Tapes #36, 37 and 38

#36 - 225 to end of Side 2
#37 - Both sides
#38 - 1 to 69 of Side 1

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

October 10, 1969

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Thirteenth Meeting, October 10, 1969

Minutes

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Mr. Robert Chandler
Mr. Donald E. Clark
Representative David G. Frost
Representative Harl H. Haas
Attorney General Lee Johnson
Mr. Frank D. Knight
Representative Thomas R. Young

Absent: Senator Kenneth A. Jernstedt
Mr. Bruce Spaulding

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

Agenda: BRIBERY AND CORRUPT INFLUENCES
Preliminary Draft No. 3; October 1969

PERJURY AND RELATED OFFENSES, sections 1 through 5;
Preliminary Draft No. 2; October 1969

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 Meeting of September 12, 1969

Judge Burns moved that the minutes of the meeting of the Commission on September 12, 1969, be approved as submitted. The motion carried unanimously.

Bribery and Corrupt Influences; Preliminary Draft No. 3; October 1969

Section 1. Bribery and corrupt influences; definitions.

Subsection (1). Mr. Wallingford explained that the definition of "benefit" in subsection (1) was included primarily to clarify the definition of "pecuniary benefit" in subsection (2).

Subsection (2). Mr. Wallingford noted that "pecuniary benefit" was defined to exclude political campaign contributions reported in accordance with ORS chapter 260, one reason being that section 2 referred to a person conferring a pecuniary benefit upon a public servant with the intent to influence him and if the definition of "pecuniary benefit" included campaign contributions, a literal reading of section 2 would preclude a public servant from accepting campaign contributions. The subcommittee's intent was that campaign contributions would be governed by the disclosure provisions of ORS chapter 260.

Chairman Yturri pointed out that buying a public servant a drink could be construed as a "benefit in the form of property" under the definition in subsection (2) and would come within the Bribery Article. Judge Burns commented that the same would be true under the present statute.

Representative Haas stated that a campaign contribution differed from a bribe in that a contribution was supposed to be utilized in the expense of running for office whereas a bribe went into an individual's pocket for his personal use and was not reported.

Mr. Clark asked if it would be possible to find someone guilty of giving a bribe while the receiver at the same time would not be guilty of receiving a bribe. Representative Carson replied this was possible under the draft because the giver might not make his intentions known at the time he gave the bribe and the receiver could be completely ignorant of the giver's intent to bribe. If the giver intended to receive a benefit by his contribution, he would have committed a crime under this draft inasmuch as evil intent on the part of the recipient was not a prerequisite to proving guilt on the part of the giver.

Representative Carson advised that the subcommittee had been particularly concerned about the definition in subsection (2) because of the obvious interest it would engender from the public when it was found that campaign contributions were excluded from the Bribery Article. The subcommittee had finally decided the best way to handle the situation was to incorporate the provisions of ORS chapter 260 in the definition. If someone then took money presumably for a campaign contribution and did not report it, he could be found guilty under the Bribery Article since it would not absolve him from responsibility for reporting his campaign contributions.

Mr. Paillette explained that the definitions in this Article were necessarily broad in order to cover the kind of conduct at which the draft was aimed and at the same time the subcommittee recognized that campaign contributions and other attempts to influence legislation would not normally come under a bribery statute. Michigan, he said, had wrestled with this same problem but had taken a less direct approach in resolving it. In their commentary they said that obviously such things as logrolling and other legitimate attempts to

influence legislation should not be covered by the bribery statute. They recognized that their definitions were broad enough that they could be interpreted to prohibit such acts, but they made it clear in their commentary that the definitions were not intended to cover that type of conduct.

Mr. Chandler observed that one of the problems in drafting this type of legislation was that the public would single out one part for criticism without bothering to understand the entire draft. They would, for example, read subsection (2), find that it excluded campaign contributions and not bother to read the explanation in the commentary. For this reason, he said, he would prefer to follow the course Michigan had taken and include the explanation of the type of activity sought to be prohibited in the commentary.

He moved that the last clause of subsection (2) of section 1 be moved into the commentary and expanded to make it clear that the statute was not intended to include campaign contributions, the right of private citizens to appear before their legislators and buy them a lunch while they were so doing, and normal activities of lobbyists including buying a drink, a dinner, an airplane ride, etc. for a public servant.

Judge Burns was of the opinion that the Commission would receive as much criticism from the public by putting this explanation in the commentary as by putting it in the statute and said he favored retention of the clause in the statute.

Mr. Paillette noted that the last paragraph of the commentary on page 2 of the draft addressed itself to lobbying and the other activities which the Commission was discussing. Chairman Yturri stated that the commentary did not go as far as Mr. Chandler contemplated by his motion and expressed the view that the commentary as stated was inadequate. Others agreed.

Senator Burns observed that there would be instances where a campaign contribution would be a direct bribe. If a specific exclusion relating to campaign contributions were put in the definition section of the bribery statute, the statute would then be saying that in no instance would the giving of a campaign contribution constitute a bribe so long as it was reported. This would be a departure from the present bribery statute, he said.

Representative Young pointed out that the only campaign contributions that were excluded by subsection (2) were those which were reported preliminary to an actual election. He indicated that lunches and plane rides which were not reported could fall into the category of bribes as the definition was presently drawn.

Representative Frost said he had three points he would like to make:

(1) He had a basic distrust of placing requirements in the commentary rather than in the statute itself and for this reason could not support Mr. Chandler's motion.

(2) Campaign contributions were entirely separate from bribery inasmuchas the person giving the contribution was gambling on his candidate gaining the office at a future time as opposed to a bribery situation where the person bribed was presently in office and in a position to confer a benefit.

(3) With respect to the problem of excluding a small benefit such as a drink or a lunch from the definition section, he suggested that "benefit" in subsection (1) be defined to mean a "substantial gain or advantage" and that "pecuniary benefit" in subsection (2) be defined to mean "a substantial benefit". To adopt this approach, he said, would put some flexibility into the statute and allow the court to place an interpretation on the word "substantial". As the draft was drawn, he said he would read it to mean that a person could not take a legislator to an ALI luncheon and pay for that meal without coming under the Bribery Article.

Judge Burns commented that if ORS 162.220 were strictly interpreted, it too could be subject to this same type of abuse by a venal prosecutor.

Representative Carson said he agreed with the first two of Representative Frost's premises but did not agree that "substantially" in the definition section would enhance its meaning. He held the opposing view, commenting that inclusion of "substantial" could render the statute unconstitutional because the jury could not know what "substantial" meant and the individual could not know at the time he accepted a gift whether it would be construed as substantial nor could he find out. "Substantial" would depend, he said, not only upon the manner in which the gift was offered and accepted but upon the position of the individual. For instance, a $14,000 stock transfer would be a substantial transaction to many people but to a man worth millions, a $14,000 stock transfer would be minimal.

Mr. Wallingford expressed agreement that the use of "substantial" would be unwise and added that it would apply a subjective rather than an objective standard which would be unsound practice.

Vote was then taken on Mr. Chandler's motion to move the last clause of subsection (2) of section 1 into the commentary and expand the commentary to state more precisely the type of activity intended to be covered by the Bribery Article. Motion failed. Voting for the motion: Chandler. Voting no: Judge Burns, Senator Burns, Carson, Clark, Frost, Haas, Knight, Young and Mr. Chairman.

Mr. Chandler moved that the commentary be revised and expanded to reflect the fact that political campaign contributions, normal lobbying activities and logrolling by legislators were not intended to fall within the scope of the Bribery Article. Motion carried.

At a later point in the meeting, Mr. Wallingford prepared a revised commentary to subsection (2) of section 1 in line with Mr. Chandler's motion set forth above. Copies were distributed to Commission members. The revised commentary read:

> "A broad interpretation of 'pecuniary benefit' could conceivably be applied to prohibit 'logrolling', i.e., the offer by a legislator or other public servant to vote in a particular way in exchange for some 'beneficial act' such as political assistance at the polls. Bargaining of this nature is not intended to be covered by the Bribery Article. Gratuities of insignificant value, in the form of a social amenity or holiday gift, are also beyond the scope of the bribery sections. The consideration sought to be prohibited is one whose primary significance is economic value and which is transferred with a wrongful intent to influence a public servant's exercise in judgment."

Mr. Johnson moved that the proposed addendum to the commentary be approved and the motion carried unanimously.

Subsection (3). Mr. Wallingford noted that the definition of "public servant" included jurors but excluded witnesses.

Judge Burns referred to an ad hoc committee recently appointed by the Commissioner of Labor and asked if the members of this type of committee would be public servants as defined in subsection (3) (b). Mr. Wallingford replied that they would while acting in their capacity as committee members.

Judge Burns said it was unclear to him what was meant by "an advisor, consultant or assistant [serving] at the request or direction of the state . . . " Senator Burns suggested the meaning might be clarified by saying, "A person officially serving as an advisor . . . "

Mr. Chandler indicated that the draft was aimed at an official making a public judgment for a corrupt reason and the definition of "public servant" was intended to cover not only high governmental officials but also minor functionaries who gave any type of advice or spent any of the public's money in a corrupt manner.

Senator Burns observed that the primary function of this Commission was to render the present archaic criminal code more concise and workable. Language such as that contained in subsection (3) (b), he said, was difficult to interpret and too broad in scope. Chairman Yturri disagreed that the language was too broad.

Mr. Paillette related that Preliminary Draft No. 1 on Bribery contained the following definition of "public servant":

> "'Public servant' means any public officer or employee of government, including legislators and judges, and any other person participating as an advisor, juror, consultant or otherwise in performing governmental functions and includes a person who has been elected or designated to become a public servant although not yet occupying that position; but the term does not include witnesses."

The subcommittee, Mr. Paillette continued, felt that definition was too restrictive and should be expanded to include municipal or quasi-municipal governments such as school districts, sewer districts, water districts, etc. [See Minutes, Subcommittee No. 2, June 10, 1969, pp. 4, 5.] The draft presently before the Commission reflected the subcommittee's directive in this respect. It was difficult, if not impossible, to draw a definition of "public servant" that did not encompass lesser officials and employes. The evil the draft was attempting to get at was not the position the person occupied but the bribery situation itself, he said. If the person involved was the secretary to a water board, he should be covered by the Bribery Article the same as the Governor or any other high ranking public official.

Judge Burns concurred that the fact of bribery was being reached not by classification of the individual but by his activity in giving corrupt advice. He said he had raised this subject today because he felt it was important to have some legislative history in the minutes and also to make sure that the Commission understood what a broad area was being encompassed by the definition of "public servant".

Representative Frost said he assumed the draft was referring to a public servant acting only in that capacity as opposed to a lawyer giving advice to his client on a private basis. Chairman Yturri pointed out that this was covered by the commentary which stated:

> "A practicing attorney would not normally be a public servant since he does not exercise the functions of a public officer; his designation as an 'officer of the court' does not create a contractual relationship empowering him to act on behalf of the state."

Representative Frost asked about the lawyer who was a member of the legislature and would therefore be a lawyer, a public servant and an officer of the court. The Commission agreed that he would be guilty of bribery only if he accepted a bribe while acting in his official capacity as a legislator.

Mr. Knight observed that the commentary did not cover the situation where an advisor solicited money from an interested businessman to pay the advisor to give certain advice to the Governor. Senator Burns asked if the Commission would agree that this type of situation would be covered by the following sentence on page 2 of the commentary:

> "A businessman advising a member of the executive or legislative branch of government, in the absence of official status, would not be a public servant."

Judge Burns said he would have no objection to approving that portion of the commentary. The shadowy areas would still have to be determined on the basis of the meaning of "official status". It would be virtually impossible, he said, to include a definition of "official status" which would cover every circumstance and relationship which might arise.

Mr. Knight and Representative Frost indicated they did not agree with the statement in the commentary as set forth above.

Mr. Clark asked if the proposed statute meant that the advisor who took $500 to recommend appointment of a certain individual to the Governor could not be charged with bribery under this draft and was told this was correct providing that advisor had no official status. The Governor was the public official who exercised the final decision and if he were to accept a cut of the $500, he would then be guilty under the proposed statute.

Representative Carson pointed out that there was some disagreement between subsection (3) (b) and the commentary statement and others agreed. He suggested that this portion of the commentary be deleted.

Judge Burns believed that subsection (3) (b), reasonably construed, would include persons who did not have "official status" while the statement in the commentary said exactly the opposite.

Mr. Paillette pointed out that the critical language in subsection (3) (b) was "at the request or direction of the state . . . " which would take out of the coverage of that section the individual who thought he had, or held himself out as having, some influence with a state official. If he gratuitously and officiously contacted the Governor and offered his advice or tried to influence him, he would not be serving at the request or direction of the state and would therefore not be included in the scope of the proposed statute. The vice of bribery, he said, was for an individual in an official capacity to peddle his influence or attempt to affect the course of the state's affairs. If the statute were to be aimed at a member of the public, it was his opinion that it would go far beyond the purpose of the Bribery Article.

Judge Burns said Mr. Paillette's statement took care of the businessman who initiated the call to the public servant but the one who concerned him was the person who was asked advice and contacted by the public servant in the first instance. If that person said he would think it over and call the public officer back and in the meantime accepted a bribe from someone for giving specific advice to the public servant, he could not be prosecuted for bribery under this draft.

Mr. Chandler replied that ordinarily when the public servant initiated the contact, it could be generally assumed that he would consider the source of the advice he was seeking with the supposition that the source would be trustworthy. Furthermore, the person giving the advice in that circumstance was not the person at which this draft was aimed.

Representative Carson asked if Task Force 70 would be considered to have official capacity and was told by Senator Burns that it would have. Representative Carson observed that the Warren King study done by AOI would not have official capacity because it was conducted by a private agency for a separate organization. Senator Burns commented that the study was a private contractual arrangement and Representative Carson remarked that a public servant also had a private contractual arrangement with the state. Being an independent contractor would not necessarily remove the person from an advisory capacity and should not absolve him from blame for taking a bribe, he said.

Representative Frost agreed with Representative Carson's premise that influence peddling was one of the most insidious forms of bribery and one of the most difficult to discover.

Representative Haas asked if bribery of a private citizen who was contacted by the Governor for his advice was covered under present law. Mr. Wallingford replied that to his knowledge it was not. Mr. Chandler remarked that such a situation was not apt to occur; it was unlikely that such a person would have time to go out and arrange to be bribed before he gave the advice. The person serving on one of the Governor's advisory committees, for example, was more likely to be placed in this position because he knew in advance that his opinion would be sought and he was the class of individual who should be covered by the proposed statute.

Chairman Yturri expressed approval of subsection (3) as drafted because it specifically stated that the advice had to be given at the request or direction of a governmental instrumentality. The situation of a third party accepting money to suggest to the state official that he take a certain course of action was not included, he said, but he agreed with Mr. Chandler that such an event was not likely to occur. He also pointed out that the sentence in the commentary having to do with the businessman was intended to pose an example only and expressed approval of its deletion inasmuch as it apparently conflicted and caused confusion when read in conjunction with subsection (3) (b).

Mr. Chandler moved that subsection (3) be approved as drafted subject to revision of the commentary. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Haas, Johnson, Knight, Young and Mr. Chairman.

Mr. Knight moved that the last two sentences of the commentary to section 1 be deleted in order to avoid confusion as to the meaning and interpretation of subsection (3) (b). Mr. Knight's motion also included a directive to revise the commentary to state that the Commission intended to extend coverage of the Bribery Article to the broad classification of persons who served governmental instrumentalities in an advisory or consulting capacity.

Mr. Wallingford asked if the first sentence of the last paragraph of the commentary was satisfactory and the Commission agreed that statement was consistent with the definition of "public servant".

Tape 2 begins here:

Vote was then taken on Mr. Knight's motion which carried. Voting no: Senator Burns.

Representative Carson moved to approve section 1. The motion carried unanimously.

Section 1 was subsequently amended further; see pages 10 to 12 of these minutes.

Section 2. Bribe giving. Senator Burns said he was concerned that the crime of bribe giving was described in unwieldy terms because it was necessary to refer to the Article on General Principles of Culpability in order to understand the section. He expressed a preference for the existing bribery statute because it used "corruptly" as a modifier. Chairman Yturri pointed out that section 2 used the phrase "with the intent to influence" in place of "corruptly".

Mr. Paillette advised that to interpret section 2 it was necessary to refer to the Culpability Article only with respect to the definition of "intentionally". Senator Burns contended that the draft should say "with the intent to corruptly influence". He was told by Mr. Chandler that the statute was saying that it was wrong to pay a public servant to use his influence by the mere fact that there was money involved in the transaction. Representative Carson expressed agreement that the money given for influence was the corruption in itself.

Representative Frost inquired as to the necessity of retaining the second paragraph of the commentary on page 6 of the draft and expressed the view that it contributed nothing to the meaning of the proposed statute inasmuch as the term "corruptly" was not used therein. Mr. Wallingford agreed that deletion of that paragraph would do no violence to the commentary.

Mr. Johnson moved that the second paragraph of the commentary on page 6 be deleted and the motion carried unanimously.

Mr. Chandler moved that section 2 be approved and this motion also carried without opposition.

Section 3. Bribe receiving. Mr. Chandler asked why section 3 did not say " . . . solicits, accepts or agrees to accept . . . ", thereby eliminating the need for two separate subsections. Mr. Wallingford replied that the section was originally drafted in that manner but the subcommittee had preferred that it be stated in two subsections with a slight variation in language between the provisions applicable to "solicits" and "accepts or agrees to accept".

Representative Frost suggested that the opening sentence of section 3 read "A public servant commits the crime of bribe receiving if:". Representative Carson said the way the sentence was drafted helped the problem Representative Frost had mentioned earlier about the lawyer who was a legislator and a public servant part of the time -- a lawyer and not a legislator the rest of the time. Representative Frost's suggestion was subsequently adopted; see page 12 of these minutes.

Mr. Johnson asked what would happen to a candidate for office who did not report a contribution but took the money for his own benefit. Mr. Wallingford replied that most often in that type of case bribery was not involved; it was simply a misappropriation of campaign contributions.

Mr. Johnson pointed out that if a person were running for office and had not yet been elected to the office, he would not be a "public servant" inasmuch as the definition of that term did not include a candidate for office. Mr. Wallingford advised that persons in this category were not covered under existing law because at the time of the transaction the candidate had no official capacity and the bribe was therefore in the realm of speculation.

Chairman Yturri asked what the situation would be where someone was nominated for an office, was running unopposed and was given $100 to do a certain thing after he was elected. A person in this situation, he said, would not fall under the definition of "public servant" so there would be no crime of bribery committed yet his election to office was a virtual certainty.

At this point the discussion turned to the definitions in section 1 as used in context with section 3. The final disposition of section 3 will be found on page 12 of these minutes.

Section 1. Bribery and corrupt influences; definitions. Chairman Carson suggested the problem raised by Chairman Yturri would be solved by broadening subsection (3) (c) of section 1 to include persons nominated for office.

Senator Burns moved that subsection (3) (c) of section 1 be amended to read: "A person nominated, elected or appointed . . . "

Representative Frost said that inclusion of nominees in the Bribery Article could disturb the Corrupt Practices Act. He noted that the Commission had earlier decided to leave the reporting of campaign contributions under the Corrupt Practices Act. Adoption of Senator Burns' motion, he said, would disrupt that phase of the Act by placing under the Bribery Article unreported contributions to persons not yet elected.

Chairman Yturri pointed out that the proposed amendment was entirely separate from the Corrupt Practices Act. The Bribery Article was concerned only with what constituted bribery and if a nominee were included in the definition of "public servant", he said he could not see how it would do violence to the Corrupt Practices Act. Subsection (3) (c) of section 1 covered the situation where someone was elected but had not yet taken office, he said, so adoption of Senator Burns' motion would merely move the time back from the November general election to the May primary.

Mr. Paillette remarked that the draft was saying that it was bad for a person who had won the November election to accept a bribe because the office was his and he would soon be in a position to exert his influence whereas the nominee in the primary had not yet won the election. Chairman Yturri pointed out that the unopposed candidate in the May primary had the office as surely as did the November election winner.

Judge Burns asked if this subject had been discussed by the subcommittee. Mr. Paillette said his recollection was that the subcommittee specifically wanted to exclude individuals not yet elected or appointed to a position because their status as an office holder was too speculative and they felt this type of conduct should be left to the Corrupt Practices Act.

Chairman Yturri suggested that the definition specifically refer to unopposed candidates. Representative Carson pointed out that in some districts winning the primary election was tantamount to election in November, regardless of whether the candidate was opposed or unopposed.

Representative Frost contended that so long as the definition of "benefit" was retained in section 1, subsection (1), the door was open to file a complaint against anyone who said, "I will benefit you by getting ten people to work for you in the election if you will support my position after you are elected." He urged that the two definitions be combined and that the definition of "pecuniary benefit" include the statement concerning gain or advantage to the benefit of the third person presently contained in the definition of "benefit". This would solve the problem of the nominee which the Commission had been discussing, he said.

Senator Burns withdrew his motion to amend section 1, subsection (3) (c), and Representative Frost moved that subsections (1) and (2) of section 1 be combined to define "pecuniary benefit" as set forth in subsection (1) of the draft and to that definition would be added the clause pertaining to gain or advantage to the beneficiary or to a third person as presently contained in subsection (1) of section 1. The motion carried unanimously.

Senator Burns then restated his motion to insert "nominated," after "person" in section 1, subsection (3) (c). Motion carried. Voting no: Judge Burns.

Senator Burns moved that section 1 as amended be approved. Motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Haas, Knight, Young, Mr. Chairman.

Section 3. Bribe receiving. Senator Burns moved that section 3 be approved with the opening sentence amended to read as suggested earlier by Representative Frost:

> "A public servant commits the crime of bribe receiving if he:".

The motion carried unanimously. Voting: Senator Burns, Carson, Chandler, Clark, Frost, Haas, Knight, Young, Mr. Chairman.

Section 4. Bribery defenses. In reply to a question by Mr. Chandler, Representative Carson explained that if a person solicited a bribe from another saying he would secure a pardon for his brother in the penitentiary if the bribe were paid, under section 4 he could not raise his action as a defense even though he had no authority to carry out his part of the bargain.

Chairman Yturri asked if there was a possibility of bribe receiving being the result of extortion or coercion. Representative Carson replied that the possibility existed. A situation could occur where the giver would say, "I will give you $5,000 to influence your vote and you had better take it or I will tell your wife . . . " This possibility was not discussed in subcommittee, he said, but if the recipient could convince the jury that he accepted the bribe not because he agreed to exercise his vote, opinion, judgment, action or decision but because he was forced to accept it, he would not be guilty of bribe receiving and the crime would be covered by the proposed statute on coercion.

Senator Burns moved section 4 be approved. Motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Haas, Knight, Young, Mr. Chairman.

Supplemental sections 5 and 6. Bribing a witness; bribe receiving by a witness. (Adopted from Obstructing Governmental Administration; Preliminary Draft No. 1; June 1969). Senator Burns called attention to sections 5 and 6 of the Article on Obstructing Governmental Administration (P. D. No. 1) and related that Subcommittee No. 1 at its meeting on the previous day had unanimously agreed that the two sections dealing with bribing a witness and bribe receiving by a witness would more appropriately be included in the Bribery Article. Mr. Paillette added that bribing witnesses would impede the administration of the courts and the subcommittee was of the opinion that the subject was more closely related to the other crimes defined in the Bribery Article; i.e., bribing jurors.

Senator Burns moved that sections 5 and 6 of the Article on Obstructing Governmental Administration be included as sections 5 and 6 of the Bribery Article and that the subsequent sections of the Bribery Article be renumbered. The motion carried unanimously.

Placement of other bribery statutes. Mr. Wallingford pointed out that the proposed criminal code also contained bribery sections in other Articles; i.e., commercial bribery and sports bribery. Mr. Paillette commented that this raised a question of placement in the code -- whether the Commission wanted to include all crimes involving bribery under the Bribery Article or whether they wished to look at the nature of the bribe and include, for example, commercial bribery with the Article on Business and Commercial Frauds.

Mr. Clark said that commercial and sports bribery were not so closely related to the functions of government as was bribing a witness and Mr. Chandler agreed that those two crimes were ancillary to governmental activity which was the chief concern of the Bribery Article.

Chairman Yturri asked if it would be easier for a person to find a crime having to do with bribery if all such crimes were in one Article. Judge Burns remarked that if the code were properly indexed, commercial bribery and sports bribery could be easily found under "Bribery" in the index no matter what their final placement in the code.

The Commission recessed for lunch and reconvened at 1:30 p.m. Present at the afternoon session were: Senator Burns, Vice Chairman, who presided in the absence of the Chairman, Judge Burns, Mr. Chandler, Mr. Clark, Representative Frost, Representative Haas, Mr. Johnson, Mr. Knight and Representative Young. Representative Carson arrived at 3:30 p.m. Staff members present were Mr. Paillette, Professor Platt and Mr. Wallingford.

Section 5. Rewarding past official misconduct. Representative Frost pointed out that sections 2 and 3, bribe giving and bribe receiving, contemplated future considerations while section 5 contemplated past considerations and contractually it was impossible to have good consideration for an act which was done in the past. He contended that if a person agreed to accept a bribe, whether it was "corrupt now and pay later or corrupt now and pay now", both situations were covered by sections 2 and 3 and section 5 was unnecessary.

Mr. Wallingford called attention to the commentary on page 14 of the draft which gave two examples of the type of conduct intended to be covered by section 5.

Judge Burns said his concern with section 5 was that it suggested that a person could successfully defend by contending that he did not receive the pecuniary benefit until after the official action was completed; yet section 3 made it a crime to receive a bribe if he accepted or agreed to accept the benefit. Mr. Wallingford commented that there had to be an existing agreement or understanding prior to the time of the judgment.

Mr. Johnson moved that section 5 be deleted.

Mr. Haas called attention to the example in the commentary where a fire inspector deliberately and intentionally failed to report a past violation of fire regulations. He asked if rewarding persons for doing something they were not supposed to do was the type of conduct intended to be covered by section 5.

Judge Burns asked if there was an evil existing in society which was sought to be cured or prevented by this section. Senator Burns replied that existing law did not cover the fire inspector who failed to report violations but the city codes probably took care of that type of conduct and that seemed the proper place to deal with the problem rather than in the criminal code.

Mr. Paillette pointed out that ORS 162.240 prohibited acceptance of a fee or compensation after a prohibited act had been performed. Mr. Wallingford said he construed that statute to pertain to past, present or future acts.

Representative Frost maintained that the criminal law should place penalties upon conduct which was detrimental to society as a whole and to be concerned with rewarding past official misconduct was to place something in the statute which had little or no social consequence.

Representative Haas posed a situation where a fire inspector did not report a violation of fire regulations in an apartment building and at Christmas the owner of the building gave that inspector ten

cases of whiskey. With no discussion between the two parties, the fire inspector on the following year again overlooked the fire violations in the apartment. Representative Haas asked if that type of conduct was covered and, further, if it should be covered in the criminal code.

Mr. Knight responded that such an act could be covered by the Bribery Article because it could be argued to the jury that the ten cases of whiskey were not only for past favors but also to take care of future inspections.

Mr. Paillette noted that section 5 was taken from section 208.12 of the Model Penal Code called "Compensation for Past Official Favor." The commentary to that section on page 109 of Tentative Draft No. 8 stated:

> "Soliciting or accepting pay for past official favor should be discouraged because it undermines the integrity of administration. Compensation for past action implies a promise of similar compensation for future favor. Apart from this implied bribery for the future, when some 'clients' of a public servant undertake to pay him for favors, others who deal with the same public servant are put under pressure to make similar contributions or risk subtle disfavor. We have not gone so far here as to prohibit all gifts to public servants, a matter which for the most part should be handled through civil service regulations and non-penal disciplinary measures . . . The proposed section obviates the difficulty occasionally encountered in bribery prosecution when the defendant contends that he did not solicit or receive anything until after the official transaction had been completed . . . "

Representative Frost said a problem existed only where the inspector was paid for his future inspections. He found it difficult to believe, he said, that a situation would exist where anyone would pay an inspector for past favors unless he also expected to receive special consideration in the future. Mr. Johnson agreed that human nature being what it was, people did not pay a reward for something they had received free unless they were asking for or expecting something in return in the future.

Mr. Clark said there were people who had the reputation for giving gifts to policemen, firemen and other public servants. In return they received special favors from the police, for example, even though no actual bribery agreement existed. He said he could see good reason for inclusion of section 5.

Vote was then taken on Mr. Johnson's motion to delete section 5 and the motion carried. Voting for the motion: Judge Burns, Frost, Johnson, Young and Senator Burns. Voting no: Chandler, Clark, Haas and Knight.

Section 6. Receiving reward for past official misconduct. Mr. Paillette explained that section 6 was directed at the public official who accepted a bribe rather than the person who gave the bribe. Mr. Wallingford added that if section 5 were deleted and section 6 retained, a public servant could be charged with receiving a bribe while the individual who paid the bribe could not be prosecuted.

Mr. Clark asserted that a policeman exercised a great deal of discretion by the very nature of his duties and constantly made decisions to arrest or not to arrest. If he received a reward for not arresting someone who had performed an illegal act, he had violated his trust, committed a wrongful act and should be penalized. He urged that sections 5 and 6 be retained.

Senator Burns asked Mr. Clark if the type of conduct described in sections 5 and 6 was a problem in police departments and was told that it was a very real problem in any police department that did not have effective control over such matters. Senator Burns next asked if it was in the best interests of the police department to control these matters internally or whether they should be put into the criminal courts. Mr. Clark commented that as of this moment the art of policemanship had not arrived at the level where it controlled itself and he reiterated his approval of sections 5 and 6,

Mr. Johnson was of the opinion that the possibility of any kind of an act occurring which would not be covered by section 3 was very remote.

Judge Burns asked Mr. Clark if he thought bribery was a problem in the situation where the police officer solicited money for past misconduct and asked if that situation could be separated from the case where he was offered money and accepted it for past misconduct. Mr. Clark said it would be difficult to separate the two. He stated it was a common practice in large police departments for policemen to visit places where officers in the past had received gratuities. In these cases there would be no solicitation, no statement and no threat; merely a gratuity given because of some conduct or violation that had been overlooked in the past. Mr. Johnson and Representative Frost were of the opinion that this type of conduct would be covered by sections 2 and 3.

Mr. Johnson moved that section 6 be deleted and the motion carried. Voting for the motion: Judge Burns, Frost, Johnson, Young, Vice Chairman Burns. Voting no: Chandler, Clark, Haas, Knight.

ORS 162.240. Acceptance of consideration by public official for services rendered to person dealing with public body. Mr. Paillette called attention to the related situation covered by ORS 162.240. He asked if the Commission's decision to delete sections 5 and 6 could be interpreted to mean that the Commission did not wish to include any section dealing with this subject in the criminal code and wanted to repeal ORS 162.240 entirely.

Senator Burns asked if the proposed criminal code contained a section dealing with abuse of office and received an affirmative reply from Mr. Paillette who added that ORS 162.240 was, however, broader than that section. Judge Burns observed that ORS 162.240 should be considered in conjunction with the Article on Abuse of Public Office and the Commission agreed to follow his suggestion.

Perjury and Related Offenses; Preliminary Draft No. 2; October 1969

Section 1. Perjury and related offenses; definitions.

Subsection (1). Mr. Wallingford noted that section 1 (1) incorporated the definitions of "public servant" and "benefit" as used in the Bribery Article. Inasmuch as the Commission had deleted the definition of "benefit" in the Bribery Article, he suggested consideration be given to defining the term in the Perjury Article. A broader definition was required in the Perjury Article, he said, because the proposed statute discussed all types of benefits rather than just pecuniary benefits.

Senator Burns suggested that "benefit" be defined in section 1 of the Perjury Article and that the definitions of "pecuniary benefit" and "public servant" in the Bribery Article be incorporated by reference. Mr. Chandler objected to incorporating the definition of "pecuniary benefit" as used in the Bribery Article because of the reference therein to political campaign contributions. This reference should be omitted in the Perjury Article, he said.

Mr. Chandler moved that the following be added to section 1 of the Perjury Article:

> "(1) 'Benefit' means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary."

The motion carried unanimously.

Mr. Chandler next moved that subsection (2) of section 1 be inserted to read:

> "(2) 'Pecuniary benefit' means a benefit in the form of money, property, commercial interests or economic gain."

Vote was not taken on this motion.

Representative Frost pointed out that the only place "benefit" would be applicable in the Perjury Article would be in section 4. He suggested that the Commission go through the subsequent sections before adopting the definitions in order to consider them in context. The Commission agreed to follow this course.

In order for the members to understand how section 1 would read if his complete proposal were adopted, Mr. Chandler said that when the proper time arrived, his third motion to amend section 1 would be to incorporate the definition of "public servant" as defined in the Bribery Article. Final action on subsection (1) of section 1 will be found on pages 23 and 24 of these minutes.

Section 2. Perjury. Mr. Wallingford read section 2 and noted that "statement", "sworn statement" and "material" were all defined in section 1. The Commission thereupon returned to its discussion of the definitions. Final disposition of section 2 will be found on page 20 of these minutes.

Section 1. Perjury and related offenses; definitions.

Subsections (2) and (3). Judge Burns noted that "material" was defined in section 1 to mean "that which could have affected the course or outcome of any proceeding or transaction." That language, he said, appeared broader than the explanation in the commentary and in the case law. It was his understanding the cases held that in order to be material, the matter had to be substantial or important. He wanted to be certain that the definition was clear enough so that a court would not treat as "material" those things which could be considered insubstantial but which could affect the outcome of the proceedings. There were many small facts which arose in trying a case which he said he would not regard as substantial and yet they could affect the outcome of the proceedings. He asked the Commission to consider adding "substantially affected the course or outcome" to the definition of "material".

Professor Platt said that the concept of section 2 was an anomaly to the concept of inchoate crimes, particularly with respect to impossibility. The general law on the subject of impossibility in this state, he said, was that if a person tried to commit a crime, he was guilty of the attempt even though it was the result of a mistaken belief. He said he thought this was a good rule and it had been adopted with respect to inchoate crimes by Subcommittee No. 3. Perjury, he said, was the same type of crime in that a person who lied on the stand was telling a falsehood to influence the administration of justice. If it just happened that what he lied about turned out to be not "material", even though that person through his specific intent was trying to subvert the purposes of the criminal justice system, under common law he would not be guilty. The Model Penal Code commented that hearsay could be material if it affected the outcome of the proceedings; the admissibility of the evidence question did not affect materiality as far as the outcome was concerned and it would simply be "material" in the sense that the person could be convicted of perjury. Professor Platt was of the opinion that the definition of "material" should not be restricted or further qualified and asked if the Commission wanted to require that the testimony had to be material in order to be perjurous.

Representative Frost commented that the definition of "statement" when read in conjunction with "material" solved some of the problems which the Commission was discussing. Judge Burns asked Mr. Wallingford to explain the definition of "statement" and to give some specific examples of the latter part of the definition. Mr. Wallingford replied that the classic example of a representation of opinion would be "I don't remember" or "I don't know."

Mr. Johnson said another example would be where the doctor on the stand testified that an injury was permanent and this statement was diametrically opposed to his earlier deposition which said there was no perjament injury.

Mr. Wallingford noted there were three different situations in the definition of "statement" -- opinion, belief or state of mind. The example he had suggested was state of mind and the example Mr. Johnson cited was an opinion.

Judge Burns asked if the example of the doctor's opinion where he said there was a permanent injury "clearly related to a state of mind apart from or in addition to any facts which are the subject of the representation." He said the meaning of the definition was not clear to him and added that he was not certain he would be ready to turn every witness who said "I don't remember" over to the district attorney to be prosecuted for perjury.

Mr. Paillette said before a complaint would be issued, there would have to be proof that his statement was false and that he knew it was false when he said it.

Representative Frost asked if ORS 162.110 included in its perjury statement a declaration of opinion and was told by Senator Burns that it said "in regard to any material matter or thing." Representative Frost expressed the view that the proposed definition of "statement" was improper and that ORS 162.110 was better because it would get to the fact that an opinion or belief was excluded. He urged that the proposed statute be limited to matters of fact.

Representative Frost pointed out that if a doctor took the stand and said, "In my opinion this is a permanent injury," he would be subject to a perjury charge if his opinion later turned out to be wrong inasmuch as his opinion was material to the outcome of the case. Mr. Paillette replied that it was not a question of being wrong; it was a question of falsity and whether or not he was lying. Mr. Johnson explained that if he lied on the witness stand and actually did not hold the opinion which he gave, then he would be guilty of perjury.

Mr. Chandler pointed out that the definition of "material" said that whether a false statement was "material" was a question of law. He asked why the judge should make that decision. Judge Burns replied

that the rationale was that the judge was better able to evaluate the importance of the statement in the context of the case in which it was made. Senator Burns asked the Commission if they were agreed it would promote justice to let the judge decide the materiality of a false statement as a matter of law. Professor Platt expressed approval of allowing the court to make that decision rather than complicating the issue by allowing the defendant to determine the issue later on appeal.

Section 2. Perjury. Mr. Chandler moved that section 2 be approved. Representative Frost said he was unable to vote for the section until the definition of "statement" was approved. The motion carried. Voting for the motion: Judge Burns, Chandler, Clark, Haas, Johnson, Knight, Young, Vice Chairman Burns. Voting no: Frost.

Section 1. Perjury and related offenses; definitions.

Subsection (2). Representative Frost explained that when he had suggested earlier that the definitions be approved following discussion of the subsequent sections, he had intended that they would be approved and acted upon in context with the sections in which the terms were used. He then moved that the definition of "material" in section 1, subsection (2), be adopted. The motion carried unanimously. Voting: Judge Burns, Chandler, Clark, Frost, Haas, Johnson, Knight, Young, Vice Chairman Burns.

Subsection (3). Mr. Johnson moved that the definition of "statement" in section 1, subsection (3), be adopted.

Mr. Frost objected to including "opinion, belief or state of mind" in the definition of "statement" in view of the way "statement" was used in section 2. He moved to amend Mr. Johnson's motion by revising subsection (3) to read:

"'Statement' means any representation of fact."

The motion failed with all members voting against the motion except Representative Frost.

Vote was then taken on Mr. Johnson's motion to adopt section 1, subsection (3). Motion carried. Voting no: Representative Frost.

Subsection (4). Mr. Johnson asked if the definition of "sworn statement" would include all notarized statements and received an affirmative reply from Mr. Paillette. Mr. Johnson pointed out that the definition was far broader than the present law and would apply to any affidavit or anything requiring notarization. He advised that perjury under present law did not apply to a nonsworn statement but Subcommittee No. 2 had discussed the matter at considerable length and finally decided to make the proposed statute all-inclusive so it would apply to all sworn statements whether in court or out of court. Senator Burns commented that this was a departure from the traditional concept of perjury.

Mr. Johnson advised that there were many statutes in the present code which made it a crime to sign a false notarized statement. Mr. Chandler said a teacher's certificate would be a case in point.

Mr. Paillette commented that this definition would not change present law to any great degree. ORS 162.110 was not limited to trial situations and would cover a sworn statement given to a notary which in effect made a statement given out of court subject to a perjury charge.

Representative Frost asked if an affirmation would be on a level equal to an oath under the definition. Mr. Wallingford replied that there was a provision in ORS 44.360 making an affirmation equivalent to an oath.

Mr. Johnson moved that subsection (4) of section 1 be approved and the motion carried unanimously with the same nine members voting as voted on the previous motion.

Further amendment of section 1 will be found on pages 23 and 24 of these minutes.

Section 3. False swearing. Mr. Wallingford explained that section 3 differed in two respects from the basic perjury statute, section 2:

(1) The falsification did not have to be in regard to a material issue; and

(2) Section 2 required actual knowledge while section 3 said "knowing or having reason to know" which would make implied knowledge sufficient.

Judge Burns said the actual effect of the implied knowledge provision would be to get the prosecution to the jury much more easily in a false swearing case than if the statute required only "knowing". Section 3, he said, expanded the definition so that knowledge need not be proven but only the likelihood of knowledge.

Mr. Wallingford called attention to the commentary on page 9 of the draft which stated that the distinction between sections 2 and 3 was included to make it clear that the crime of perjury involved an intentional, knowing misstatement while a false swearing offense could be predicated upon a reckless disregard for the truth. The distinction, he said, would also give the state a plea bargaining opportunity.

Several members said they would not be willing to go so far as to permit prosecution on the phrase "having reason to know."

After a brief discussion, Representative Haas moved to strike from section 3 the phrase ", or having reason to know,". The motion carried. Voting for the motion: Judge Burns, Frost, Haas, Johnson, Young. Voting no: Chandler, Clark, Knight, Vice Chairman Burns.

Representative Haas then moved that section 3 as amended be approved and the motion carried unanimously with the same nine members voting.

Section 4. Unsworn falsification. Mr. Wallingford explained that section 4 referred to a written statement, not made under oath, in connection with an application for a pecuniary or any other type of "benefit" as defined in section 1.

Senator Burns asked if all the ORS sections listed on page 18 of the draft would be repealed by enactment of this section and was told by Mr. Wallingford that each would have to be examined but presumably the only ones which would not be repealed would be those which would not involve a benefit. Any type of license, he said, probably would be considered to be a benefit.

Mr. Chandler pointed out that both state and federal income tax statements carried the force of a sworn statement and Representative Frost noted that section 4 would also apply to persons submitting written testimony to legislative committees. He said the section was extremely broad and would apply to a letter to any state department requesting a license or permit of any kind.

Judge Burns was critical of the language "pecuniary or other benefit" and moved to amend the last phrase of section 4 to read " . . . in connection with an application for any benefit." Motion carried unanimously.

Judge Burns observed that section 4 would create a host of new crimes or situations in which a person's activity would be subject to criminal prosecution. He said he could not quarrel with the statement in the commentary that this type of deception in official matters created an impermissible interference with the proper administration of government but the state had gotten along thus far by exercising this authority only in certain selected areas. With the range of governmental activities growing wider and wider, he felt the Commission should realize that section 4 would sweep into the criminal net a great many activities which had not been there heretofore. In one sense, he said, this was somewhat contrary to the over-all purpose of criminal law revision which was to make the laws simpler and more concise.

Mr. Johnson was of the opinion that if a general statute in the nature of section 4 were not included, the legislature would be apt to enact a host of statutes covering selected situations some of which could be misdemeanors and some felonies. Section 4 would probably be a misdemeanor, he said, and would at least keep the penalties equal for this type of offense.

Representative Frost asked if the criminal code would contain a section on deceit which would cover this type of crime. Mr. Paillette replied that if property were obtained by a deceptive statement, it would be covered by the section on theft by deception but that statute would cover property only and would not apply to obtaining a job or a license.

Mr. Wallingford explained that section 4 was designed to discourage false statements in the first instance. If the person received a benefit from the false statement, he would be chargeable under some other statute.

Senator Burns pointed out that there was a special statute prohibiting falsification of statements on applications for a driver's license. If that statute were not repealed upon enactment of section 4, he asked if the district attorney would have an option of charging the person under one or the other of these statutes. Mr. Wallingford responded that the list of ORS sections on page 18 of the draft was not all-inclusive and if this statute were enacted, all licensing statutes of this type would be repealed inasmuch as a license would fall within the definition of "benefit".

Judge Burns cited a hypothetical example of a person who was arrested and taken to the police station. In order to obtain his release from jail he wrote an exculpatory statement and signed it. By doing so, Judge Burns asked, had he applied for a benefit? Several members expressed the view that his release from jail would qualify as a "benefit". Judge Burns said that if this were the case and if that interpretation were placed on section 4, there would be many police officers who would be delighted to find the existence of this statute. Mr. Clark did not believe that the section would be used by the police in this manner and it was unlikely it would be used in lieu of a criminal charge. Mr. Knight observed that the interpretation suggested by Judge Burns would mean that every defendant who took the stand and said "I didn't do it" could be indicted for perjury.

Mr. Chandler moved that section 4 as amended be approved. The motion carried. Voting for the motion: Carson, Chandler, Clark, Haas, Johnson and Knight. Voting no: Judge Burns, Frost, Young, Vice Chairman Burns.

Section 1. Perjury and related offenses; definitions. Mr. Chandler moved that section 1 be amended as follows:

(1) Subsection (1) would set forth the definition of "benefit" as approved earlier in this meeting. [See page 17 of these minutes.] Inasmuch as section 4 had been amended and the term "pecuniary benefit" was no longer used in this Article, it was unnecessary to define it.

(2) Subsection (2) would read:

"(2) The definition of 'public servant' in Article ___ (referring to the Bribery Article) applies to this Article."

(3) Renumber the subsequent subsections.

The motion carried unanimously.

Section 5. Perjury and false swearing; irregularities no defense. Mr. Clark asked for an example of the type of defense covered under section 5. Senator Burns said an example would be that a wife who testified against her husband when she was incompetent and who perjured herself would not have a defense against a perjury charge on the ground that she was incompetent.

Judge Burns explained that if a person said the traffic light was red and he knew his statement to be false, he could not later defend on the ground that the judge should not have admitted the evidence even though it was technically inadmissible for some reason. Presumably, he said, the false statement was as destructive to the ends of justice as was the admissibility of the testimony.

Judge Burns moved that section 5 be adopted. This motion was subsequently withdrawn.

Mr. Paillette said Professor Platt had pointed out to him that the language in subsection (1), "mental disability or immaturity", did not conform to the language used in the Responsibility Article which was "mental disease or defect excluding responsibility".

Judge Burns called attention to ORS 44.030 which listed two classifications of persons who were not competent witnesses:

(1) Those of unsound mind; and

(2) Children under 10 years of age.

He asked if there was anyone else who was technically incompetent as a witness under existing law. Mr. Wallingford replied he was not aware of any others. Judge Burns said that unless "unsound mind" and "mental disability" were interpreted to mean different types of incompetency, it was unnecessary to include subsection (1) of section 5 since it would be redundant of ORS 44.030.

In reply to a question by Senator Burns, Mr. Paillette explained that section 5 was saying that if the person were incompetent for any reason other than mental disability or immaturity, there would be no defense. Assuming these were the only two grounds on which a witness could be declared incompetent, Mr. Paillette asked what the result would be when a witness who was in fact incompetent, but the objection

was not raised at the time of trial, proceeded to testify and to lie. He said he was not certain that the two statutes under discussion would get to that problem.

Mr. Wallingford pointed out that ORS chapter 139 pertained to competency of certain witnesses -- for example, ORS 139.320 discussed husband and wife as witnesses. Judge Burns read ORS 139.120 and Professor Platt commented that if subsection (1) of section 5 were retained, the Commission would be setting up two different standards for competency in his opinion.

Judge Burns said he assumed that the common law rule would still be the law in Oregon and that was that incompetency for either of these two reasons (mental disability or immaturity) would be a defense even though subsection (1) were deleted. Professor Platt acknowledged that this would be true because the defendant who perjured himself would be charged with the crime of perjury and obviously responsibility and immaturity were defenses to that crime.

Judge Burns withdrew his motion to approve section 5 and Mr. Johnson moved to amend section 5 by deleting subsection (1) and renumbering the subsequent subsections. The motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Clark, Haas, Johnson, Knight, Young, Vice Chairman Burns.

Judge Burns then moved that section 5 as amended be approved. Adoption of this motion will be found on page 28 of these minutes.

Retraction. Representative Haas advised that when a witness made a deposition and subsequently at trial the same witness testified contrary to the facts stated in his deposition, a statute in existing Oregon law permitted that witness to retract his prior testimony and testify at the trial without subjecting himself to a charge of perjury. The argument for retaining this type of statute, he said, was that it encouraged the final truth to come out at the trial and took away the premium on consistency of testimony.

Representative Carson noted that the statute was drawn so that the person made the retraction before he testified to the inconsistency.

Mr. Paillette pointed out that inclusion of a retraction procedure was discussed on page 38 of Preliminary Draft No. 1 of the Perjury Article.

Mr. Wallingford read Model Penal Code section 241.1 (4) pertaining to retraction:

> "No person shall be guilty of an offense under this section if he retracted the falsification in the course of

the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding."

He noted that Michigan, Illinois and New York had adopted similar provisions but they were contrary to the common law rule which held that while retraction could be used to show inadvertence in making the statement, perjury once committed could not be purged. The Model Penal Code reporters, however, felt that a retraction provision would preserve the incentive to correct falsehoods without impairing the compulsion to tell the truth in the first place.

Mr. Wallingford stated there were compelling reasons in favor of both sides of the question. There were good arguments to include a retraction defense based upon the theory that once having told a lie, the actor would not be forced to stick with it and it therefore served a socially desirable purpose in the search for truth. On the other side of the coin, it could encourage a person to lie in the first instance because he would know that if it later appeared he was going to be found out, he could recant, tell the truth and his retraction would insulate him from criminal liability.

Mr. Haas pointed out that if a person lied initially, without a retraction provision in the law he would be guilty of perjury if he later told the truth under oath.

In reply to a question by Judge Burns, Mr. Paillette said the subcommittee had no strong feelings either way concerning inclusion of a retraction defense but did feel that the Commission should discuss the question.

Mr. Knight pointed out that retraction would only be effective if the actor recanted prior to the time he had been exposed. He said the only time he could conceive of a person going forward and saying he lied before he had been exposed would be in a case where he had been honestly mistaken when he lied in the first place in which case he would not be indicted for perjury anyway. Mr. Carson said it would be a race to beat the district attorney to the judge; if the actor got there first, he could recant and be absolved of a perjury charge.

Representative Haas said he was disturbed by this question because section 7 provided that the state was required to prove only that a person had given contrary sworn testimony and the case would then go to the jury. Section 7, he said, placed a premium on consistency of statements.

Senator Burns asked Representative Haas if he made this point in opposition to the motion to adopt section 5 as amended and was told that he had introduced the subject because section 5 dealt with defenses to the perjury charge and this is where a retraction defense would logically fit into the Article.

Representative Carson mentioned that the first statement did not always contain the lie. It could be the other way around, he said, where the actor would tell the truth to the grand jury in the first instance, then lie at the trial and say he had lied to the grand jury.

Mr. Chandler expressed the view that the actor was more likely to lie the first time and tell the truth the second time. He contended that unless a retraction defense were included, the actor was forced to stick with a lie forever or be convicted of perjury.

Tape 3 begins here:

Representative Carson said he had no interest in protecting the perjuror. He said the question of including a retraction defense boiled down to this:

Did the Commission want the law to say to the one who was about to commit perjury, "If you are going to lie, be consistent because if you cross up, we are going to prosecute you." On the other hand, did the Commission want the law to say what Representative Haas had suggested: "Go ahead and lie and you will have a chance to change your testimony if the district attorney starts breathing down your neck."

It was a philosophical question, Representative Carson said, but truth was what the law was after and he asked which way would serve the truth better. His opinion was that it was better to stop perjury in the first instance and he felt this would more likely be accomplished by omitting a retraction defense.

Senator Burns pointed out that Representative Haas had said section 5 would be the proper place to include a retraction defense. He asserted, however, that section 5 contained no defenses but rather pointed out specific instances which did not constitute a defense.

The retraction defense, he said, could still be used as a defense even though the procedure was not specifically set forth in a statute. Judge Burns said that in theory this was correct but as a practical matter, he did not believe that any competent defense lawyer would adopt that as a strategy in the absence of a retraction statute.

Senator Burns then asked for a show of hands of those who favored Representative Haas' suggestion that retraction be included as an affirmative defense. Five of the nine members present indicated approval of the suggestion.

Mr. Clark moved that the staff draft a separate section on retraction as a defense and submit it to the next meeting of the Commission. The motion carried.

Section 5. (Cont'd). Vote was then taken on Judge Burns' motion to approve section 5 as amended. The motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Clark, Haas, Johnson, Knight, Young, Vice Chairman Burns.

The meeting was adjourned at 4:25 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission