Tapes #12 and 13

#12 - 22 to end of Side 1 and all of Side 2
#13 - 1 to 512 of Side 1

OREGON CRIMINAL LAW REVISION COMMISSION
Room 309 Capitol Building
Salem, Oregon

April 27, 1968
10:00 a.m.

A G E N D A

# # #

OREGON CRIMINAL LAW REVISION COMMISSION
Fourth Meeting, April 27, 1968

Minutes

Members Present: Senator Anthony Yturri, Chairman
Representative Dale M. Harlan, Vice Chairman
Judge James M. Burns
Senator John D. Burns
Mr. Robert Chandler
Representative Carrol B. Howe
Senator Thomas R. Mahoney
Representative James A. Redden
Attorney General Robert Y. Thornton

Absent: Mr. Donald E. Clark
Representative Edward W. Elder
Mr. Frank D. Knight
Mr. Bruce Spaulding

Staff: Mr. Donald L. Paillette, Project Director
Miss Kathleen Beaufait, Deputy Legislative Counsel

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

Also Present: Mr. Desmond D. Connall, Secretary, Oregon State Bar Committee on Criminal Law and Procedure, Portland
Mr. John R. McCullough, Administrative Assistant to the Chief Justice
Judge Kurt C. Rossman, member, Circuit Judges' Committee on Criminal Law Revision, McMinnville
Mrs. Lucy Schafer, Lebanon
Justice Gordon Sloan, Chairman, Bar Committee on Criminal Law and Procedure
Mr. Jacob Tanzer, member, Bar Committee on Criminal Law and Procedure, Portland
Mr. William Wiswall, member, Bar Committee on Criminal Law and Procedure, Springfield

The meeting was called to order at 10:00 a.m. by the Chairman, Senator Anthony Yturri, in Room 309 Capitol Building, Salem.

Approval of Minutes of Meeting of January 10 and 11, 1968

There being no additions or corrections to the minutes of the meeting of January 10 and 11, 1968, they were unanimously approved as submitted.

Progress Report

Staff Activity. Mr. Donald L. Paillette reported that Subcommittee Nos. 2 and 3 had not yet met and Professor Courtney Arthur of the Willamette University School of Law and Professor George M. Platt of the University of Oregon School of Law who were serving as reporters for those two subcommittees would report their progress during the course of this meeting. The bulk of the Commission's activities to date, he said, had been directed toward Subcommittee No. 1 which had been assigned the responsibility of drafting the consolidated theft articles. The subcommittee had met three times and the results of their meetings would be considered by the Commission today. This meeting, Mr. Paillette said, would enable the Commission to see whether the subcommittee approach was going to be a feasible and practical method of accomplishing the revision project.

Representative Harlan asked Mr. Paillette if he anticipated any change in the method of procedure from that outlined to the Commission at its January meeting. Mr. Paillette replied that it would be helpful to have a larger permanent staff but within the framework of the present budget, the plan as outlined in January appeared to be working quite well.

Additional funds. Senator Mahoney asked Mr. Paillette if he believed it would be advantageous to enlarge the staff and was told that if the Commission hoped to complete the revision of the entire criminal code, it would be extremely difficult, if not impossible, to do so with the size of the present staff.

Chairman Yturri asked the members if they felt it would be wise to appear before the Emergency Board to request additional funds in order to increase the tempo and scope of the Commission's work.

Mr. Thornton commented that Mr. Phillips of the Office of Law Enforcement Assistance in Washington, D.C., had told him there was a good prospect that grant monies would be available under the Safe Streets and Crime Control Act to use for criminal law revision on a matching basis which might be a good talking point when presenting the Commission's request to the Emergency Board. Chairman Yturri agreed this source of assistance would be welcome in the future but the Commission was not in a position to wait several months for the funds.

Senator Burns commented that Mr. Paillette had been able to keep ahead of Subcommittee No. 1 which had met at two to three week intervals but said he did not see how it would be possible for him to perform this service for three subcommittees at the same time. He expressed approval of the proposal to enlarge the permanent staff.

After further discussion, Senator Mahoney moved that the Chairman be authorized and directed to go to the Emergency Board for whatever

sum of money he and Mr. Paillette considered necessary to augment the staff. Judge Burns specified that it was implicit within the motion that the Commission could also take advantage of whatever monies might become available under the Safe Streets Act and was told by the Chairman that the bill which created the Commission authorized it to accept and apply for gifts and grants. Vote was then taken on the motion which carried unanimously.

Willamette School of Law. Professor Courtney Arthur outlined that the Commission needed more assistance than the law schools could give and urged that the professional staff be increased. He reported that his law students were presently researching material on defenses but he had himself been unable to do any drafting. He said he planned to devote at least a month beginning about June 1 to actual drafting and it would be no earlier than July before something concrete would be available for consideration by the Commission.

Consolidated Theft Articles - Preliminary Draft No. 4

Chairman Yturri complimented Senator Burns, Chairman of Subcommittee No. 1, on the work he and the members of the subcommittee had done and expressed the gratitude of the Commission for the assistance received from Justice Sloan, Professor Arthur, Professor Platt and Miss Beaufait. Inasmuch as Professor Platt was teaching a class and was not yet present to make his progress report, Chairman Yturri turned the meeting over to Senator Burns as Chairman of the subcommittee which had prepared the draft of the consolidated theft articles.

Senator Burns described the meetings the subcommittee had held and explained that the objective of the subcommittee was to prepare a comprehensive theft statute that would cover all types of theft with the least possible number of ambiguities. At their last meeting they had proposed to present the theft statute to the full Commission today for review and suggestions. Chairman Yturri commented that if the Commission approved the draft, the approval would be on a tentative basis. The draft would then be circulated, comments from interested groups and individuals solicited and the Commission would have an opportunity to go over it again at a future time. Mr. Paillette indicated that the draft had already been circulated to a number of individuals with a request for their comments and suggestions.

Senator Burns referred to the title of the draft and explained that the subcommittee had decided to substitute "theft" for "larceny" because there were certain areas where "larceny" did not logically apply and they believed that "theft" was more consistent with the trends in other states.

Section 1. Definitions. Representative Harlan inquired if tying the definition of "appropriate" to economic value or benefit would

tend to limit the definition and was told by Mr. Paillette that even though there might not be a permanent deprivation of property of another, if someone was deprived of his property for such an extended period of time that the value was lost to him, the effect of that act would be treated by the law the same as if it had been a permanent deprivation.

Judge Burns asked if the definitions were phrased so that juries would be instructed in terms of the definitions. Mr. Paillette replied that if a judge were instructing in a theft case, he would use the language of the statute including the definitions. Judge Burns said he raised this question so the intent of the Commission would be clear in the statute's legislative history. Mr. Paillette related that the fundamental purpose of the proposed theft statute was protection of property rights and subsection (1) (a) would strengthen the statute for those cases where there was a defense that there wasn't any intent on the part of the defendant to permanently deprive the owner of the property. He added that this draft not only eliminated the distinctions between traditional concepts of larceny, obtaining and embezzlement, but the scope had been expanded so that a withholding of property would be theft. Judge Burns remarked that in the vast majority of cases, there would be a jury question if a period were placed after "permanently" and the necessity for the second half of the definition would arise only in rare instances. He did, however, believe that the provision was both useful and desirable. Senator Burns pointed out that the definition in (1) (a) also eliminated the need for separate conversion statutes such as conversion of funds by a trustee, etc.

Senator Burns read the definition of "deprive" in subsection (2). Representative Howe asked if this subsection would cover the situation where someone rented an article from a rental agency and failed to return it. He indicated it was difficult to get a conviction in this type of case because the defendant would say he had intended to return the property to the agency and pay the rental fee. Senator Burns answered that such a case would more likely be covered by subsection (1) (a) and if not, certainly it would come under (2) (a). Mr. Paillette advised that the main question would be whether the actor intended to steal the property.

Senator Burns pointed out that the subcommittee had discussed the manner in which a district attorney would frame an indictment and had reached the conclusion that, consistent with present law, a district attorney would have to bring the indictment in the language of the statute. Mr. Paillette pointed out that the subcommittee purposely stayed away from words like "taking" and "carrying away" to avoid the limitations in the present larceny statutes that there had to be an actual trespassory taking of the property.

Senator Mahoney suggested that "extended" be deleted from subsection (2) (a) because the term was not precise and could apply to

nearly any period of time. This point was discussed and Chairman Yturri suggested the Commission await comments of the sheriffs and district attorneys to see if they objected to the language of the subsection.

The Commission agreed that "larcenous" in subsection (4) (a) should be changed to a form of the word "theft" to conform to the language used in the rest of the draft.

Senator Burns read subsection (4) and explained that under (4) (a) ABC Ford, for example, could not get a criminal complaint against a person for theft if the buyer had failed to make a payment on his car; it would be a civil matter. The subcommittee was of the opinion that such an act did not belong in the purview of the criminal law. Several hypothetical situations were posed wherein a car buyer, while still making payments to a bank, leased the car to another individual. If the third person refused to surrender possession when the original buyer's payments became delinquent, the members asked what the bank's remedy would be. Senator Burns pointed out that the bank could bring a civil action without placing an added burden on the district attorney and Chairman Yturri noted that subsection (4) (a) did not change the present law in this respect.

Judge Burns asked if the use of "deemed" in subsection (4) (a) created a rebuttable presumption. Mr. Paillette replied that this provision was derived from the New York Penal Law and it was not intended that it would reach the dignity of a presumption. Judge Burns contended that "deemed" was a troublesome word and it might be appropriate to include a definition of it. Mr. Paillette indicated that it was entirely possible there was language in the draft that would be subject to change or definition after the preliminary articles were drafted. For example, he said, the definition of "person" had been purposely omitted from the draft because "person" would in all probability be defined in the general articles.

[NOTE: See section 7, page 12 of these minutes for further revision of subsection (4).]

Senator Burns read subsection (5) and explained that "tangible and intangible personal property" had been included to take care of the problem that occurred in State v. Tauscher, 227 Or 1 (1961).

Senator Burns next explained that subsection (6) had been included because ORS 165.045, the receiving and concealing statute, would be brought within the purview of the consolidated theft statute.

Mr. Tanzer pointed out that section 6 was broader than the definition of "receiving" in subsection (6), section 1. Mr. Paillette explained that subsection (6), section 1, had originally been included in section 6 but the subcommittee had decided to move the definition to the definitions section. Since "receiving" was used

only in section 6, the Commission agreed to return the definition of "receiving" in subsection (6), section 1, to section 6.

Commentary. Senator Burns mentioned that the subcommittee had experimented with various methods of including the commentary in the drafts. In the beginning, he said, the commentary preceded the draft while in the draft under consideration, a commentary followed each section. He indicated that any suggestions or recommendations for improvement in this area would be appreciated.

Section 2. Theft. Representative Harlan asked why "take" was used in subsection (1) since the word was not defined. He suggested that "deprives" might be preferable and Senator Burns pointed out that "deprives" would create a redundancy because the word was used in the opening sentence of section 2. He suggested that further comments with respect to section 2 be withheld until the Commission had gone through the rest of the draft inasmuch as subsequent sections enlarged upon the provisions of section 2.

Section 3. Theft of lost, mislaid property. Representative Harlan proposed to insert a comma after "mislaid" and the Commission agreed this would be appropriate.

In reply to a question by Representative Redden concerning "knows or has good reason to know," Mr. Paillette explained that this phrase appeared in some of the present Oregon criminal statutes and the subcommittee favored retention of it. The phrase also appeared, he said, in the section relating to theft by receiving.

Mr. William Wiswall asked if it was the intent of section 3 that the crime of theft of lost or mislaid property would be committed if the prosecution could not establish ownership. Mr. Paillette replied that the purpose of the section was to get at cases where the identity of the owner was known; it was not intended to raise the possibility of prosecution where there was no one to complain about the act.

Chairman Yturri suggested that a comma after "recipient" would clarify the meaning of the section and the Commission agreed.

Miss Beaufait asked if there was a problem with the intent statement in section 3 in view of the fact that section 2 provided that theft would include the intent to deprive another of property. Mr. Paillette pointed out that the purpose of section 3 was to place the duty upon the finder to take reasonable measures to restore the property to the owner, regardless of whether he had an intent to keep the property at the time he found it.

Mr. Desmond D. Connall commented that unless section 3 was clarified in this regard, the prosecutor would be required to prove the question of intent both at the time of the finding of the property

and at the time he failed to take some affirmative action to restore the property to the owner.

Professor Arthur advised that Washington had a similar law and suggested it might be of benefit to read the language of the Washington statute.

Senator Burns read section 223.5 of the Model Penal Code. Judge Burns commented that the Model Penal Code section would mean that the proof would have to establish the unlawful intent at the time the actor failed to take steps to find the owner as opposed to the time he came into possession of the property. He said Mr. Connall's point was that the prosecution should be entitled to prove existence of intent only at the time the actor failed to take steps to return the property to the owner. He contended that the wording of the Model Penal Code was more specific as to what the prosecution's burden would be at that point.

Mr. Paillette read the following comment from Tentative Draft No. 2 of the Model Penal Code, pp. 83-84:

> "Even though a finder may take possession with intent to keep the property from the owner, he is not liable to conviction under this section if within a reasonable time he acts to restore the property to the owner. Thus essentially finders are punished for failure to act rather than for an initial misappropriation. Common law theory of larceny as an infringement of another's possession required a determination of the actor's state of mind at the moment of finding, for an honest state of mind at that point would preclude the felony conviction; the subsequent formation of a dishonest purpose would not be criminal since he would already be in possession. The search for an initial fraudulent intent appears to be largely make-believe. The realistic objective in this area is not to prevent the initial appropriation but to compel subsequent acts to restore to the owner. Therefore the section permits conviction even where the original taking was honest in the sense that the finder then intended to restore, but subsequently changed his mind; and it bars conviction where the finder acts with reasonable promptness to restore the property, even though he may have entertained a fraudulent purpose at some time during his possession."

Chairman Yturri remarked that the above comment stated the purpose of the Commission with respect to section 3 and requested Mr. Paillette to give further study to the section and present his findings to the Commission at a later time.

Section 4. Theft by extortion. Senator Burns explained that "in the future" had been inserted in section 4 to draw a distinction

between the act of robbery and extortion. He observed that if a person pointed a gun and said, "Give me your money or I will shoot," that would be robbery rather than extortion and the phrase "in the fugure" was included to make it clear that the section was referring to a threat to be carried out at a time later than the immediate future.

Mr. Thornton was critical of subsection (6) and pointed out that the Cosa Nostra would qualify as a "group" and, as such, would be entitled to defend themselves under this section if they did something for the benefit of that group.

Judge Burns suggested Mr. Paillette read the Taft Hartley Act and the so-called Hobbs Anti-Racketeering Statute to see if there was language or cases in those areas that would be helpful.

Mr. Paillette noted that the commentary on subsection (6) contained in the Model Penal Code said that because this was such a difficult area to control, they had concluded that if the act was a legitimate collective bargaining between labor and management, it should not be considered criminal even though the demands made were outrageous.

Senator Burns pointed out that it was not the intent of the subcommittee to direct subsection (6) toward labor and for this reason "labor" had been deleted from the draft. The Commission agreed that it was not their purpose to direct subsection (6) specifically at labor groups and the exception contained in the subsection was to make it clear that they did not intend to infringe upon legitimate collective bargaining.

Senator Burns suggested the Commission solicit the views of interested groups with respect to subsection (6) and that the draft be accompanied by an explanation of the subsection with the comment that it was not necessarily in its final form. Chairman Yturri directed that copies of the Model Penal Code, together with commentary, and the Michigan, New York and Illinois code sections on this subject accompany the material so the groups would be aware that Oregon was not the only state to include a provision of this nature in its criminal code. The Commission agreed they would review subsection (6) after comments had been received from the groups to whom it was circulated.

Mr. Thornton volunteered to supply Mr. Paillette with research material in this area.

The Commission recessed for lunch at 12:15 p.m.

The following persons were present for the afternoon session:

Members: Representative Dale M. Harlan, Vice Chairman
Judge James M. Burns
Senator John D. Burns
Mr. Robert Chandler
Representative Carrol B. Howe
Senator Thomas R. Mahoney
Mr. Bruce Spaulding
Attorney General Robert Y. Thornton

Also present: Donald L. Paillette, Project Director
Kathleen Beaufait, Deputy Legislative Counsel
Professor Courtney Arthur, Reporter
Professor George M. Platt, Reporter
Justice Gordon Sloan, Chairman, Bar Committee on Criminal Law and Procedure
Judge Carl Francis, Chairman, District Judges' Committee on Criminal Law, McMinnville

Vice Chairman Harlan presided and reconvened the meeting at 1:30 p.m.

Section 4. Theft by extortion (Cont'd). Representative Redden inquired concerning the meaning of subsection (9) and was told by Senator Burns that the subsection had originally read:

> "Performs any other act which would not benefit the actor but which is calculated to harm another person's health, safety, business, calling, career, financial condition, reputation or personal relationships."

Senator Burns advised that subsection (9) was intended as a catch-all for a blackmail type of situation and the subcommittee had decided to adopt the Model Penal Code version, substituting "actor" for "offender." Mr. Paillette noted that the Model Penal Code commentary pointed out that the subsection stated the general principles on which other threats were to be included within "intimidation."

Judge Burns asked how subsection (5) would fit into a statute relating to criminal libel. Senator Burns replied that libel would be covered in another section and the two sections might have to be coordinated. Mr. Paillette added that the present extortion law was not extortion in the sense that this draft would be extortion because the draft would require property to be obtained as a result of the threat and it was not intended that it would replace the present extortion law which would be dealt with later under Crimes Against Persons.

Representative Harlan questioned the inclusion of subsection (3) and Mr. Paillette read the comment from Tentative Draft No. 2, Model Penal Code, p. 76:

> "Although this category largely overlaps the preceding two subsections, it has an additional application in a situation like this: A racketeer obtains property from another racketeer by threatening to operate houses of prostitution or illegal gambling enterprises in competition with him. * * * However, where the competition itself would be criminal activity, there is no need to immunize a threat to engage in that activity, used for the purpose of extortion."

Mr. Chandler pointed out that this subject was discussed in the subcommittee and they had decided that subsection (3) should be included because, while it might not be needed in Oregon today, it could prove to be a useful provision in years to come.

Judge Carl Francis expressed doubt as to the meaning of subsection (5) and was particularly critical of the phrase "whether true or false." He contended that it would be absurd to say that it was a crime for a lawyer to approach a person and say, "If you don't enter into a paternity agreement to support this child, we will have to bring an action against you." Mr. Paillette asserted that the subsection was concerned with blackmail and Judge Burns proposed that a construction such as that suggested by Judge Francis could be ruled out by a note to the contrary in the comment and the Commission agreed.

Section 5. Theft by deception. Senator Burns explained that an earlier draft contained two separate sections dealing with theft by deception and theft by false pretenses and the two had been consolidated in section 5.

Judge Burns asked what type of situation would fall under subsection (d) and was told by Mr. Paillette that the subsection was intended to cover almost any transaction involving real property where there was an intent on the part of the seller to defraud the buyer. He gave as an example a situation where there was a lien or a mortgage against property, either recorded or unrecorded, and the seller purposely failed to reveal this fact to the buyer.

Judge Burns asked how the prosecution would present a case to supply the element of intent to defraud and was told by Senator Burns that the district attorney would have to produce oral testimony as to the occurrence just as district attorneys now proved common law larceny by trick.

Senator Burns called attention to the fact that the draft dropped the mandate for a statutory token in order to prove obtaining money by false pretense. Under section 5, he said, the charge could be proved without the necessity of showing a false token to document the false pretense.

Judge Burns expressed concern that section 5 was sweeping into the criminal law a great number of land sale transactions by making a prima facie criminal case of every transaction where there was a cloud on the title. Mr. Chandler pointed out that the intention was to take care of aggravated cases, such as land development schemes, where fraud was perpetrated upon the buyer.

After further discussion, the Commission decided to solicit the views of title companies with respect to section 5 and to consider the section again after replies had been received.

At Professor Arthur's suggestion Mr. Paillette explained subsection (e). He remarked that present law required a misrepresentation of past or existing fact, and promise of performance traditionally had not been thought of as obtaining by false pretense if the promise was not fulfilled. Under subsection (e) a promise to perform in the future, if the promissor knew he did not intend to so perform, would be prohibited. At the same time, he said, subsection (3) provided that the mere nonperformance alone would not be sufficient for prosecution. This provision was included to make it clear that the section was intended to get at the intent to defraud and the deceptive act. It was aimed in particular at the "con artist," he said, and expressed the view that this subsection on false promises was one of the most important provisions in section 5.

Judge Burns posed a situation where a used car salesman told the buyer that the tires on a car would last 50,000 miles, knowing full well the buyer would be lucky if they lasted 10,000 miles. Senator Burns called attention to pages 7 and 8 of the Minutes of Subcommittee No. 1, April 6, 1968, where a long discussion was held on the question of whether such a statement would impose criminal liability. The subcommittee was of the opinion that such a statement would fall under "representations" in subsection (2), would be considered puffing and would not impose criminal liability. He asserted that subsection (3) was designed to take care of situations such as those in Portland where "con artists" bilked people of thousands of dollars by falsely promising to rid their homes of termites.

Mr. Paillette read the comment from Tentative Draft No. 2, Model Penal Code, pages 68 and 69, which pointed out that the feared abuses that someone, simply because he failed to perform on a contract, was going to be prosecuted for criminal theft by deception had proved to be completely without foundation.

Section 6. Theft by receiving. Senator Mahoney questioned the use of the phrase "subject of theft." Mr. Paillette explained that the intention was to say that it was stolen property without using the word "stolen." Senator Burns pointed out that the Minutes of Subcommittee No. 1, April 6, 1968, pages 9 and 10, showed the discussion on this subject and outlined that the subcommittee had decided to avoid the use of the word "stolen" because they did not want to have to define "stolen" or "steal."

Judge Burns commented that property criminally acquired from its rightful owner was what the statute referred to and the Commission attempted to employ more definitive language but was unable to do so. Mr. Thornton suggested converting "is" to "was". After further discussion, Senator Burns so moved and the motion carried unanimously.

[NOTE: See pages 5 and 6 of these minutes for further amendment to section 6.]

Tape 2 begins here:

Section 7. Right of possession. Mr. Paillette pointed out that subsections (1), (2) and (3) of section 7 had been inadvertently included in the draft twice and for this reason subsections (a), (b) and (c) of subsection (4), section 1, should be deleted.

Section 8. Value of stolen property. Senator Burns commented that the Model Penal Code used "the highest value by any reasonable standard" as a criterion for establishing value, but the subcommittee had decided to use "market value at the time and place of the crime" principally because the latter term had a well established meaning in case law and would make no change in the present manner of establishing value. [Note: See Minutes, Subcommittee No. 1, March 23, 1968, p. 9.]

Senator Burns remarked that the subcommittee had no disagreement with the purpose of subsection (3) once the technical language was perfected. It was their belief that the subsection codified the theory of existing case law although the dollar amount had been revised upward.

Judge Burns inquired if there was magic in the $100 figure and Senator Burns replied that $100 was a tentative amount subject to policy decisions yet to be made when the Commission defined classes of misdemeanors, felonies and penalties. After a brief discussion, the Commission agreed that when the draft was retyped, the dollar amount should be replaced by a blank to be filled in following determination of penalty provisions.

Professor Platt asked if he had been correct in directing his students working on the revision not to concern themselves with penalty provisions and was told by Mr. Paillette that no penalty provisions would be included in any of the drafts until classes of crime had been decided by the Commission

Mr. Thornton asked if "reasonably" was necessary in subsection (3) since the sole purpose of the subsection was to take care of situations where there was no available proof as to the value of the article. Mr. Paillette noted that "satisfactorily" was the language used in New York and the subcommittee felt that "reasonably" was an improvement.

Judge Burns asked whether it would be a jury question to determine value of the property and whether it would necessitate a special verdict where the jury would say, "We find the defendant guilty and we further find that the value of the property is blank dollars." Senator Burns was of the opinion that subsection (3) would be susceptible to two interpretations:

(1) If the district attorney neglected to prove value, the judge could instruct the jury on the class of the theft; or

(2) There could be a motion for a directed verdict.

There was further discussion on this subject but no action was taken on subsection (3).

Section 9. Theft; defenses. Judge Burns asked if section 9 referred to affirmative defenses and was told by Mr. Paillette that the section did not mean that the defendant had to plead the defense. He explained that section 9 was an effort to make the draft clear that the enumerated situations would amount to defenses to a charge of theft but they were not elements to be negatived by the prosecution and when someone was indicted for theft, the district attorney did not have to allege that the defendant was aware that it was the property of another or that the defendant did not reasonably believe he was entitled to the property. This was the reason for using the language of the Michigan draft, "The burden of injecting the issue of claim of right is on the defendant."

Judge Burns commented that a jury instruction under section 9 would be comparable to the standard Bar instruction on alibi to the effect that the alibi claimed the defendant was not present at the time and place the crime was committed and if the jury had a reasonable doubt that the defendant was present, he should be acquitted. Nevertheless, he said, the burden was still on the prosecution to prove beyond a reasonable doubt that the defendant was there at the time and place in question so the fact that the defendant brought in an alibi didn't shift the burden of proof. By the same token, if the defendant contended that he was unaware that the property was that of another, the state would still have to prove that he stole the property and the jury instruction would have to be similar to that used in alibi cases at the present time.

Mr. Thornton questioned the need for section 9. Senator Burns replied, and other members agreed, that if criminal liability was to

be broadened, as it was in this draft, to the point where it would go far beyond the old concepts of theft and larceny, it was imperative to include a set of safeguards to which attorneys and courts could turn and to place a brake on the discretion of the district attorney. Mr. Paillette added that while the proposed statute was a codification of some existing common law principles relating to larceny, the draft also applied to theft and it should be as comprehensive as possible.

Judge Burns inquired as to the views of the subcommittee members who opposed inclusion of subsection (5). Senator Burns read the Minutes of Subcommittee No. 1, March 23, 1968, page 10, with respect to this question.

Mr. Paillette explained that all the states having recently revised criminal codes were moving toward the concept that a spouse could steal from a spouse because the common law was based on the fiction of the unity of husband and wife. He was of the opinion that the Illinois approach contained in subsection (5) was a reasonable compromise which gave some protection if it was required but would keep most of the husband and wife arguments out of the district attorney's office.

Judge Burns commented that the district attorney would still have discretion as to whether he would prosecute but inclusion of subsection (5) would provide a vehicle for the unusual case which merited prosecution. He moved that subsection (5) be included in the proposed statute. The motion carried. Voting for the motion: Judge Burns, Chandler, Harlan, Redden and Thornton. Voting no: Senator Burns.

Professor Platt inquired if there was any problem with equal protection in subsection (5) and Mr. Paillette was of the opinion that there would be a reasonable basis for classification because of property and ownership rights.

Senator Burns moved, seconded by Mr. Chandler, that subject to the reservations expressed, the draft as amended be approved for circulation to interested groups and individuals, with the Commission reserving the right to make further changes in the draft after comments and suggestions had been received and considered. The motion carried unanimously.

Comment from Illinois

Professor Platt read the following excerpt from the Section News Letter of the Criminal Law Section of the Illinois State Bar:

> "Attorneys all over the state on both sides of the table are now struggling manfully with the new criminal code. The reports to date have been most favorable and

some anticipated difficulties have vanished upon actual application. Most state's attorneys are discovering that old concepts are easily replaced by new ones; that articulation of crimes in up-to-date, precise phraseology is actually a boon, particularly in the theft field. Many state's attorneys are finding it much easier to make the facts fit the crime rather than in the good old days when there was a plethora of choices with doubt always as to whether the right choice was made."

Progress Report of University of Oregon School of Law

Professor Platt reported that the Student Project Committee working on the material assigned to him consisted of six law students who stood well above average in their class. They had been assigned the articles on Inchoate Crimes including conspiracy, attempt, solicitation and homicide and the article on Responsibility which included insanity and immaturity. The committee had been meeting regularly each Wednesday. The student in charge of the principle research on the Responsibility article was at the drafting stage where he was ready to suggest what the language of the statute should be with the supporting explanatory comments. The Homicide and Inchoate Crimes articles should reach that stage this week, he said. The student committee had agreed that by May 18 the first rough draft of the entire project would be completed and at that time, Professor Platt said, the students would be faced with final examinations and would phase out of the project and he would begin checking their work and revising the comments. He said he could not predict when the material would reach the Commission but expected it to be available in very early summer, probably the first part of June.

Professor Platt advised that he was unable to predict the competence of the work at this point but he was encouraged by the attitude of the students who, he said, were asking the right questions, looking at the right materials and were making substantial progress.

Future Plans

Mr. Paillette reported that he intended to continue drafting in the area of Crimes Against Property for Subcommittee No. 1 and eventually all the segments would be put together as one section of the code. He asked the Commission whether they felt the subcommittee approach appeared to be reasonable and workable. Judge Burns replied, and other members concurred, that the subcommittee and staff had done an excellent job and the subcommittee approach appeared to be entirely satisfactory. Representative Harlan suggested more information be

furnished with respect to the reasons for departing from the language of the Model Penal Code or from the language used in codes of other states.

There being no further comments, the meeting was adjourned at 3:45 p.m.

Respectfully submitted,

Mildred E. Carpenter

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission