Article on Inchoate Crimes, defines the crime of "Possessing Instruments of Crime" and he felt that definition clearly would encompass what the draft specifically attempts to do--that is, make possession of this particular kind of an instrument a crime. Professor Platt advised that in one instance that he knew of the Commission had already approved this kind of an offense and this was with respect to possession of burglar's tools.

Professor Platt advised that in the Inchoate Crime Draft that he had raised the issue that he felt that the Inchoate Crimes Article was really the better place for all possession-type crimes to be, although he realized the Commission had made the decision with respect to the burglar's tools. He felt that rather than proliferate possession-type crimes, it would be better to concentrate them within the Article which really deals with the basic concept of criminality, that is, the incompleteness or the inchoateness of this kind of crime.

Professor Platt replied that he had raised the issue in the draft and had suggested that perhaps the section ought to be added in Inchoate Crimes, depending upon what the Commission decided it wanted to do with this particular kind of an offense. Obviously, he continued, if it was decided to define "possession" with respect to each kind of crime, then it ought not to be in the Article on Inchoate Crimes.

Mr. Knight observed that the draft made "possession" of a forged prescription a crime whereas "passing" it will not be a crime. He thought they were doing specifically what Professor Platt was arguing against.

Professor Platt noted that he was not necessarily taking a position on the matter.

Senator Burns did not think the Inchoate Crimes Article was sufficiently broad enough to embrace this particular type of a possession offense.

Professor Platt thought the section in the MPC could certainly be improved to encompass anything the Commission wanted.

Senator Burns said he tended to agree and that was the reason the Commission was meeting, to try to broaden this in a cohesive manner.

Mr. Paillette said he would like to speak with respect to Professor Platt's remarks on Inchoate Crimes. He recalled that at the time the Commission considered the Burglary Draft and discussed burglar's tools, a comment was put in the final draft to the effect that the Commission realized this might be covered by Inchoate Crimes as an "attempt" but that it was being included

with the understanding that this would have to be reviewed by the Commission later in light of the draft on Inchoate Crimes. He thought from the standpoint of structuring the criminal code that the general approach through the Inchoate Crime Article is preferable over hit-and-miss, specific-type statutes. He thought that serious consideration should be given to adopting the MPC approach, not only with respect to the draft presently being considered but also with respect to burglar's tools and other possession-type offenses.

Senator Yturri commented that normally a forged instrument is thought of as one which the person intended to utter. He felt this was the same thing that was bothering Mr. Knight. He observed that section 4 made it a crime to have something in your possession that it would not be a crime to utter.

Mr. Knight agreed. He felt it was wrong; if it would not be a crime to make the instrument or to pass it, he could not see why it should be a crime when someone possessed it.

Chairman Yturri said this is why he wondered about the definition of a "forged instrument", section 1, subsection (8).

Mr. Knight thought that the possession of something that was forged must be something that if the possessor was capable of uttering it would be a crime of forgery. He felt the courts would hold to this.

Mr. Paillette asked if he did not think the definition of a "forged instrument" defined an instrument that was capable of being used to commit a forgery.

Mr. Knight replied that then his possession would not be important but he felt that they had just said that regarding prescriptions that it would not be a crime to write it out, it would not be a crime to pass it because there would be no intent to injure or defraud, but it is a crime when you possess it. It was his contention, not only for prescriptions but for any other type of writing, that if it was a crime to possess it, it had to be a crime to pass it.

Chairman Yturri observed that the definition of a "forged instrument" was a broad definition and he noted that the intent to utter is absent.

Mr. Paillette pointed out that the intent to utter is set out in section 4, however.

Senator Lent suggested that perhaps the problem of uttering might be solved if the definition of a "forged instrument" were changed to read: "A written instrument which has been falsely made, completed or altered for the purpose of defrauding or injuring another person."

Chairman Yturri thought this would bring up the problem of the words "deceive" or "misled" not being there and he noted that in a prescription there is no injurious or defrauding.

The Commission broke for a short recess.

Senator Burns asked if the Commission would be amenable to this sort of approach to solve the problem relating to prescriptior

(1) To send the question of forged prescriptions back to the subcommittee. The commentary to show that insofar as the draft is concerned, assuming it is approved by the Commission at this meeting, that it was not intended to cover forged prescriptions.

(2) To get to the Inchoate Crime problem discussed by Professor Platt and which Senator Burns thought made tremendous sense, to reserve "criminal possession" to the Inchoate Crime Article. He stated that he want it understood that he was not saying that in his judgment that the MPC Inchoate Crime Article was necessarily acceptable but he thought it could be revised.

With these things in mind, Senator Burns moved to delete section 4, Criminal possession of a forged instrument in the second degree; section 5, Criminal possession of a forged instrument in the first degree; and section 6, Criminal possession of a forgery device.

Chairman Yturri asked if it would be Senator Burns' intention that all three of the sections go back to subcommittee.

Senator Burns said that it would be his intention that all three sections go over into Inchoate Crimes; that they would be sent to Mr. Platt with instructions that these are the kinds of things that the Commission felt were intended to be covered in the Inchoate Crimes Article. The question of forged prescriptions, he continued, could go back to subcommittee No. 1 for additional consideration.

Representative Frost asked if the subcommittee could also look at section 1, the definition of "written instrument." He questioned that it added anything and thought it might just be a "Pandora's Box" that the Commission might not want to open.

Mr. Spaulding was of the opinion that it did add to the section.

Judge Burns seconded Senator Burns' approach and the motion carried unanimously.

Section 7. Criminal simulation.

Mr. Paillette remarked that section 7 was a minor provision of the Article. He noted that it was similar to the MPC provision in §224.2 and that it has been adopted by other revisionists. He thought perhaps that Oregon did not have the problem that other more populous states have, but the section was intended to cover art objects, antiques, this type of property. The Michigan commentary points out that this crime takes careful planning, that a great deal of money is usually at stake, and it is difficult to apprehend a criminal of this nature after a crime has been committed.

Judge Burns referred to subsection (2) and voiced the opinion that if the "possession situations" were all to be thrown over to inchoate crimes, that subsection (2) should be in the same transfer generally.

Chairman Yturri recalled that the problem involved in the previous sections was that of mere possession without the intent to defraud.

Section 8. Fraudulently obtaining a signature.

Mr. Paillette advised that this was taken from the New York Revised Penal Law and the Michigan code. It would cover the type of situation which would not be forgery because the document that is completed actually ends up as it purports to be, a document executed by the person having the authority to sign it. This is intended to get at the person who obtains a qualified signature under false pretenses.

Mr. Paillette read the subcommittee minutes relating to this section. (See pp. 10-11, Minutes S. C. No. 1, October 18, 1968.)

Professor Platt said that without having the definition of Theft by Deception at his fingertips, he did not see any difference between Theft by Deception, as it has already been defined, and this particular description. He asked Mr. Paillette if there is a difference. Professor Platt did not think this was, initially, a typical forgery situation but was a false pretense, deceptive practice that he thought would fall under the theft definition.

Judge Burns observed that the commentary stated that "A signature is not 'property' as defined in the Theft Draft."

Professor Platt contended that if a salesman misrepresented facts with respect to the value of an article and he knows this to be wrong and the purchaser signs a check paying for the article the salesman has stolen money on the grounds of deceptive, false pretenses, not on the grounds of forgery. He thought this was within the theft definition. He pointed out how closely forgery and theft run together. Professor Platt stated that he raised

the point because he did not want the Commission to get into a Pinkey situation, where the state's attorney has an alternative, perhaps, for the same kind of conduct.

Senator Burns quoted from Theft, Tentative Draft No. 1, April 1968:

> "A person, who obtains property of another thereby, commits theft by deception when, with intent to defraud, he:
>
> Creates or confirms another's false impression of law, value, intention or other state of mind which the actor does not believe to be true; or
>
> Fails to correct a false impression which he previously created or confirmed; or...."

Professor Platt asked what the difference, essentially, was between the definition read and that in section 8 of the proposed draft.

Senator Burns replied that Theft by Deception presupposes the obtaining of property as a result of the deceitful act. The crime of fraudulently obtaining a signature is more of an inchoate state; it does not necessitate the obtaining of property.

Mr. Paillette advised that the definition of property contained in the Theft Draft was: "'Property' means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract." They were concerned, he said, whether or not a signature would fall within the definition of property.

Senator Lent quoted from section 8 "by means of any misrepresentation of fact which he knows to be false" and felt the language was awkward. He asked if it should not be "representation of fact which he knows to be false" or perhaps it should be "his knowing misrepresentation of fact."

Senator Lent asked if it was intended to cover both kinds of conduct, fraud in the inducement and fraud in the execution.

Senator Burns replied that they were attempting to cover fraud in the inducement here. Fraud in the execution would be covered in Theft by Deception.

Senator Lent asked about the case where a signature is obtained by asking someone to sign three copies of an instrument and the instruments are laid out so that the signature line shows in three places. The person reads the first instrument and intends to sign it. The second instrument is entirely different but is signed under the assumption that it is the same as the first instrument. The third instrument is the same as the first one; however, the signature on the second instrument is really

the one that is wanted. Senator Lent asked if this would not be fraud in the execution. Certainly the individual signed something he did not intend to sign.

Chairman Yturri thought that would be Theft by Deception.

Mr. Paillette thought both fraud in the inducement and in the execution were covered by the section and were meant to be covered.

Judge Burns asked if the section was intended to cover roofing and siding contracts. While he did not endorse some of the practices of some of the roofing and siding contractors, he was not sure he favored adding so much more to the burdens of the district attorneys. As the section is worded, Judge Burns thought any person who signed one of the contracts and was disappointed later, could go to his district attorney to issue a complaint.

Mr. Knight commented that presently there has to be a false token in misrepresentation. He said it was very frustrating to have someone going around with an organized type fraud and not be able to produce a false token. He did not think it would create any greater problem by adding the proposed section than what there is now.

Chairman Yturri thought that whatever was intended in the inducement and in the execution, that it should go into the chapter on forgery.

Senator Burns revealed that the subcommittee had discussed the problem created by roofing and siding contractors and decided that the section should appropriately fall within forgery.

Judge Burns stated that his point was that if the Commission wished to place this type of thing in as a crime, they should bear in mind the burden being placed, mainly, on the prosecutors.

Mr. Knight remarked that if the complainer had paid for the siding, he would be in the district attorney's office, anyway, under OMFP, so he did not think a good deal would be added by putting the signature situation in.

Mr. Paillette referred to the Inchoate Crime Article and asked Professor Platt if his definition of an "attempt" gets far enough into the preparation stage to include this kind of conduct? In other words, would it be Attempted Theft by Deception to falsely obtain a signature on a document if the actor intended to go ahead to obtain property?

Professor Platt said his feeling would be that it would be covered. He admitted that it was a problem of fact, the difference between preparation and attempt. The defining of "attempt"

for the purpose of distinguishing it from more preparation is one of the most difficult, if not the most difficult, sections in the Inchoate Crimes Article and for that reason, Professor Platt said, he was a little hesitant about the matter. However, as Mr. Paillette put it, Professor Platt thought it would be an attempt. He added that there are a lot of inchoate crimes that are now described as completed crimes, burglary is a good example, breaking and entering with intent to commit another crime.

Chairman Ytsmi referred to Senator Lent's comments re some of the language in section 8 and agreed that it ought to be cleared up.

Senator Lent asked Mr. Paillette if it would do violence to any drafting technique he had been employing to say "by means of knowingly misrepresenting any fact".

Mr. Paillette did not feel this would cause any drafting problem.

Mr. Spaulding suggested the language, "by means of any intentional misrepresentation of fact".

Senator Lent felt either would be satisfactory.

Senator Burns moved the amendment suggested by Senator Lent, to provide that the last clause of section 8 read: "he obtains the signature of any person to a written instrument by means of knowingly misrepresenting any fact." Senator Lent seconded the motion and it carried unanimously.

Section 9. Unlawfully using slugs.

Mr. Paillette stated that section 9 gets into the problem of the use of slugs. It was the intent to combine several existing statutes. He advised that the first subsection of section 9 defined the crime and that subsection (2) defined "coin machine" and "slug." It was intended that "coin machine" be defined broadly enough to include any type of vending machine that would take not only coins but also bills or tokens. "Slug" is defined to include what is commonly thought of as a slug as well as anything that could be used in a machine that is designed to accept other things such as a bill or token. He noted that coin changing machines are becoming popular, by inserting a bill an individual will receive coins in return. It was the intent to cover this type of machine, also.

Mr. Paillette advised that the section was taken from the Michigan proposed draft, which, in turn, is based on the New York statute. The difference in the approach employed in the draft is that the proposed draft does not provide for different degrees

of the crime. The subcommittee felt that for most purposes that one statutory crime would be sufficient in Oregon.

Judge Burns wondered if a Pinkey type situation would be created in that he thought the term "slug" under the definition of "slug" would also [illegible] (a written instrument which is already made) or counterfeiting.

Mr. Paillette stated that the intent required under section 9 is the intent to defraud the supplier of property or a service sold or offered by means of a coin machine; so he thought there were some guidelines with respect to this particular point. He questioned that this section would create a Pinkey problem any more than larceny in a store which can also amount to shoplifting.

Judge Burns was of the opinion that if he uttered a written instrument, which he knew to be forged, with the intent to injure or defraud, he is guilty of forgery in the second degree He felt that inserting the bill into a coin machine was another way of "uttering".

Senator Burns did not feel there was a Pinkey problem involved because there was the added element of the machine itself.

Mr. Paillette added that what Pinkey gets at and what Pinkey proscribes is the situation where the same facts can amount to either a misdemeanor or a felony and the district attorney or the grand jury is free to capriciously choose either one without any appropriate guidelines.

Mr. Knight noted that the Pinkey decision was an out-and-out NSF situation. He added that the Pinkey question had been raised a number of times but the Supreme Court has held each time that it did not apply.

Professor Platt noted the section contained the word "possesses" again and asked if the Commission wished to do something about the use.

Chairman Thurmond observed that "possesses" was used directly in the language "with intent to enable a person to use it fraudulently" and this characteristic was not present in section 4.

Professor Platt then wondered why the "possession of a credit card" was not made part of the definition.

Senator Yturri suggested going on over to section 10, Fraudulent use of a credit card.

Section 10. Fraudulent use of a credit card.

Professor Platt said he raised the question because he thought perhaps there was an inconsistency. If "possession" with the intent to defraud with slugs was a crime should not

"possession" with intent to defraud with a credit card be also. He said he still felt that "possession" as used in "slugs" ought to be treated as a general possessory question.

Mr. Knight asked if the penalty for an "attempt" was to be directly related to the principal crime advanced?

Professor Platt answered that the crime of possession is generally viewed not as a crime of attempt but is defined as something that is criminal in order to allow the police to intervene at an earlier time than they could with respect to the definition of the crime of attempt. Possession, he said, is not generally equated with the crime of attempt. The penalty provisions for the crime of attempt is equated with the principal offense. Possession of slugs or weapons is designated currently as a misdemeanor in the code--it is not related to the principal for the reason that it is not close enough, yet, to completed conduct to warrant the higher penalty.

Mr. Knight thought there were certain instances where possession should be related to the completed crime, i.e., possession of a forged check with the intention to pass it. He thought this should be greater than a simple misdemeanor. Mr. Knight favored leaving the word "possess" in the drafts as they go through them and then if it is seen that in some instances they fall under the general possession definition and under its penalty, they could be pulled out and put there. He contended that the possession of some things should have greater penalties than possession of other things.

Professor Platt thought that philosophically, at least, if the penalty for possession is lighter than that for the completion of the crime, it acts as a deterrent.

Mr. Knight thought in some instances that possession should be penalized as a felony.

Senator Burns pointed out that one of the most commonplace of all felonies is burglary and, traditionally, the possession of burglar's tools is a misdemeanor.

Mr. Knight noted that possession of a narcotic drug had a greater penalty than using a drug.

Professor Platt was of the opinion that these were the things that the subcommittee on Inchoate Crimes should consider and thought that if the language were to left in the draft that it be done with the condition subsequent that it may be taken out, depending upon the decisions in the Inchoate Crimes Article.

Mr. Paillette replied to Professor Platt's question re the reason for putting "possession in section 9 but not in section 10. It was felt by the subcommittee that a credit card itself would

constitute property; consequently stealing it would be theft and possession of a stolen card would probably be theft by receiving. It was felt that forging a credit card or possession of a forged card would be prohibited by the forgery sections of the draft. It was intended that credit cards be covered under the definitions, he said, but it was felt that there was no purpose in having separate sections relating specifically to theft or forgery of credit cards.

Judge Burns agreed with Professor Platt. He noted that sections 4 and 5 had been taken out and there the gist was "possession with intent to utter"; in section 9 it is "possession with intent to enable a person to use it fraudulently..." and he could not see where there was any real difference. He did not think the Commission members could make an intelligent choice until Professor Platt completes his draft and the subcommittee considers it.

Mr. Paillette related that when the subcommittee was trying to get at possession of slugs, it was intended that the manufacturer or the supplier be reached. He felt it would cover the situation where it might be difficult to prove a person had made the slugs but perhaps it could be proved that he was in possession of them with an intent to sell them to someone else who would, in turn, use them in a machine.

Chairman Yturri asked if the word "possesses" were deleted and tossed into the subcommittee with respect to inchoate crimes, if the section would then be satisfactory.

Senator Burns was not certain that the deletion would add anything to the section. He quoted the language, "he...possesses... with intent to...use it fraudulently in a coin machine" and asked how this intent would be proven. He thought that if the element of possession were to be placed in the inchoate crimes section, it would be necessary to take the whole qualifying phrase along with it in order to permit the district attorneys to get this kind of proof in. He did not feel it would do violence to the inchoate crimes concept to leave "possesses" in section 9.

Chairman Yturri asked those in favor of the retention of the word "possesses" in section 9 to raise their right arms. The members unanimously favored its retention in section 9.

Section 10. Fraudulent use of a credit card.

Mr. Paillette quoted from the MPC commentary:

"This is a new section to fill a gap in the law relating to false pretense and fraudulent practices. §223.3 and §223.7 cover theft of property or services by deception. It is doubtful whether they reach the credit card situation

because the user of a stolen or canceled credit card does not obtain goods by any deception practiced upon or victimizing the seller. The seller will collect from the issuer of the credit card, because credit card users assume the risk of misuse of cards in order to encourage sellers to honor the cards readily. Thus it is the non-deceived issuer who is the victim of the practice."

Mr. Paillette advised that section 10 is based on MPC section 224.6 and the Michigan code. The intent to "injure or defraud" is the same as that in the forgery sections. The existing statute, ORS 165.300, requires an intent to defraud and he noted that the definition of "credit card" is an amended version of ORS 165.290 (3

Mr. Paillette advised that there were presently three statutes on the books covering credit card crimes; ORS 165.290, defining the term "credit card" and "card holder"; ORS 165.295, dealing with the unlawful taking, procuring, possession, alteration or use of a credit card; ORS 165.300, prohibiting the fraudulent use of a revoked or canceled card. He said that the subcommittee had wanted it specifically pointed out that the existing statute provides for misdemeanor punishment if the total amount of services or goods obtained is under $75 and for a felony punishment if the total is over $75. The subcommittee felt there should be similar grades in the case of credit card use.

Chairman Yturri deferred consideration of section 11 until after the noon recess. He did however, decide to obtain a Commission vote on the sections already discussed and referred the members to section 1.

Senator Lent understood that if it was moved at this time to adopt that it would also include the prior agreement that the subcommittee would re-examine the definition of "written instrument."

Chairman Yturri agreed, adding that even after the Commission has formally adopted a draft, if something inconsistent or improper is found, they could go back over the draft.

Section 1 was adopted unanimously, with the above provision.

Section 2 was adopted unanimously, as drafted.

Section 3 was adopted unanimously, as amended.

Sections 4, 5 and 6 were previously voted on.

Section 7 was adopted unanimously, as drafted.

Section 8 was adopted unanimously, as amended.

Section 9 was adopted unanimously, as drafted.

Section 10 was adopted unanimously, as drafted.

The Commission members recessed for lunch, convening again at 1:30 P.M.

Section 11. Negotiating a worthless negotiable instrument.

Mr. Paillette observed that a note will be made for not even having a specific statute which mentions bad checks, particularly since under the comprehensive theft statute drafted, the obtaining of property by means of a bad check would be theft by deception. He thought there were some other advantages to having a bad check statute, however--one, property does not actually have to be obtained in order for a crime to be committed; two, there are certain prima facie evidence factors written into the law. He noted that the Michigan approach emphasizes the protection of the system of negotiable paper itself and that because checks are so widely used, there is sound reason for being able to take care of them with the prima facie evidence provisions.

Mr. Paillette advised that the subcommittee had anticipated that section 11 would amount to a misdemeanor and that the serious crimes, involving a good deal of money, would be prosecuted under theft by deception.

Mr. Paillette felt that the Michigan approach, with respect to the definitions, was a good one--this was to incorporate by reference the Uniform Commercial Code definitions.

The prima facie evidence factors, he noted, were not new; Oregon has these under present statute. The draft language is a little different from ORS 165.225, Mr. Paillette said, and he also noted that there is a ten day provision included. This provision received a good deal of consideration in the subcommittee. Section 11 subsection (2) (b) is not intended to prohibit prosecution of a check charge if the ten day period has not elapsed.

Mr. Paillette quoted from the draft commentary:

> "Under the prima facie evidence provisions of the section the state meets its initial burden of proving intent if it shows either that the issuer of the instrument had no account with the drawee or that the instrument was not made good within ten days after receipt of a notice of dishonor. This does not mean that the state cannot prosecute until after the ten day period has elapsed, but, merely that the prima facie evidence provisions are not available" until this time has gone by.

Mr. Paillette stated that a rather important change is made with respect to existing check laws on the question of intent. The draft is geared to an intent or knowledge that the check would not be honored. If a person presents a check on Friday with not enough money in the bank on Friday to cover it but with the intent to have enough money banked on Monday when the check

is presented for payment, under the proposed draft no crime would be committed. The reasoning behind this is that if there is no intent to defraud the person to whom the check is given, no crime is committed. Under ORS 165.225 the knowledge element is "knowing at the time of the making, drawing, uttering or delivering that the maker or drawer,..., has not sufficient funds in or credit with said bank...for the payment of the check,..."

Senator Lent referred to the language employed in section 11, subsections (1) and (2) and felt that it was quite apparent that it was referring to drafts and bank checks. He did not think the terminology quite fit, in that a negotiable instrument could be a promissory note, for instance. He wondered if it were meant to cover anything other than the bank draft or check.

Mr. Paillette admitted that the section was mainly intended to cover bank drafts and checks but said it was certainly meant to cover other negotiable instruments as well. The prima facie evidence provision probably would not apply in the case of a promissory note.

Senator Lent was of the opinion that under the draft language that if you could not point to a "drawee" you could not have a crime and if the section were intended to cover promissory notes and paper other than bank drafts and checks, the statement was too narrow.

Mr. Paillette thought Senator Lent had brought out a good point.

Mr. Knight suggested it might help if in section 11 sub (1) the words "by the drawee" were deleted.

Senator Lent suggested that the language "by the drawee" be replaced by "upon presentment."

Judge Burns thought the word "presentment" might have some restrictive connotations.

Representative Frost read from the definition of "presentment" in ORS 73.5040 and concluded that it was quite broad. He stated that there was a good deal of excess language, also, in the definition of "negotiable instrument" in ORS 73.1040.

Mr. Paillette replied that the definitions were incorporated by reference because they were broad and the section was intended to cover instruments other than bank drafts and checks.

Representative Frost referred to the time of presentment and expressed the opinion that problems were being created by having the commercial code definitions; he thought it was creating a good defense because time of presentment and how it is made is very strict in the commercial code.

Mr. Paillette stated that not only the MPC, but the modern view of these things is that caution should be exercised in writing prima facie provisions in the criminal statutes. In cases where a prima facie case is created against a defendant, it should be strictly limited. This is purposely done under the Michigan draft, he continued, to make it difficult to have a prima facie case. The tendency in the subcommittees, he said, not only with this draft, but with respect to theft of services, has been to attempt to limit the prima facie evidence provisions much more severely than they are under present Oregon statutes.

Representative Carson pointed out the language "failed to make good" contained in section 11 sub (2) (b) and commented that it was apparently a phrase of art used in negotiable instruments as it was not English.

Mr. Thornton voiced the opinion that some consideration should be given to what a burden check prosecution is on the district attorneys' offices and on the penal institutions. He stated that usually between 1/3 and 1/2 of the inmates in the penitentiary and the correctional institutions are check people. He thought consideration to whether or not a large portion of the NSF cases should be taken out of the criminal justice system entirely. There might be some restriction made to the effect that there will be no criminal prosecution unless it can be shown that the person who took the check exercised reasonable diligence in inquiry as to the identity of the individual and the existence of a bank account.

Chairman Yturri questioned that practical, precautionary steps could be instituted, say in a busy supermarket. He felt that passing a bad check was just as reprehensible as shoplifting cases handled by district attorneys for the merchants.

Representative Haas suggested perhaps some kind of a compromise could be worked out so that instead of putting a great burden on the merchants, it could be put into the statute that rather than have the conduct complained of occur at the time the check is given, that it be knowledge or expectation that the instrument will not be honored within a reasonable time or within ten days or something like that.

Mr. Knight observed that this would create problems because the check writer simply would have an additional ten days and enlarges the story he can come up with.

There followed a discussion regarding the various types of identification required by merchants before cashing a check and the fact that they are more interested in the identity of the passer than whether or not he has a bank account or a good credit rating.

Mr. Knight observed that if passing a bad check were not a crime, the businessman would take more care in protecting himself against such loss but he said he agreed with the commentary in the MPC to the effect that it is necessary to protect the integrity of commercial paper. He was of the opinion that most stores treat a check more as money than as a promise to pay money.

Chairman Yturri agreed that something should be done, certainly, because the merchant is at fault many times and invites the problem. While he felt something could be done in that area, he did not feel that the Commission could insert a roadblock into commerce.

(Tape 2 begins here)

Senator Burns referred to the problem raised with respect to felonies and to the fact that there were so many "paper hangers" in the penitentiary and that some thought they really should not be out there. He thought people tended to forget that recidivism is highest among "paper hangers" and that it is the easiest way to steal. Senator Burns said he recognized the custodial problem involved but did not feel the proscription against such conduct could be ignored. He felt to take out section 11 completely would leave a serious gap and noted that the MPC contained a section to cover this.

Judge Burns suggested that perhaps Mr. Evans or Mr. Wiseman would be able to speak with a good deal of proficiency on the problem.

Mr. Evans replied that he thought in terms of responsibility to the individual. He said he would be in agreement with Mr. Knight regarding giving an additional ten day period in which to continue what was an irresponsible act in the first place. He felt this would be saying, in effect, that if someone brought in a counterfeit bill that it would be okay for ten days. He believed that such a postponement would just compound the problem.

Senator Lent referred to the Michigan text contained on page 34 of the draft and to the MPC text on page 35, pointing out that the language seemed to limit the sections to the payment of money and did not seem to get into other negotiable instruments. He thought the discussion should get back to what was really the abuse, drafts and bank checks. He thought perhaps section 11 should be confined to these things.

Mr. Thornton asked if those with district attorney experience felt that the present policy in the law should remain unchanged as far as prosecution is concerned.

Senator Burns replied that he would hate to abolish the right of the district attorney to prosecute a bad check case.

Representative Carson remarked that section 11, sub (2) (b) with its ten day policy made the district attorny by legislative policy, a collection agency.

Senator Burns thought that the MPC approach was better than that proposed in the draft. He suggested the following language:

> "A person commits the crime of negotiating a bad check if he issues or passes a check or similar sight order for the payment of money knowing that it will not be honored by the drawee."

Senator Yturri asked if anything was to be included regarding postdated checks or re the payment being refused by the drawee for insufficient funds and the maker making good within 10 days.

Senator Burns asked if presently just the issuing of a bad check was prima facie evidence.

Mr. Knight replied that it had to be presented to a bank and dishonored for insufficient funds in order to be prima facie evidence.

Mr. Paillette pointed out that the ten day period was intended to make it more difficult to make a prima facie case and Senator Burns and Chairman Yturri felt it should be made more difficult to make a prima facie case.

Mr. Knight did not think it would be easier presently to obtain a conviction than it would be under the proposed language. He felt that all the draft would do would be to extend the "excuse" period or the "story" as to why the passer did not intend to defraud.

Representative Carson commended the thought of making the statute language more understandable to a jury but he felt sometimes the attempt to "humanize" the language amounted to "vulgarizing" it and thought the proposed definition had gone too far in this respect. A "bad check" he contended means "defective or void by the dictionary; it does not mean "worthless".

Mr. Paillette advised that one of the intents of the draft was to cure the artificial distinction between a "no account" and a "NSF" check and to cover it by one statute.

Mr. Knight commented that this was presently a problem that needs to be remedied.

Senator Lent admitted that he, also, did not like some of the changes made in the English language but noted that the purpose of language is to communicate and words do take on new and added meanings as time passes. He felt that the language "bad check" communicated its meaning pretty well. He thought the proposed definition of the crime of negotiating a bad check stated what a bad check was.

Representative Frost observed that a bad signature, even though valid, could cause a check to not be honored. A bad endorsement could result in a bad check, one not honored by the drawee.

Mr. Paillo pointed out that there must be an intent element of "knowing that it will not be honored." He advised that New York and the MPC employ the language "bad check."

Senator Burns took a count of those favoring the use of "worthless" and of those favoring "bad"; "bad" was adopted, four to three.

The new language proposed for section 11 subsection (1) now read:

> "A person commits the crime of negotiating a bad check if he negotiates, utters or delivers a check or similar sight order for the payment of money knowing that it will not be honored by the drawee."

Senator Burns moved that the remaining language in the MPC draft on page 35 be adopted--the second sentence and the subsections.

It was agreed that there would necessarily be some drafting changes in the language to adapt it for the proposed draft.

Judge Burns asked if the ten day period imposed any obligation on the taker of the check to redeposit.

Chairman Burns answered that he did not think there was any obligation on the holder to redeposit the check but if the maker deposited money to cover the check before the ten day period elapsed, the prima facie case would not exist.

Judge Burns asked how the prosecutor would customarily prove the fact of notice of refusal.

Senator Burns took account of the number of members favoring the inclusion of a prima facie provision in the statute and then noted that the members had made the following policy decisions: (1) to streamline the draft under the MPC language and (2) to include the prima facie provision. With these policy decisions in mind, he said he would entertain a motion to send the draft back to the subcommittee to come back out containing the appropriate language.

Judge Burns thought there was still a question as to whether the prima facie should come into being upon dishonor or upon dishonor plus ten days. He thought a vote should be taken on this policy. He said he himself would be reluctant to depart from the

policy in the draft, the MPC approach, since the subcommittee had given the matter much consideration and had recommended the draft.

Mr. Knight thought the problem might arise in the proof of the notice of dishonor.

Judge Burns moved the retention of the policy of the subcommittee as expressed in section 21. The motion carried, receiving nine "aye" votes and one "nay" vote, Representative Haas.

It was agreed that the proposed draft would go back to the subcommittee for redrafting, incorporating the Commission's policy decisions.

Arson and Related Offenses, P.D. No. 4; November 1968. Subcommittee No. 1 Recommendation re Section 2.

Mr. Paillette explained that there had been a section in the Arson draft called "Unlawful Use of Fire" which was really a restatement of ORS 164.070. It is the negligent type of burning situation, is called "Crimes relating to fires on land" and provides for misdemeanor punishment. Mr. Paillette read the text of ORS 164.070 to the Commission members and related that the first draft on Arson had not included this. It had been discussed in subcommittee in connection with civil liability. He stated that the Forestry Code provides for treble damages in these instances and the courts have looked to ORS 164.070 to determine the standard of care or duty that is placed on the defendant in such cases. There had been reluctance to discard the language in ORS 164.070 in view of the fact that it was tied in so closely with the civil cases. At the Commission meeting held on the Arson draft, there was much dissatisfaction expressed with the policy of retaining the language just because it had something to do with civil law and because the statute, as written, contained inconsistencies. The Commission approved all of the sections of the Arson Draft except section 2 and sent this section back to the subcommittee for further recommendations. After further discussion, the subcommittee recommended that the section be transferred to the Forestry Code, chapter 477. Mr. Paillette revealed that the section had originally been in the Forestry Code and had been taken out in 1965 and put into the Penal Code. It would be up to the Legislature to decide what they would want to do about the transfer.

Senator Burns moved the approval of the subcommittee recommendation regarding section 2 of Arson and Related Offenses.

Judge Burns stated that when the recommendation is made to the Legislature it should be stressed that they consider redrafting the section.

Chairman Yturri said that the Commission could propose something aside from the present code and submit it as a separate

recommendation to the Legislature for inclusion in the Forestry Code.

Judge Burns seconded Senator Burns' motion and it carried unanimously.

Note on Criminal Impersonation; Forgery and Related Offenses.

Senator Burns stated that the Commission members should know that criminal impersonation had been eliminated.

Mr. Paillette noted that Forgery and Related Offenses, P.D. No. 1, had had a section on criminal impersonation to pick up and combine into one section all of the existing statutes, beginning with ORS 165.305. The subcommittee felt these should not be retained in the code, that there were civil remedies to take care of such cases, and that if theft were involved, it would be covered. It was felt by the subcommittee that the statute re impersonating a peace officer should be retained but that it should be in another part of the code, crimes against public administration, perhaps. No objection to this action was raised by the Commission.

Kidnapping and Related Offenses, P.D.No. 3; February 1969.

It was decided to carry the consideration of this draft over for another meeting of the Commission.

Mr. Paillette expressed the hope that the Commission could meet every three or four weeks as there was sufficient material ready for its consideration.

The meeting was adjourned at 3:15 P.M.

Maxine Bartruff

Maxine Bartruff, Clerk
Criminal Law Revision Commission