Tapes #34 and 35

#34 - 681 to end of Side 1 and all of Side 2
#35 - Both sides

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

September 12, 1969

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Twelfth Meeting, September 12, 1969

Minutes

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Representative Harl H. Haas
Senator Kenneth A. Jernstedt
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding

Delayed: Representative David G. Frost

Absent: Mr. Robert Chandler
Mr. Donald E. Clark
Representative Douglas Graham

Staff: Mr. Donald L. Paillette, Project Director
Professor George Platt, Reporter
Mr. Roger D. Wallingford, Research Counsel

Also Present: Mr. Donald R. Blensly, Yamhill County District Attorney; Member, District Attorney's Association Criminal Law Revision Committee

Agenda: CULPABILITY; Amendments to Preliminary Draft No. 4; April 1969; sections 2 and 3

RESPONSIBILITY; Preliminary Draft No. 5

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

Approval of Minutes of Commission Meetings of June 17, 1969, and July 19, 1969

Senator Burns asked what ultimate disposition the Commission had made of section 1, subsection (4), of the draft on sexual offenses discussed at the meeting on July 19, 1969. Mr. Paillette pointed out that page 4 of the minutes of that date showed that the second sentence of subsection (4) had been amended to read: "The exclusion

is inoperative as respects spouses living apart pursuant to a decree of separation from bed and board." Chairman Yturri explained that the Commission had in effect adopted the language of the existing statute so that subsection (4) would refer to a decree of separation from bed and board and not to the 60 day appeal period.

Judge Burns moved that the minutes of June 17, 1969, and July 19, 1969, be approved as submitted. The motion was seconded by Senator Burns and carried unanimously.

Culpability; Preliminary Draft No. 4; Amendments to Sections 2 and 3

Mr. Paillette called attention to pages 40 to 42 of the Commission minutes of June 17, 1969, wherein question was raised as to whether the Commission wished to adopt a policy similar to that contained in the Model Penal Code with respect to offenses in ORS which were not included in the criminal code itself. He explained that the culpability draft provided in effect that criminal liability for the commission of a crime required conduct which included a voluntary act or the omission to perform an act which the actor was capable of performing. Secondly, it required a culpable mental state which was defined as intentional conduct, knowing conduct, recklessness or criminal negligence. It further provided that a person could not be guilty of commission of a crime unless he possessed one of these mental states at the time of commission of the act.

Section 3, Mr. Paillette continued, would provide that these requirements would not apply to violations and offenses outside the criminal code, and such offenses existing at the time of enactment of the criminal code or subsequent to its enactment would be designated as violations and would therefore be punishable only as violations as that term was defined in the criminal code. Subsection (3) of section 3 would further provide that even though there was no culpability required and the offense could not be prosecuted as an offense greater than a violation, the prosecution could nonetheless allege and prove culpability, in which case the offense would be taken out of the violation category and would be punishable as otherwise provided by law.

Professor Platt commented that sections 2 and 3 served a desirable purpose in the criminal law particularly in the light of Stevenson v. Shields, decided by the Supreme Court this week. It also reflected the policy of the Model Penal Code to attach to the acts of citizens the requirement that there be some culpable mental state before they could be sent to jail.

Chairman Yturri indicated that he had not yet read the opinion in Stevenson v. Shields and asked if it applied to misdemeanors or to

situations where the defendant was required to serve time in jail in lieu of payment of his fine. Mr. Wallingford said he had read the decision and interpreted it to mean that it applied to any type of prison sentence, whether one hour or ten years.

Senator Burns indicated he was not necessarily opposed to sections 2 and 3 but questioned whether it was good policy to apply this standard to offenses defined by statutes clearly outside the criminal code. Mr. Paillette replied that it was a method of standardizing the penalty structure for all strict liability offenses without going through each and every regulatory statute to conform them to the criminal code grading system.

Senator Burns advised that the Commission would ultimately define what constituted a violation, a petty misdemeanor, a misdemeanor, etc. Some regulatory penalties, he said, particularly those in the PUC area, mounted to thousands of dollars in fines and he asked if these PUC fines, for example, would be governed by the fine limitations imposed by the definition of a violation in the criminal code. Mr. Knight suggested this problem might be solved by elimination of a dollar limit on the fine structure when "violation" was defined.

Chairman Yturri commented that if the legislature wanted a statute outside the criminal code to carry a penalty higher than that prescribed for a violation, it could either state that fact clearly or include one of the elements of culpability in the statute itself.

Professor Platt noted that adoption of language similar to that contained in section 6.03 (6) of the Model Penal Code would solve the problem posed by Senator Burns:

> "A person who has been convicted of an offense may be sentenced to pay a fine not exceeding any higher amount specifically authorized by statute."

Senator Burns moved the adoption of sections 2 and 3 of the culpability draft as set forth in the amendments distributed to the Commission. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Haas, Johnson, Knight, Spaulding, Mr. Chairman.

Responsibility; Preliminary Draft No. 5; July 1969

Professor Platt explained that the Responsibility draft focused broadly on the two categories outlined in sections 1 and 2. The balance of the draft was procedural in aspect and the Commission had previously determined to include procedure in this particular Article because it was so intertwined with the test itself that it was virtually impossible to separate the two.

Section 1. Mental disease or defect excluding responsibility. Professor Platt advised that the test in section 1 was the Model Penal Code test which contained elements of the M'Naghten rule presently in operation in Oregon in a somewhat liberalized form. The test was not unfamiliar to the legislature because in 1961 it was enacted and subsequently vetoed by Governor Hatfield on the ground that it would put more people in the institutions as a result of an increase in the number of successful insanity defenses. Based on information he had been able to gather elsewhere, Professor Platt expressed the opinion that adoption of this test would not necessarily increase the number who would be successful with the insanity defense.

Section 1, he said, was clearly the choice of the psychiatrists who testified before the Commission on January 18, 1969, because it allowed them the kind of freedom they felt they needed when testifying in court. They could speak in terms of substantial capacity and terms of levels of understanding which was the emotional level the psychiatrists thought so important when testifying with respect to the ability of the defendant to be responsible for what he did. The Model Penal Code approach, he said, excepted the sociopath and would not extend to him the responsibility test. He expressed the view that section 1 was an improvement over, without being a radical departure from, present Oregon law.

Judge Burns commented that in actual practice defendants under these conditions were more and more frequently waiving jury trials and leaving the decision to the court. Ordinarily two psychiatrists testified and the formal test became something of a side issue, with the most important decision being the disposition of the defendant. He agreed with Professor Platt that psychiatrists were more comfortable with the test provided in section 1 than they were with the M'Naghten rule.

Senator Burns expressed concern over the "control test" contained in the last clause of subsection (1) because the dimensions of that test could not be accurately defined. He advised that New York had refused to incorporate the control test in its revision. As an example of the type of person who would be affected by the control test, he said he had once prosecuted a 65-year-old man who had spent 40 years in prison and stated it was an impossibility for that man to "conform his conduct to the requirements of law." Professor Platt pointed out that subsection (2) was aimed at precisely that type of situation and would not permit the habitual criminal to come under the defense prescribed in subsection (1). Chairman Yturri commented that while such a person might not be able to conform his conduct to the requirements of law, his conduct would not necessarily be as a result of mental disease or defect as required by subsection (1).

Mr. Johnson was opposed to the inclusion of any type of a defense based on a person's criminal capability. The question which should be before the court to decide, he said, was whether or not the defendant had in fact committed a crime. Following that determination a psychiatrist should be brought into the picture to aid in the determination of the best type of correctional remedy to use for that particular case. Judge Burns commented that Mr. Johnson's suggested approach would raise a constitutional due process question.

Professor Platt indicated that the test contained in section 1 made little change in the test presently used in Oregon courts. The Oregon cases over the years since 1864, he said, had applied a much more liberal version of the M'Naghten rule than would appear on the surface. Almost invariably evidence of the ability to control or conform was permitted to go to the jury or to the court. In effect, therefore, juries were presently getting the control kind of evidence. This would not be changed by section 1 but it would permit the court to instruct the jury in an official manner that they could consider the evidence. He said he did not believe its adoption would increase the number of people who were successful in the defense on the control issue but even if it did, this draft would make major changes in the procedural aspects, and he outlined the three alternatives available to the judge under section 10 for care or treatment of the accused.

Judge Burns remarked that psychiatrists had criticized, with what he considered to be some validity, the lack of objectivity and clarity in the M'Naghten test. Oregon should have a test that more nearly met reality in terms of what science knew about mental illness, he said. He was satisfied that the test in section 1 would make no material difference in the outcome of the vast majority of cases tried before a judge as opposed to the outcome of the same cases tried under present law.

Mr. Johnson commented that the Commission appeared to be in agreement that they were basically discussing a correctional problem. He said it was difficult for him to believe that a psychiatrist could state with any degree of certainty that a particular individual was totally unable to conform his conduct to the requirements of the law.

Mr. Spaulding disagreed with Mr. Johnson's comment that the basic principle underlying the Responsibility Article was the matter of where to send the defendant. That decision, he said, was the judge's and the important point was whether the offender and his family were marked with the stigma of a criminal conviction. Chairman Yturri expressed the view that section 1 would come closer to doing justice in the vast majority of cases than the M'Naghten rule. Mr. Spaulding agreed and added that it would make no change over existing law in the ultimate determination of where the defendant would be incarcerated.

Mr. Knight said he did not feel that defense psychiatrists were in any way limited in their testimony in a trial under the M'Naghten rule as presently used in Oregon. The M'Naghten test, he said, was an instruction to the jury which they could easily understand and he was opposed to changing that rule.

Senator Burns called attention to the explanation of the test adopted by New York on page 6 of Preliminary Draft No. 4 of the Responsibility Article under the subheading "Derivation." He again urged deletion of the control test in the last phrase of subsection (1) of section 1. He said he would support the New York rule because the control test, when related to mental disease or defect, added nothing to the balance of the section. Chairman Yturri noted that some of the liberality in the control test was diluted by the addition of subsection (2).

Mr. Johnson commented that adoption of section 1 would turn a portion of the penitentiary into a psychiatric institution. Chairman Yturri expressed the opposing view and said that when an individual was before the court on, for example, a rape or homicide charge and there were two possibilities for his commitment -- he must either go to the state hospital or to the penitentiary -- it seemed to him it was better to err on the side of sending him to the hospital rather than to the penitentiary. While several members expressed agreement, Mr. Knight said that he was not convinced the hospital was the best place for such an individual from the standpoint of society.

Vote was then taken on the motion to adopt section 1 of the Responsibility Article. Motion carried. Voting for the motion: Judge Burns, Carson, Frost, Haas, Spaulding, Mr. Chairman. Voting no: Senator Burns, Johnson, Knight.

Section 2. Partial responsibility due to impaired mental condition. Professor Platt explained that section 2 adopted officially what he believed to be present law in Oregon, although not stated anywhere in the statute, and that was the partial responsibility doctrine which was essentially very much like the intoxication defense. A person charged with a crime with a specific culpability element such as intent or knowledge -- burglary, for example -- under section 2 could raise the partial responsibility defense and then produce evidence he was suffering from a mental disease or defect which would interfere with his ability to form the requisite knowledge or intent to commit the burglary. If he persuaded the jury that this was actually the case, he could not then be convicted of burglary but could be convicted of any lesser included offense. Section 2, Professor Platt said, differed from section 1 in that it was not a complete defense of a crime. The case law in Oregon had never specifically held that the partial responsibility doctrine applied in this state but at least State v. Jensen, 209 Or 239 (1957), appeared to approve of this doctrine.

Judge Burns commented, and others agreed, that it would be difficult, if not impossible, to convince a jury that an individual had a mental disease or defect which interfered with his ability to form a specific intent or purpose.

Mr. Knight noted that section 2 would be used in most cases to seek reduction of a murder charge from first degree to second degree. Professor Platt concurred this was one of the main reasons for including section 2. It offered the jury an option and allowed a more subtle treatment of the defendant. He said he would agree with Judge Burns that the defendant would have a difficult time proving partial responsibility but in the special case, rare though it might be, if he were entitled to show that his mental capacity due to disease or defect was such as to reduce his level of culpability, the jury should be allowed to reflect that fact in its findings. This procedure was followed traditionally, he said, with respect to both intoxication and self-defense.

The burden of proof, Professor Platt said, was on the defendant in section 1 but was not on the defendant in section 2. Because there was a mens rea element involved in the partial responsibility defense, the defendant should not have to bear the burden in that situation any more than he was required to prove intoxication. The burden would be on the state, if the defendant raised the issue, to prove beyond a reasonable doubt that he was guilty of, for example, burglary.

Senator Burns commented that the intoxication provision in section 4 of the culpability draft was silent with respect to intent and did not follow ORS 136.400 in using language requiring intent. Section 2 of the responsibility draft would not, therefore, be inconsistent with the intoxication provision.

Senator Burns moved that section 2 be approved and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Frost, Haas, Spaulding and Mr. Chairman. Voting no: Johnson and Knight.

Section 3. Burden of proof in defense excluding responsibility. Professor Platt explained that section 3 made no change in existing Oregon law and placed the burden of proof in a defense excluding responsibility on the defendant by a preponderance of the evidence.

Senator Burns moved that section 3 be adopted and the motion carried. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Johnson, Knight, Spaulding and Mr. Chairman.

Section 4. Notice required in defense excluding responsibility. Section 5. Notice required in defense of partial responsibility. Professor Platt noted that section 4 of Preliminary Draft No. 5 varied somewhat from Preliminary Draft No. 4 because the Commission had previously decided the language of P. D. No. 4 was vague with respect to the kind of notice to be given. [See Commission minutes, January 18, 1969, pp. 25, 26.] The section, he said, essentially provided that the defendant could not introduce evidence on the complete

defense described in section 1 unless he gave notice of his intent to do so in the manner prescribed in section 6.

Section 5 required that if the defendant wanted to rely on the partial responsibility defense as described in section 2, he must give notice of his intent to do so. Section 5 contained the additional provision that if the defendant intended to bring in lay witnesses to show partial responsibility, he need not give the state notice. The district attorneys had agreed, he said, that it was unnecessary to give notice if the defendant was not going to bring in an expert witness.

Senator Burns expressed concern over the use of the term "case in chief" in section 5 and asked if the phrase would tend to restrict the defendant in any way.

Mr. Knight contended that it would be better to require that if the defendant in the preparation of his case on the issue of partial responsibility determined that he was going to call an expert witness -- whether or not in his case in chief -- he should be required to give notice. If on the other hand he decided to use only lay witnesses and the state had a psychiatrist at the trial, the defendant at that point could request the court to grant him permission to procure his own psychiatrist and the judge could grant that request without requiring the defendant to give notice. The notice requirement, he said, should not be limited to his case in chief because the defendant could contend that he intended to call an expert for rebuttal only and therefore didn't need to give notice. Mr. Spaulding said this would not be proper procedure unless an expert witness had been introduced by the state.

Representative Frost expressed agreement with Mr. Knight's contention. A sense of fair play, he said, would require notice being given if an expert was to be called and this requirement should apply to the state as well as to experts of all kinds; not just psychiatrists.

Mr. Johnson moved that section 4 be adopted and the motion carried unanimously.

Senator Burns moved that section 5 be approved and this motion also carried without opposition.

Section 6. Notice requirements. Mr. Spaulding asked if the third sentence of section 6 was necessary in view of the language contained in the second sentence. Mr. Paillette replied that the first option would allow the judge to permit the defendant to file a late notice and the latter would permit him to introduce evidence with no notice at all.

Mr. Johnson moved that section 6 be approved and the motion carried unanimously. Voting on approval of sections 4, 5 and 6: Judge Burns, Senator Burns, Carson, Frost, Haas, Johnson, Knight, Spaulding, Mr. Chairman.

Section 7. Right of state to obtain mental examination of defendant; limitations. Professor Platt explained that upon notice of intent to use responsibility or partial responsibility as a defense, section 7 would provide that the state had a right to have its own psychiatrist examine the defendant. At the suggestion of Mr. Spaulding at the January Commission meeting, the last sentence of the section had been inserted to allow the defendant to object to the psychiatrist appointed by the state. [See Commission minutes, January 18, 1969, p. 38.] The purpose of this provision, he said, was to put some flexibility into the system and still permit the court to remain in command of the situation.

Section 7, Professor Platt continued, codified the holding in State v. Phillips, 245 Or 466 (1967), which specifically held that the state had the right to have a psychiatrist examine the defendant when the defendant gave notice of the defense of responsibility. The section was silent with respect to the holding in Shepard v. Bowe, 86 Or Ad Sh 981 (1968), which held that the defendant could not be asked questions, the answers to which might tend to incriminate him.

Chairman Yturri asked if the court required the defendant to state specifically the grounds for his objection to a particular psychiatrist and Judge Burns replied that the grounds were customarily stated and, at least in Multnomah County, when defense attorneys objected to a particular psychiatrist being appointed, the court generally accepted those objections and appointed someone else.

Senator Burns said he assumed that ORS 136.150 would be repealed if section 7 were enacted. That statute provided that the court would order the county which committed the defendant to the state hospital for examination to pay for his examination and hospitalization, and a similar provision should be included in this Article. Professor Platt advised that provision was included on page 22, section 12, of the draft.

Senator Burns moved the adoption of section 7. Mr. Knight moved to amend the motion by striking the last sentence in section 7. Shepard v. Bowe, he said, offered the defendant adequate protection in his psychiatric examination and he saw no reason to permit the defendant to object to the psychiatrist chosen by the state when the state had no right of objection to the psychiatrist chosen by the defendant. Mr. Johnson seconded the motion to amend inasmuch as the defendant was entitled to have his attorney present during the examination in addition to his right to refuse to answer questions.

Mr. Spaulding explained that part of the reason for including the last sentence in section 7 was that the state worked with psychiatrists in criminal cases on a regular basis while the defendant did not. Another part of the reason was that state psychiatric examinations were often simply a procedure to qualify the psychiatrist to say what he would say in any case based on his discussions with the district attorney. In Multnomah County, he said, the state had a group of psychiatrists which they called upon for testimony on a regular basis. Senator Burns expressed agreement and gave as an example one particular psychiatrist in Multnomah County who for several years conducted all the mental examinations in the probate court for commitment to Dammasch State Hospital and who had been habitually requested by the state for the past seven or eight years. Judge Burns affirmed Senator Burns' statement and expressed the view that it would be useful for the court to have some leeway in appointing psychiatrists.

Mr. Blensly agreed with Mr. Knight's motion to delete the last sentence in section 7 and Mr. Haas suggested a reciprocal objection be included for the state. Mr. Spaulding said he would not object to this latter suggestion but noted that the court would take the reciprocal objection into consideration and would be very slow to accept the district attorney's objection to the treating psychiatrist unless there was good reason to do so.

At this point the Commission recessed for lunch.

The meeting was resumed at 1:30 p.m. with the following members in attendance: Judge Burns, Senator Burns, Representative Carson, Representative Frost, Representative Haas, Senator Jernstedt, Mr. Johnson, Mr. Knight, Mr. Spaulding and Chairman Yturri. Also present were Mr. Paillette, Mr. Wallingford and Mr. Lou Williams, member of the District Attorney's Association Criminal Law Revision Committee.

Tape 2 begins here:

Vote was taken on Mr. Knight's motion to delete the last sentence of section 7. Motion failed. Voting for the motion: Frost, Haas, Johnson and Knight. Voting no: Judge Burns, Senator Burns, Carson, Spaulding and Mr. Chairman.

Vote was next taken on Senator Burns' motion to adopt section 7 and the motion carried with Mr. Knight voting no.

Section 8. Civil commitment authority of court following defense of partial responsibility. Professor Platt explained that section 8 was designed for the rare and exceptional case where, under section 2, the defendant raised the defense of partial responsibility and was so successful that the jury found him not guilty of any crime, including

a lesser included offense, and where it clearly appeared, after the evidence was in, that the defendant was mentally deranged or disturbed and would be a danger to society if released. In such an instance the trial court under section 8 would be empowered to commit that defendant under civil commitment procedures. The section, he said, was a safety measure to protect the public in the situation where the partial responsibility defense was in effect too successful.

Mr. Spaulding asked who was going to measure the extent of the defendant's success and from what point of view and was told by Professor Platt that in the situation where a defendant had demonstrated by the evidence he himself had put on that he was likely to be a threat to society and the court therefore felt that the only safe place for him was in an institution, this action could be brought in the trial court where the original trial had taken place rather than having to go to a probate court or other court under the civil commitment procedures. He noted that the civil commitment procedures in ORS chapter 426 were incorporated by reference in section 8.

Representatives Haas, Frost and Carson expressed the view that if the jury decided the evidence was not sufficient to convict the defendant of the crime, the fact that the judge disagreed with the jury should not in itself permit him to place that person in an institution. The jury, they believed, should be allowed to determine the question and if the judge or district attorney disagreed with the verdict, either had the prerogative of initiating commitment proceedings under ORS chapter 426.

Mr. Frost pointed out that ORS chapter 426 contained a further safeguard in that it required the complaint to be signed by two persons. If the man were so obviously deranged, he said, there should be no problem in obtaining two signatures on the complaint from people who had witnessed his actions during the course of the trial.

Mr. Knight pointed out that the district attorney during the trial had maintained that the defendant was sane and it would place him in an awkward position if, immediately following trial, he were to do an about-face and institute commitment proceedings on the ground that the defendant was insane.

Judge Burns remarked that although the defense of partial responsibility would be a rarity in the courts and the situation covered by section 8 would be an even greater rarity, he was of the opinion there was good reason to afford some protection to society in cases where a mentally disturbed defendant was completely acquitted under the partial responsibility defense.

After further discussion and to resolve the issue, Judge Burns moved that section 8 be deleted in its entirety and the subsequent sections renumbered accordingly. Motion carried. Voting for the motion: Senator Burns, Carson, Frost, Haas, Jernstedt, Spaulding, Mr. Chairman. Voting no: Judge Burns, Johnson, Knight.

Section 9. Form of verdict following successful defense excluding responsibility. Section 9, Professor Platt said, reflected present Oregon law requiring that when the defendant was found not guilty on the grounds that he was not responsible, the verdict and judgment shall so state. There was some discussion of this requirement in subcommittee where it was decided that the history of the section should include within the commentary a statement of the exact language of the verdict; namely: "Not guilty by reason of mental disease or defect excluding responsibility." [See Minutes, Subcommittee No. 3, October 31, 1968, p. 11.]

Senator Burns asked why section 9 did not apply to section 2 as well as section 1. Mr. Frost replied that this particular form of verdict would be entered only when the verdict was not guilty by reason of mental disease or defect and Mr. Spaulding and other members expressed the view that section 9 should not be made applicable to section 2.

Mr. Johnson moved adoption of section 9 and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Mr. Chairman.

Section 10. Acquittal by reason of mental disease or defect excluding responsibility; release or commitment; petition for discharge. Professor Platt advised that section 10 was the heart of the entire Responsibility Article once the verdict had been entered. He noted that the office of Legislative Counsel had indicated that section 10 should be divided into several smaller sections.

Section 10, he said, was designed to deal with the defendant who had been found not guilty by reason of mental disease or defect excluding responsibility. When that point was reached, the court shall on the basis of evidence given at the trial or at a separate hearing make one of the following orders:

(1) Commit the defendant because he was dangerous to himself or the public; or

(2) Discharge him completely on the ground that, even though he might be mentally diseased or defective within the responsibility test, he was nevertheless not dangerous to himself or to the public; or

(3) If he was suffering from a mental disease or defect and was dangerous but not so dangerous as to warrant commitment, he could be released on supervision to the community on such terms as the court imposed.

The question of commitment, Professor Platt said, looked at the defendant at the time of the end of the trial whereas the question of insanity looked at him at the time of the criminal act and there could well be some intervening months during which time it was possible his condition had improved to the point where he would be sane at the conclusion of the trial. The results of a survey conducted by Professor Platt and Judge Burns on an informal basis indicated that at trials where insanity was raised as a defense, in many if not most cases, the evidence put on by the psychiatrist went not only to the time of the act but also to the condition of the defendant at the time of trial. There was ample evidence to warrant the judge, looking at the evidence given at the trial, to determine whether that defendant at that moment should be committed or released. If, however, such evidence did not exist at the trial or if the court felt the evidence was inadequate, the court could, but did not have to, require a separate hearing on the question of commitment.

The procedure in section 10 posed some problems, Professor Platt said, because it could certainly be said that if the judge went on the basis of the evidence given at the trial and simply committed the defendant without a separate hearing, a due process question existed in that the defendant was not given an opportunity to argue the issue. It presented the question of whether it would do more harm to require a separate hearing in every case when experience indicated that separate hearings in fact were not requested, were not desirable and were not useful.

Professor Platt noted that the Model Penal Code provided for automatic commitment following a verdict of not guilty by reason of insanity which more clearly presented a due process question than did the provisions of section 10.

Mr. Johnson asked if the district attorney's ability as an advocate was not undermined when he had argued vehemently during the course of the trial that the defendant was perfectly sane and then, following trial, he was put in the position of saying that the offender should be committed to a hospital because he was dangerous. Mr. Spaulding commented that the district attorney would not be forced to make this latter argument if he believed the defendant to be sane. Professor Platt stated that the defendant was in an analagous position because he would be arguing at the hearing that he was not as insane as he said he was at the trial.

Mr. Knight pointed out that Professor Platt had said that automatic commitment caused a serious due process question and asked if that was not what the defendant was requesting when he said during the trial he was insane. Professor Platt responded that the defendant was saying he was insane when he committed the crime but he was no longer insane at the conclusion of the trial.

Representative Frost asked if section 10 was getting away from the criminal law and what it should be doing and noted that the Responsibility Article overlooked the time between the entry of the plea and the time of the trial. He suggested that persons in this category be handled under the present civil commitment procedures. Professor Platt replied that the test under the civil commitment statute was entirely different than under the Responsibility Article. The requirement in ORS chapter 426, he said, was that the person was in need of care, treatment and custody. He contended that the defendant found not guilty by reason of mental disease or defect excluding responsibility should remain in a channel entirely separate and apart from the civil commitment process.

Senator Burns remarked that section 10 was in essence little different from ORS 136.730. Mr. Spaulding said he would object to any procedure which presumed that because the defendant was acquitted by reason of mental disease or defect, he should be automatically committed. Mr. Paillette commented that section 10 met Mr. Spaulding's objections better than ORS 136.730 and the Chairman concurred.

Judge Burns advised that the subcommittee had discussed the matter of requiring a separate hearing at great length and had finally concluded that in the largest number of cases a separate hearing was totally unnecessary. Professor Platt added that the draft did not materially change existing procedure; it was designed to clarify situations which had always been unclear in the law and to fill in some of the gaps in the present statutory system.

Professor Platt, continuing his explanation of section 10, said that if the court decided to commit the defendant, the hospital was required to retain him for at least 90 days before the institution of any release procedures. Presently a defendant sent to the state hospital by a judge following an insanity verdict could be released by a doctor immediately under authority of an Attorney General's opinion read in conjunction with ORS chapter 426. The Model Penal Code and the subcommittee, he said, viewed this as one of the major defects of the state hospitals' release procedures; the procedure ought not to be medical because the original decision which caused him to be committed was not a medical decision but a legal decision made as a result of a legal test. It should, therefore, be up to the judge to release the offender.

Section 10 would provide that only after application by the state superintendent, if he believed discharge was in order, and after a hearing, the judge could release him. Also, the committed person was given, in addition to habeas corpus, the right to petition for his release after the expiration of the 90 day hospitalization period and to have the issued tried at a hearing. The draft also provided that the person could not petition more often than once every six months.

Additionally, the person, once committed or released on supervision, could be kept in that status for a period of five years. At the end of that five year period, if he were still on release or still in the state hospital, he was automatically entitled to a hearing on the condition of whether he should remain in the institution or on release.

If he were in the hospital, the hospital itself was held responsible for giving the committing court 30 days notice of the expiration of the five year period. The state superintendent could make a recommendation at the hearing which automatically followed the five year period as to the continued status of the committed person. He could recommend discharge, continued confinement, release on supervision or continuation of his present status.

The issue at the hearing, whether it be the five year hearing or a hearing on petition of the person confined, was always twofold under the provisions of the draft: Is the defendant insane within the test of his original trial and is he still dangerous? If he were found to be insane but no longer dangerous to himself or to society, the court would be required to release him.

Professor Platt indicated that the problem that existed with respect to the burden of proof was a major one and this draft attempted to deal with the subject of who had the burden of proof by a preponderance of the evidence. On the original commitment, the original release on supervision or the original discharge, the subcommittee made no recommendation with respect to the burden of proof. With respect to subsequent hearings where the confined person himself applied for release, the subcommittee recommended that he, being the applicant for release, was required to show by a preponderance of the evidence either that he was insane and no longer dangerous or that he was not insane at all before he could be released. However, if the superintendent recommended that he be kept in the institution beyond the five year period or recommended that the release on supervision be revoked and that he be committed, the state would then be the moving party and would be required to bear the burden of proof. The subcommittee attempted to follow the course that the petitioner would bear the burden of proof.

At the end of the five year period if the superintendent recommended and proved that the defendant should not be released and that his confinement be continued because he was insane and dangerous, he could be continued under confinement under those conditions indefinitely but he was still permitted, every six months after the expiration of the five year period, to petition again for his release.

Senator Burns expressed approval of the procedures outlined in section 10. If the insanity test were to be liberalized, he said, the procedural aspects needed to be stated more definitively in the law than they had been in the past. He indicated greater confidence in a system which permitted the judge to make the decision to release the defendant than one which permitted the superintendent of the hospital to make that decision. As a matter of semantics, he noted that the term "Superintendent of the Oregon State Hospital" would need to be changed in the final draft and Judge Burns said the subcommittee had recognized this fact and intended to correct it.

Representative Haas called attention to the second paragraph on page 13 of Preliminary Draft No. 5 which stated that the court "may appoint one or more psychiatrists to examine the person and to submit reports to the court." He asked if it was the intention of the draft that the court would read these reports and make its decision on the basis of those reports without requiring the physicians to testify in court and without any opportunity for cross examination by the defense. Professor Platt replied that while the subcommittee had not addressed itself to that particular point, he agreed there should be every opportunity for cross examination in this kind of hearing and he felt certain the subcommittee had intended no other result. He said he would have no objection to making an explicit insertion in section 10 concerning the right to cross examination and, if the Commission so desired, to include a statement concerning the defendant's right to bring in his own witnesses.

Mr. Paillette noted that subsection (4) began by saying that the "court shall conduct a hearing" and the subcommittee felt that cross examination was implicit in that provision inasmuch as a hearing would consist of both cross examination and testimony. Chairman Yturri expressed agreement that the first sentence of subsection (4), by referring to "any application" filed pursuant to the entire section, would be sufficient to insure a just hearing. Judge Burns suggested that Representative Haas' criticism might be taken care of by commentary.

Representative Haas contended that the incompetent should have the right to cross examine the psychiatrists who prepared the reports submitted to the court and he further pointed out the difficulties which could be caused by the cost factor in having the experts available during the hearing. He maintained that the defense at the

competency hearing was being required to overcome an almost insurmountable obstacle if the psychiatric reports sent to the judge were adverse to the defendant.

Mr. Spaulding said the draft contemplated that in the majority of the cases there would be a short hearing, the judge would decide the issue on the basis of the reports which had been submitted to him and the defendant probably wouldn't even have a lawyer.

Chairman Yturri suggested that instead of providing only that the court may appoint one or more psychiatrists to submit reports, the draft should say that the court may designate one or more psychiatrists to examine the incompetent and, as an alternative procedure, either testify at the hearing or submit a written report. Mr. Spaulding said this would pose a problem of where to draw the line because the committed person still had a right to petition the court for a hearing every six months. This could, he noted, become an expensive procedure.

Mr. Paillette observed that subsection (4) without amendment appeared to him to empower the court to call a psychiatrist to testify at the hearing and Professor Platt agreed. Judge Burns suggested, and the Chairman agreed, that this could be spelled out specifically either in the commentary or in the last paragraph of subsection (4).

Professor Platt suggested Representative Haas' objection could be overcome by incorporating in subsection (4) the language in section 13 on the determination of fitness to proceed by the addition of the following:

> "If the report is received in evidence upon such hearing, the party shall have the right to summon and to cross examine the psychiatrist or psychiatrists who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's mental condition may be introduced by either party."

Senator Burns moved that subsection (4) of section 10 be amended to reflect the language just cited by Professor Platt to incorporate the rights of the defendant. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Johnson, Knight, Spaulding, Mr. Chairman.

Burden of proof. Mr. Johnson proposed that the burden of proof be made uniform in the first three subsections of section 10. Professor Platt recommended that the burden should be the same at least in subsections (1) and (3). In response to a comment by Representative Carson concerning the implication that the person had been adjudicated insane by reason of his conviction under the Responsibility Article, Professor Platt indicated that the issue in section 10 was not insanity but was whether or not the person was dangerous to himself or to the community and this issue had not been tried at his trial.

Chairman Yturri remarked, and Judge Burns concurred, that in the case of subsection (1) the defendant had just persuaded the jury that he was dangerous at the time of the commission of the act charged and when the hearing was being held on whether or not he was still dangerous to himself or to society, it would not be unfair to place the burden on the defendant to show that he was no longer dangerous.

After further discussion, Judge Burns pointed out that when the hearing was concluded, the judge had three alternatives available to him for disposition of the defendant. If the defendant had the burden in subsection (1) and failed to maintain that burden, it followed that the court would be obliged to make its finding under subsection (2) or (3) and would be precluded from finding that the defendant was no longer dangerous.

Mr. Spaulding said one way to solve the problem would be to provide that the state had the burden under subsection (1) but the existence of a verdict that the defendant was not guilty by reason of mental disease or defect excluding responsibility was prima facie evidence that he was dangerous.

A brief recess was taken at this point. Upon resumption of the meeting Judge Burns suggested that any statement relative to the burden of proof at the initial hearing be omitted. The existing statute did not prescribe a burden, he said, and he felt it was fair to say that there had not been any difficulty as a result of this omission from the statute. If the burden of proof were omitted, each side could put on testimony and the test was clearly stated in the draft. He then moved to delete the following sentences:

(1) The last sentence in subsection (1);

(2) The second sentence in subsection (2); and

(3) The last sentence in the first paragraph of subsection (3).

Mr. Johnson asked how the judge was expected to resolve the problem when one psychiatrist had testified that the man was sane and the other had testified that he was insane. Assuming the state would be the initiating party, he asked what evidence the state would put on that the defendant should be committed. Mr. Knight replied that the state could introduce the jury verdict.

Judge Burns said it was perfectly possible that during the course of the trial, neither of the psychiatrists would have said anything about the defendant's present condition; their testimony could have been confined to his state of mind at the time of commission of the act. In that situation, he said, the judge would call both

psychiatrists back and hear what they had to say concerning his condition at the end of the trial.

Chairman Yturri remarked that if, on the other hand, neither side presented evidence, the judge was still obliged to make some kind of determination and he would in all probability conclude that there was nothing to show any improvement in the defendant's condition so he would place him under supervision or confinement; however, such a situation would rarely occur.

Mr. Johnson maintained that the burden at the initial hearing should be on the defendant to prove that he was no longer insane. The basic issue, he said, was whether or not to release the man. Chairman Yturri disagreed and said the basic issue was whether the man was still suffering from a mental disease or defect and, if so, whether he was dangerous to himself or the person of others.

Professor Platt commented that the dialogue the Commission was having at this point presented an excellent argument in support of Judge Burns' motion to delete specific allocation of the burden of proof. Deletion would provide the flexibility that the discretion of the court would supply, he said.

Mr. Knight noted that the judge had heard the evidence at the trial and if he felt the defendant presented no danger to himself or others, he proposed to permit the court to release him unless one of the parties objected to that decision and wanted to present evidence to the contrary. Chairman Yturri indicated that this approach was in essence very little different from the result which would be accomplished by adoption of Judge Burns' motion.

Vote was then taken on Judge Burns' motion to delete reference in subsections (1), (2) and (3) of section 10 to burden of proof. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Johnson, Knight, Spaulding and Mr. Chairman.

Separate hearing. Representative Haas moved to delete "at the trial or" in the first sentence of section 10. His contention was that the court should make the order based on the evidence given at a separate hearing as opposed to making his decision based on a short hearing to be taken up at the conclusion of the trial.

Judge Burns said there was no real necessity for a separate hearing unless the defendant requested it. Frequently, he said, there was no real dispute when both psychiatrists felt the defendant was insane and both agreed he should be sent to the state hospital.

Senator Burns asked Judge Burns if his objection to a requirement for a separate hearing would be met by amending Representative Haas' motion to make the first sentence of section 10 read: " . . . on the basis of the evidence given at the trial or, if requested by the defendant, at a separate hearing . . . " Judge Burns replied it would be better to say "if either party requests" rather than "if requested by the defendant".

After further discussion, Senator Burns moved to amend Representative Haas' motion by revising the first sentence of section 10 to read: " . . . on the basis of the evidence given at the trial or at a separate hearing, if requested by either party, make an order as follows:". The amended motion carried without opposition.

Senator Burns moved the adoption of section 10 as amended and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Jernstedt, Knight, Spaulding and Mr. Chairman. Voting no: Frost.

Section 11. Mental disease or defect excluding fitness to proceed. Professor Platt explained that section 11 set up the standards by which the court was to determine whether the defendant was competent to proceed and listed in subsections (1), (2) and (3) what the subcommittee had concluded was present law.

Senator Burns commented that when discussing section 1 earlier, the Commission had talked about mental disease or defect and also about excluding the defendant from responsibility if he was unable to conform his conduct to the requirements of law. If the draft was completely clear that the control test, insofar as it concerned conformity of conduct, related solely to mental disease or defect, there was no problem, he said, but if it was not, an inconsistency existed. Chairman Yturri expressed the view that it was clear that section 11 related only to mental disease or defect and not to the defendant's inability to conform or control his actions. Mr. Spaulding noted also that section 11 applied to his condition at the time of the trial.

Senator Burns moved the adoption of section 11 and the motion carried without opposition. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Jernstedt, Knight, Spaulding, Mr. Chairman.

Section 12. Psychiatric examination of defendant on issue of fitness to proceed. Professor Platt indicated that Preliminary Draft No. 5 contained two alternative forms of section 12 which were identical except with respect to the basic policy decision on whether the court should be required to request the services of a psychiatrist in assisting him in the competency decision or whether the services of a psychiatrist would be within the court's discretion. The section generally set up the ground rules for the court to make the determination as to the defendant's competency to proceed and closely followed existing law. Under present law, he said, the court was required to appoint a psychiatrist to make a report with respect to the competency of the defendant. The subcommittee considered this policy and decided to leave the ultimate decision to the Commission.

The basic issue involved was why the court should be required to request the psychiatric report, which was very expensive, and whether that report was of any great assistance to the judge in making his ultimate decision. The argument for providing that the court may make this decision without a psychiatric report was that the court knew

better than the psychiatrist what the defendant was liable to be faced with at his trial. The court was in a position to understand the due process problems, the self-incrimination problems, the general elements of the offense that the defendant would be faced with, the general procedure at the trial and the judge would have the defendant before him to talk to him directly and to call in other witnesses if he wished to do so. Basically, Professor Platt said, the competency to proceed decision was founded on the common sense and legal sense of the judge rather than on the necessity of calling a psychiatrist to add medical testimony.

Professor Platt also called attention to subsection (2) of the first alternative form of section 12 which read:

> "In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect."

The subcommittee, he said, felt the Commission might also want to address itself to this Model Penal Code provision. He noted that the psychiatrists who testified at the Commission meeting in January 1969 favored this provision because it would be useful to a medical expert and set a desirable standard, at least to the psychiatrists. The subcommittee made no recommendation with the respect to the inclusion of subsection (2). Professor Platt indicated that Kathleen Beaufait had observed that inclusion of the subsection might cause problems because within the medical profession itself there might be a conflict as to what constituted proper procedure. She had suggested it be omitted.

After a brief discussion, Judge Burns moved that subsection (2) of the first alternative form of section 12 be deleted. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Jernstedt, Knight, Spaulding.

Representative Frost moved the adoption of the second alternative form of section 12, with the amendment just adopted, which would leave the matter of requesting psychiatric assistance to the discretion of the court.

Professor Platt called attention to a further provision in section 12 which had not yet been discussed: When the state or defendant requested a competency hearing, the psychiatrist appointed by the court almost uniformly replied with respect not only to competency but with respect to insanity. This was not authorized by the present statute, nor was it prohibited, but it was a standard practice. It presented the Shepard v. Bowe self-incrimination situation which caused some great difficulty in the subcommittee and also in the Commission discussion of the problem with respect to the

competency hearing. [See Commission minutes, January 18, 1969, pp. 30-32; Subcommittee No. 3 minutes, April 4, 1969, pp. 16-21.] The subcommittee decided to resolve the problem by providing that the statute would prohibit the psychiatrist from replying with respect to insanity where the issue was incompetency unless the defendant so requested. However, to allow the court some control over the situation, they recommended that the court must also concur in the defendant's request.

Mr. Paillette said the practical consideration the subcommittee discussed was that in most, if not all, counties a two-pronged examination was given the defendant and if the defendant's attorney wanted to agree to this double-barreled examination, the subcommittee did not want to prohibit it.

Vote was then taken on Representative Frost's motion to adopt the second alternative form of section 12 with the deletion of the second paragraph of subsection (2). Motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Knight, Spaulding.

Section 13. Determination of fitness to proceed; effect of finding of unfitness; proceedings if fitness is regained; pretrial legal objections by defense counsel.

Subsection (1). Professor Platt explained that subsection (1) of section 13 generally reflected existing law and would require the court to make the determination with respect to incompetency on the basis of the report filed. If no one contested the incompetency hearing, the report itself would stand and the court would not need to bring in witnesses. However, the draft contained specific language that if the defendant wished to contest the report, he could call in the psychiatrist who submitted the report and cross examine him as well as bring in his own evidence. This was the portion of section 13 which the Commission earlier decided to incorporate in section 10, he said. [See page 17 of these minutes.]

Representative Frost called attention to the last sentence of subsection (1) and said it was his understanding that the subcommittee intended for the provision with respect to introduction of other evidence to apply only to the issue of the defendant's fitness to proceed.

Following a brief discussion, Representative Frost moved that the last sentence of subsection (1) be amended to read: "Other evidence regarding the defendant's fitness to proceed may be introduced by either party." The motion carried unanimously.

Subsection (2). Professor Platt explained that subsection (2) was novel to Oregon law. Where an extremely long period of time had elapsed between the commitment and the subsequent finding of the defendant's fitness to proceed, if the court felt that in the interests of justice the charge should be dismissed, the court could so dismiss.

Representative Haas asked if the state could appeal that order of the court and Professor Platt said that question had not occurred to him.

Judge Burns said it was the subcommittee's belief that there would be very few cases where the procedure in subsection (2) would be in order, but it did introduce a policy question which the Commission should determine.

Senator Burns said it was in the best interest of public policy to handle criminal cases with as much dispatch as possible and if the court determined that a person lacked fitness to proceed, he should then be sent to the state hospital. If the court determined that the defendant was competent, he should be sent back to the district attorney who would then decide whether to dismiss or prosecute. Where the fact that the judge could either commit or release the defendant on supervision was injected into the statute, it was getting dangerously close to the situation where a case could be continued indefinitely, he said. Judge Burns disagreed because the test in subsection (2) was clearly stated and required that "so much time has elapsed that it would be unjust to resume the criminal proceeding."

Professor Platt indicated that the state's case would deteriorate with the passage of time more than the defendant's case because the state had the burden of proof beyond a reasonable doubt and would probably dismiss the charge in most instances for the reason that there would be no case left after a period of time. To cover the rare situation where the state still had a case and the defendant did not, in the interests of justice, he said, the court should also have the discretion to dismiss.

Mr. Knight said he had opposed this provision in subcommittee and was still opposed to it. He contended that if the state felt the case should not be prosecuted, the district attorney would move to dismiss it. Mr. Blensly added that the procedure in the draft could be used as a discovery process by defense counsel by a motion based on insufficient evidence and the state would then have to show its evidence.

After further discussion, Mr. Knight moved to delete the last two sentences in subsection (2) beginning: "If, however, the court is of the view that so much time has elapsed . . . "

Senator Burns noted that the subsection contained no standard for measuring time and Mr. Spaulding observed that it would be better if a standard were included but he could think of no way to accomplish this.

Vote was then taken on Mr. Knight's motion. Motion failed. Voting for the motion: Judge Burns, Senator Burns, Knight. Voting no: Carson, Frost, Haas, Spaulding.

Senator Burns called attention to the last sentence in subsection (2) and suggested that more precise language be used. After a brief discussion he moved that "chapter 426 or as near as may be" be deleted and the following inserted in lieu thereof: "426.070 to 426.170." The motion carried unanimously.

Subsection (3). Professor Platt explained that subsection (3) was existing law and permitted the court to release the defendant as an alternative to commitment.

Subsection (4). Subsection (4), he said, was a new provision. A defendant accused of a crime might have a readily available defense for that crime but an incompetency to proceed hearing could have intervened causing the defendant to be committed. This might forestall him from ever bringing in anything with respect to his defense until he finally regained his competency in a proceeding, possibly months or years later. Subsection (4) attempted to deal with that situation by permitting the defendant, through counsel, to raise defenses which would not interject matters of fact into the trial. Examples of the kinds of issues determinable prior to trial would be: The sufficiency of the indictment; the statute of limitations had run; double jeopardy principles applied; or venue was improper. These issues would not go to the factual case of innocence or guilt, which would be unfair to the state by making the state put on its whole case, and they would not be binding on the defendant because he had already been adjudged incompetent. Subsection (4), Professor Platt advised, was a compromise provision to allow the defendant to bring in certain issues he had heretofore not been able to raise but at the same time it would prevent him from trying his whole case while he was incompetent.

Mr. Spaulding said he did not understand the subsection. He asked if it meant that the defendant had defenses which might be complete defenses but would not require his presence in the courtroom. He also inquired if subsection (4) met constitutional requirements that the defendant must be personally present at his trial. Professor Platt said he was aware of the constitutional requisite that the defendant must be present but this provision was clearly and entirely to the benefit of the defendant. Mr. Spaulding agreed but said the subsection was being used to describe what things could be done when the defendant was insane. The state could say that it would not follow this subsection because it was something that could not be done without the defendant's personal presence.

Chairman Yturri suggested that changing "fair" to "proper" might resolve the problem. If there were an issue which could not be tried for constitutional reasons without the defendant's personal participation, it would not then be covered by the subsection.

Professor Platt asked that the Commission express itself with respect to the basic philosophy of subsection (4); namely: Should the defendant be allowed in some instances to raise certain defenses even

though he is incompetent? The Commission was generally agreed they would support this provision.

Senator Burns suggested that the insertion of a period after "trial" in subsection (4) might solve the problem.

Judge Burns moved that subsection (4) of section 13 be returned to Subcommittee No. 3 and that the balance of section 13, as amended, be approved. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Knight, Spaulding, Mr. Chairman.

Section 14. Incapacity due to immaturity. Mr. Spaulding asked whether the defense in section 14 was accurately described as an affirmative defense. Professor Platt said he had used "affirmative defense" all the way through the Responsibility Article as defined in section 1.12 of the Model Penal Code which defined an affirmative defense to mean that once the defendant introduced some evidence on the issue, the burden of proof beyond a reasonable doubt was then upon the state.

Mr. Paillette explained that some confusion had arisen with respect to the term "affirmative defense". As used in the New York and Michigan codes, for example, the term was defined as meaning that the burden was on the defendant to establish proof by a preponderance of the evidence. Whenever the burden had been placed on the defendant in the Oregon revision, he said, it was stated that the burden was on the defendant to prove by a preponderance of the evidence. When the provision referred to a defense, it had been framed in terms of "It is a defense that . . . ". He advised that section 14, to conform to the rest of the code, should say, "It is a defense that the person was less than 14 years old."

In response to a question by the Chairman, Mr. Paillette said "affirmative defense" had not been defined in the proposed criminal code because when the burden was on the defendant, the drafts indicated by specific language that it was a defense for the defendant by a preponderance of the evidence.

Chairman Yturri indicated that subsection (2) of section 14 should be changed in accordance with the language proposed by Mr. Paillette and the Commission agreed. The decision of the Commission was to provide in subsection (2) that the burden should not be on the defendant.

In response to a question by Mr. Spaulding, Judge Burns explained that section 14 meant that if a person committed a crime before he was 14 years of age, he would not be tried in a court of adult criminal jurisdiction.

Mr. Spaulding asked what would happen if the juvenile committed a crime before he was 14 and committed the same crime two more times after he was 14. If reference were made at the later trial to the fact that he did the same thing before he was 14, he said it would have an effect on the charge for which he was being tried in adult court. Chairman Yturri agreed that reference to his earlier crime would be one of the factors on the basis of which the jury would determine his guilt or innocence.

Senator Burns said the situation just posed by Mr. Spaulding was analagous to a circumstance wherein an offender was charged with a crime in adult court and under present law evidence could not be introduced by the state that he had committed the same crime as a juvenile. Mr. Spaulding urged that a similar provision be included in section 14.

Chairman Yturri asked what the present law was in a remand case with respect to introduction of evidence of like acts which occurred prior to a certain age if that evidence had a tendency to establish that the defendant had a history of this type of act. Mr. Blensly replied that this type of evidence was admissible if it showed a common scheme or design. The Chairman asked if the Commission wanted to continue this practice and the members expressed approval of that procedure.

Mr. Paillette advised that the subcommittee had meant to make no change in present law in this respect. They were merely trying to say that if a person was less than 14 years of age, as a matter of law he was incapable of committing a crime. The Responsibility Article, he said, was concerned with the capacity of the defendant, and the evidentiary rules which the Commission had been discussing should not be included in this Article.

Judge Burns moved adoption of section 14 subject to the change in language discussed with respect to subsection (2). The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Knight, Spaulding and Mr. Chairman.

Next Meeting

The Commission discussed the date for the next meeting and also discussed the possibility of a two-day meeting in October. It was decided that the staff would contact the members by telephone to determine the most convenient date or dates for the next meeting.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission