Tapes #25, 26 and 27
#25 and #26 - Both sides
#27 - Side 1 and 1 to 434 on side 2

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

November 21 and 22, 1968

A G E N D A

# # #

OREGON CRIMINAL LAW REVISION COMMISSION
Sixth Meeting, November 21 and 22, 1968

Minutes

November 21, 1968

Members Present: Senator Anthony Yturri, Chairman
Representative Dale M. Harlan, Vice Chairman
Judge James M. Burns
Senator John D. Burns
Mr. Frank D. Knight
Senator Thomas R. Mahoney
Mr. Robert Y. Thornton

Absent: Mr. Robert Chandler
Mr. Donald E. Clark
Representative Edward W. Elder
Representative Carrol B. Howe
Representative James A. Redden
Mr. Bruce Spaulding

Staff: Mr. Donald L. Paillette, Project Director
Miss Jeannie Lavorato, Research Counsel

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

Also Present: Mr. Jacob B. Tanzer, Chairman, Bar Committee on Criminal Law and Procedure
Justice Gordon Sloan, Oregon Supreme Court
Mr. Jack E. Collier, Member, Bar Committee on Criminal Law and Procedure
Mrs. Lucy Schafer, Lebanon
Members of District Attorneys Association Criminal Law Revision Committee:
Mr. Donald R. Blensly, Yamhill County District Attorney
Mr. Lou L. Williams, Columbia County District Attorney

The meeting was called to order at 10:15 a.m. by the Chairman, Senator Anthony Yturri, in Room 309 Capitol Building, Salem.

Commission Ruling on Proxy Votes

Chairman Yturri indicated he had received a letter from Mr. Robert Chandler stating he would be unable to be present at today's meeting and conferring upon Senator John Burns the right to act as his proxy. Mr. Chandler, as a member of Subcommittee No. 1, had actively participated in the formulation of the drafts to be presented to the Commission today, the Chairman said, and had expressed confidence that Senator Burns would vote as he would vote if it were possible for him to be in

attendance. Chairman Yturri noted that the Commission did not have a rule on the acceptability of proxy votes and requested the Commission to take action on Mr. Chandler's request.

Judge Burns expressed the view that it would be unwise to lay down a general rule that proxy votes would be in order at all times but because Mr. Chandler had taken part in the subcommittee meetings and was familiar with Senator Burns' views on the material to be discussed today, he felt it would be appropriate to permit his proxy vote in this one instance without in any way creating a precedent for subsequent meetings.

Judge Burns moved that Senator Burns be permitted to exercise Mr. Chandler's proxy vote at the meeting of the Commission on November 21 and 22, 1968. Mr. Knight seconded and the motion carried unanimously.

Minutes of Meeting of July 19, 1968

Judge Burns moved that the minutes of the Commission meeting of July 19, 1968, be approved as submitted. Mr. Knight seconded the motion and it carried without opposition.

Drafting Technique for Inclusion of Penalty Provisions

Professor Platt posed a general drafting question concerning the insertion of penalty provisions in each section relating to a specific crime. He noted that the method which the Commission had used thus far was the technique employed in the New York and Michigan codes; namely, to describe each crime by degree with the thought that each degree would eventually be tied to the appropriate penalty. Another method was employed, he said, in the Model Penal Code and that was to describe within each crime the elements which made that crime a felony or misdemeanor. In order that all subcommittees use the same drafting policy, Professor Platt urged that the Commission decide which approach they wished to employ and if the New York approach were adopted, an additional subsection should be added to each degree of every crime so that robbery in the third degree, for example, would include a subsection which said "Robbery in the third degree is a Class ___ felony."

Mr. Paillette related that the very early drafts had included exactly that language but the practice had been eliminated as drafting progressed; it was contemplated, however, that such a subsection would eventually be added to each section as the crimes were classified. Professor Platt said he was not urging that these subsections be added immediately but he was advocating that the form of the draft be formalized so there would be no drafting diversities between the subcommittees which would necessitate redrafting at a later time.

Chairman Yturri asked Mr. Paillette to prepare a draft of the language to be used uniformly in penalty sections throughout the code, which draft would be acted upon at the next Commission meeting. In the meantime, he said, the drafters should proceed to prepare their drafts in the same manner as the tentative drafts thus far approved by the Commission; namely, along the lines of the New York and Michigan codes.

Mr. Paillette commented that in circulating tentative drafts, accompanying material had pointed out that the Commission was aware no penalty provisions had yet been designated and the crimes would be subsequently reviewed and graded in conformity with the classifications approved by the Commission.

Robbery; Preliminary Draft No. 3; August 1968

Chairman Yturri took this opportunity to thank Senator Burns as Chairman of Subcommittee No. 1 and the members of his committee, Robert Chandler, Edwar Elder and Bruce Spaulding, for the time and effort they had devoted to prepar the drafts to be considered by the Commission today. He commended them for th depth of their exploration of the problems involved and the close scrutiny giv to every detail.

At the Chairman's request Senator Burns reviewed the Commission's reasons for rereferring the robbery draft to Subcommittee No. 1 at its previous meetin [Note: See Minutes, Criminal Law Revision Commission, July 19, 1968, pp. 14-1 He explained that the basic change made by the subcommittee in Preliminary Draft No. 3 was to designate three degrees of robbery instead of two. Robbery in the second degree was designed to take care of the situation where the rob used a toy pistol to commit the robbery, as discussed at the previous meeting, while robbery in the third degree covered unarmed robbery and was the same as robbery in the second degree in Preliminary Draft No. 2. Robbery in the first degree, he said, had been narrowed to some extent but was basically the same as contained in the draft originally submitted to the Commission.

Judge Burns said he understood the draft to mean that second and third degree robberies were lesser included crimes and Chairman Yturri noted that the commentary on page 2 said:

> "A defendant who is tried under subsection (1) or (2) of section 3 could be found guilty of the lesser included crimes of second or third degree robbery, depending upon the nature of the evidence regarding the weapon and the use thereof by the defendant."

Section 1. Robbery in the third degree. Judge Burns asked if anyone was bothered by the fact that third degree was section 1 and first degree was section 3. Mr. Paillette explained that the draft was purposely prepared in that manner beginning with the basic definition of the crime in section 1. Ascending degrees of the basic crime were then described in subsequent sections and in this manner it was possible to relate back to a preceding section and make each succeeding section a higher degree of the crime by adding aggravating factors.

Chairman Harlan moved, seconded by Mr. Knight, that section 1 be approved. The motion carried unanimously.

Section 2. Robbery in the second degree. Senator Burns called attentio to the August 9, 1968, minutes of Subcommittee No. 1, pages 13 and 14, describing the committee's attempt to conform the draft to the suggestions made by the full Commission. Mr. Paillette explained the primary rationale o section 2 was the possibility of threat to the bodily security of the victim but the section recognized at the same time that the use of a toy weapon or the threatened use of a non-existent weapon, such as a finger in the pocket, increased the terror to the victim and facilitated the commission of the crime For that reason such an act was considered by the draft as more serious than third degree robbery. He called attention to the commentary on page 2 of the

draft which said that under section 2 the state would not be required to prove that the defendant was actually armed or that he used or attempted to use a weapon. Under Preliminary Draft No. 2, he said, the threatened use of a weapon would have been treated as unarmed robbery. Section 2 of this draft attempted to conform to the Commission's request that express provision be made for the situation where the threatened use of a weapon heightened the terror in the victim's mind but at the same time did not actually increase the danger to the victim.

Mr. Thornton referred to a robbery or an attempted robbery where the threat was by an act rather than by a verbal or written representation. He asked Mr. Paillette if he was satisfied that "or other representation" would cover an "act" and was told that this broad language had been employed to cover any sort of a gesture or an act that the robber might use. Mr. Thornton suggested "any act or" be inserted after "dangerous weapon by" in section 2.

Judge Burns inquired as to the difference between "threatens the immediate use of" in section 2 and "attempts to use" in section 3 (2). The unloaded gun situation, he said, was one which frequently occurred and normally the state was not able to prove that the gun was actually loaded. He asked how the court would construe "immediate use of a dangerous weapon," particularly if Mr. Thornton's suggestion were adopted and "any act or" were inserted in the section. If a gun were used in a robbery, he said, the jury was presently entitled to infer that the gun was loaded. Mr. Paillette commented that the language of the draft would not disturb that inference.

Senator Burns explained that section 3 (2) had formerly read 'uses or threatens to use" and the subcommittee had changed that language to "uses or attempts to use." He said section 2 was designed to cover the situation where a robber gave the clerk of a store a note saying, "I have a gun in my pocket and unless you give me the money, I will shoot you." In this situation, although he actually did not have a gun, he threatened the immediate use of a dangerous weapon and would be guilty of second degree robbery. If he did in fact have a loaded gun and was apprehended with it, the crime would rise to the dignity of first degree robbery. The subcommittee, he said, thought that "uses" contemplated a completed act. He explained that if the definition section ultimately provided that an unloaded gun was not a dangerous weapon but was a deadly weapon, a person who used or attempted to use that unloaded gun would be guilty of robbery in the first degree under the proposed draft. On the other hand, if the robber attempted to use a toy pistol, the crime would be robbery in the second degree.

Senator Mahoney contended the penalty for using an unloaded gun should not be as severe as for using a loaded gun. Senator Burns replied that the subcommittee was charged by the Commission to make exactly that distinction. The committee felt that the actual danger to the victim would be less under a circumstance which would fall under second degree robbery where the person threatened the use of a dangerous weapon than in the instance where the robber attempted to use or did in fact use a dangerous weapon as outlined in section 3. Senator Yturri commented that he could see no difference in the danger element between the use of toy gun and an unloaded gun; the actual danger to which the victim was exposed was not great but the fear instilled in him was exactly the same as though he were faced with a deadly weapon.

Mr. Tanzer expressed the view that the danger was increased by the use of an unloaded gun, partly because of the response of the victim, and he outlined instances where the robber who was pointing a gun had been shot by the victim. The reaction of a person to a man with a gun, he said, was the same whether it was loaded or unloaded.

Judge Burns said the fact that the gun used by the robber later turned out to be a toy pistol, as opposed to a real gun with no shells, seemed to him to be a flimsy distinction to make in terms of the fear created in the mind of the victim. Mr. Paillette advised that under existing law the district attorney could not get a conviction for armed robbery if the robber used an unloaded or toy pistol and Preliminary Draft No. 2 produced the same result. The draft under discussion contemplated a compromise and provided the crime would be second degree rather than third degree in the same situation, but it would not be as serious as using a deadly or dangerous weapon. Judge Burns pointed out that even though there was some evidence at the trial that the gun was unloaded, it was still possible to get a conviction for first degree robbery and Mr. Paillette agreed this was a possibility under section 3, subsection (1) or (2).

Judge Burns said he could foresee problems in court where the evidence was a gun and there was no affirmative evidence that it was loaded at the time of commission of the crime. The defense lawyer would argue that the most the judge could submit to the jury would be robbery in the second degree, and the district attorney would argue that it was an attempt to use a dangerous weapon and therefore the judge should submit both first and second degree charges to the jury. Senator Yturri replied that the judge could instruct the jury that if it was a real gun, whether or not it was loaded and whether or not he used or attempted to use it, the defendant could be found guilty of robbery in the first degree. If, on the other hand, the jury found it was a toy pistol, they could not find him guilty of first degree, unless the toy pistol fell into the category of a dangerous weapon by reason of the manner in which it was used, but they could find him guilty of robbery in the second or third degree. Mr. Paillette commented that the intent of the draft was to strengthen existing law and to inject another degree into the statute to reach the toy pistol situation which was more serious than unarmed robbery because it facilitated the commission of the crime and terrorized the victim to a greater extent.

Professor Platt asked if there was a reason for choosing "attempts" in section 3 rather than "threatens." Senator Burns explained that the subcommittee had moved "threatens" to section 2 because the Commission was of the opinion that "threatens" should be used where there was less danger to the victim. Professor Platt asked if the choice of the two words had been made bearing in mind that "attempt" was a word of art to be dealt with in the section on inchoate crimes. He advised that the emphasis in most modern codes was on the "substantial step" doctrine which meant the fact that the actor had a gun on his person when he was sitting outside in the car was considered to be an attempt to use a gun because the attempt section focused on the dangerousness of the actor, not on the fear of the victim. For this reason, he said, by using "attempt" in the draft, the proposed statute was moving farther away from the so-called "last proximate act" with respect to the use or threatened

use of the weapon. He said he would feel more comfortable if "threatens" were used in section 3 instead of "attempts" because "attempts" moved the line back to allow the law enforcement officers to intervene earlier than was intended in the draft.

Senator Burns replied that the committee was not unmindful of the inchoate crimes section when the robbery draft was being discussed. They were, however, unmindful of the substantial step doctrine and he said he was not sure that it would be consistent with present Oregon case law. Professor Platt remarked that the drafting he had done so far on the attempt section of inchoate crimes would move the line back to allow the law enforcement officer to intervene at a much earlier point than was possible under present Oregon law and would focus on the dangerous characteristics of the actor rather than what might actually happen at a later time.

Chairman Yturri pointed out that if "threatens" were used in section 3, the offense would be nearly identical to that described in section 2. He asked if it would be possible to use terminology to replace "attempts to use a dangerous weapon" which would make it clear that the section referred to the immediate use of the weapon in the presence of the victim and was not concerned with the preparation stage of the crime.

Mr. Paillette contended there was a distinction between an attempted crime as distinguished from preparation for that crime, and an attempt to use a weapon should constitute a crime. Professor Platt agreed and added that the manner in which "attempt" was employed in the robbery section was not the same as the way it was used in the inchoate crimes section and yet it was the same word. He was of the opinion that the use of the same word in both places would cause difficulty for the courts in construing the code. Justice Sloan suggested a statement in the commentary might serve to clear up the meaning of the word in both situations.

Justice Sloan said he did not see how "dangerous weapon" as used in section 2 could be construed as a toy pistol. Senator Burns suggested that section 3 be amended to refer to "an actual dangerous weapon."

Mr. Knight said that a defense attorney would argue to the court that the defendant was not threatening the use of a dangerous weapon when he used a toy pistol so the charge would have to be reduced to third degree. Senator Yturri said that argument would not be consistent because the robber wouldn't have to show any type of weapon at all to be guilty of second degree robbery so long as he threatened to use a dangerous weapon. The fact that he exposed a toy pistol, he said, should not be of a lesser degree than if he said he had a gun in his pocket when he did not. Mr. Knight said the Commission could agree that the concern was the manner in which the courts would construe the statute and if the robber was threatening with a toy pistol, he was not using a dangerous weapon. Mr. Paillette agreed that the criticism was well taken and the draft was attempting to get at the threatened use of the weapon and not the fact that a dangerous weapon was used.

Justice Sloan commented that the debate was centering around the kind of weapon the robber used and the thing the statute was attempting to proscribe

was the nature of the conduct.

Mr. Blensly noted that section 3 made a distinction between a deadly weapon and a dangerous weapon. He suggested section 2 be limited to the threatened use of a dangerous weapon and section 3 be confined to the use or attempted use of a deadly weapon.

Mr. Tanzer pointed out that 'representation' was a key word in section 2 and suggested that the section might be amended to read " . . . if he violates section 1 and he represents by word or act that he is in possession of a dangerous or deadly weapon." The important thing, he said, was that the robber communicated in some manner that he had a weapon. He also noted that both sections 2 and 3, through reference to section 1, required that the actor use or threaten physical force.

Mr. Thornton moved, seconded by Rep. Harlan, that section 2 be amended in the third line by inserting "any act or" after "by". Mr. Thornton suggested the section might accomplish the same purpose if a period were placed after "weapon" and the remainder of the section stricken. Mr. Knight recommended retention of the final clause in the sentence and the members agreed that it was more precise with the phrase than without it. Vote was then taken on Mr. Thornton's motion which carried unanimously.

Mr. Knight suggested that the Commission discuss section 3 and then send the robbery draft back to Subcommittee No. 1. Mr. Paillette indicated that sections 2 and 3 were interrelated and if the Commission was going to rerefer section 2 to the subcommittee, there was little to be gained by discussing section 3.

At this point the Commission recessed for lunch and the meeting was resumed at 1:45 p.m. with the following members of the Commission present: Chairman Yturri, Representative Harlan, Judge Burns, Senator Burns, Mr. Knight, Senator Mahoney and Mr. Thornton. Also present were: Mr. Paillette, Miss Lavorato, Mr. Tanzer, Mr. Collier, Mr. Blensly and Mr. Williams.

Chairman Yturri indicated that Senator Burns and Mr. Paillette had worked through the noon hour to redraft section 2, robbery in the second degree. Mr. Paillette commented that the criticism directed at section 2 of Preliminary Draft No. 3 was well taken, particularly with respect to Justice Sloan's comment that the subcommittee might have inadvertently written into section 2 the implication that the actor would have to threaten the use of an actual dangerous weapon. He read the section he and Senator Burns had drafted:

> "A person commits the crime of robbery in the second degree if he violates section 1 and represents [either] by [his] words or conduct that he is armed with what purports to be a dangerous or deadly weapon."

Mr. Paillette explained that "words or conduct" would encompass the note written by the actor saying that he had a gun and also the display of a gun on his person or the use of what appeared to be a gun. The proposed section, he said, was directed at the representation made by the robber and not at the type

of weapon with which he was armed. The use of "dangerous or deadly weapon" was also a change from P.D. #3, he noted.

Professor Platt suggested saying "what appears to the victim to be" rather than "what purports to be". Mr. Paillette replied that Professor Platt's proposed language would add the element of the subjective test. The representation and the acts of the robber rather than what the victim thought were the important points to be covered, he said.

Judge Burns suggested "his" be deleted from the proposed section and other members of the Commission expressed agreement.

Mr. Tanzer asked if it was advisable to insert language referring to an accomplice and Mr. Knight replied that if the actor said his accomplice was armed, the robber would also be armed constructively and the final result would depend on the ultimate definition of "armed." After further discussion, Mr. Tanzer commented that he believed the proposed section took care of the question of whether the actor was armed actually or constructively without further amendment. The Commission was in accord that "armed" as used in the proposed section 2 meant that the actor was armed either actually or constructively.

Judge Burns pointed out that the Michigan code employed "dangerous"instrument" rather than "dangerous weapon" and Mr. Paillette replied that it would make no difference which term the draft employed so long as it was appropriately defined. The Commission had previously decided, he said, to use "weapon" rather than "instrument."

Judge Burns commented that the proposed language took care of the troublesome areas the Commission had been discussing. In the toy pistol situation if the defense could convince the jury that the pistol did not purport to be a dangerous weapon, the defendant could either be found not guilty or convicted of robbery in the third degree; if the jury were not convinced, the defendant would be found guilty of second degree.

Representative Harlan moved, seconded by Judge Burns, that section 2 be adopted to read:

> "A person commits the crime of robbery in the second degree if he violates section 1 and represents by words or conduct that he is armed with what purports to be a dangerous or deadly weapon."
> [Note: See page 10 of these minutes for further amendment to section 2.]

Section 3. Robbery in the first degree. Judge Burns asked what kind of situation section 3 (3) was designed to cover when it used the phrase "attempts to cause serious physical injury." By way of background information, Mr. Paillette explained that the early draft of the proposed burglary sections included a subsection which would have aggravated the crime of burglary if the actor intentionally or recklessly "inflicts or attempts to inflict physical injury to any person." He called attention to page 9 of Subcommittee No. 1 Minutes of May 27, 1968, outlining the committee's discussion concerning the use of "inflicts" as opposed to "causes." The committee had decided to use

"causes" because "inflicts" seemed inconsistent with "recklessly" and they had also retained "attempts" in the burglary statute. When the robbery statute was drafted, the committee, in order to maintain consistency of language with the burglary draft, had retained "causes or attempts to cause" with the thought that the phrase would cover that kind of situation where through no fault of the defendant, he did not succeed in completing the act he had begun. The committee felt he should nonetheless suffer the consequences of the attempted offense.

With respect to section 3 (4) Representative Harlan said the meaning of "actually present" had been discussed at the Commission's previous meeting but no definite conclusion had been reached. Senator Burns called attention to pages 15 and 16 of the Commission Minutes of July 19, 1968, which reflected the discussion with respect to this question. Mr. Paillette explained that the rationale behind subsection (4) was that if an accomplice were there to enforce the robber, the situation was potentially as dangerous as if the robber were armed. Chairman Yturri asked if section 3 (4) was intended to include a "look-out" and Mr. Paillette replied that the feeling of the sub-committee was that the subsection would apply to someone within such proximity of the victim that he would be in a position to aid the accomplice in exerting force upon the victim. Chairman Yturri said that such a definition could include a "look-out" in some cases and Mr. Paillette agreed.

Judge Burns remarked that the draft was really aimed at the added fear engendered in the mind of the victim plus the added likelihood of violence by virtue of the presence of more than one robber. He suggested that the commentary include an explanation of the term "actually present" phrased in terms of proximity to the victim as stated by Mr. Paillette in the preceding paragraph.

Mr. Blensly asked if the draft should contain the phrase "then and there" to distinguish between an accomplice present at the time of the robbery as opposed to one who "cased" the premises at an earlier time. Mr. Collier suggested: "Is acting in concert with another person and both persons are within the conscious presence of the victim." Chairman Yturri proposed to add: "Is acting in concert with another person then and there present . . . " to Mr. Collier's suggested language.

Mr. Tanzer pointed out that the Commission was thinking in terms of charging the man inside the store with the crime. If the situation were approached from the standpoint of charging the man at the wheel of the get-away car, that person would be "aided by another person actually present" and could be guilty of first degree robbery while the man inside the store might be charged with third degree robbery because he was unarmed. Judge Burns pointed out that the man in the car could not be guilty of first degree robbery because he was not violating section 1 by using or threatening the immediate use of physical force upon another.

Chairman Yturri proposed to substitute the following language for that contained in subsection (4):

"(4) Is acting in concert with one or more other persons located within such proximity of the theft as to be able to aid

or assist in the commission of the theft."

He explained that the Commission was not particularly concerned with the added fear instilled in the victim and the suggested language would include an accomplice who was either outside or inside the store which was being robbed.

Professor Platt questioned whether a "look-out" man really increased the danger to the victim. He was of the opinion it might actually lessen the danger because the robber would have someone there to issue an alarm if a policeman were to appear on the scene. Chairman Yturri then revised his suggested language:

"(4) Is acting in concert with one or more other persons located within such proximity of the theft as to be able to assist in causing injury to the victim of the theft or others nearby."

Mr. Paillette commented that an attempt to define "actually present" only created more problems because it then became necessary to define other terms, and in Chairman Yturri's proposal "nearby" would need to be defined. He was of the opinion that Michigan had employed "actually present" in its code to distinguish between the look-out situation and the person in close proximity. Judge Burns contended that the type of language Chairman Yturri had proposed should be contained in the commentary rather than the statute.

Mr. Tanzer asked whether an accomplice increased the danger to the victim to such a degree that it should raise the punishment for the crime to a life sentence as opposed to the penalty for second degree robbery. Mr. Paillette informed the Commission that in New York prior to 1965 robbery with an accomplice was a first degree offense but in their revised code it had been dropped to second degree. Judge Burns commented that the crime of robbery with an accomplice was also second degree in Michigan and in that code it was the only manner of committing second degree robbery. Mr. Paillette indicated that in the Oregon draft it had been placed in first degree in an attempt to hold down the number of degrees to be included in the code and when the offense of being aided by another person actually present was originally placed in first degree robbery, the draft did not contain a second degree section. Mr. Knight suggested that section 3 (4) might more appropriately be contained in section 2 and Senator Burns expressed agreement.

Judge Burns then moved that section 2 be amended to read:

"A person commits the crime of robbery in the second degree if he violates section 1 and:

"(1) Represents by words or conduct that he is armed with what purports to be a dangerous or deadly weapon; or

"(2) Is aided by another person actually present."

Also included in Judge Burns' motion was the instruction that the commentary to section 2 be revised to include a statement to the effect that the phrase "actually present" was intended to apply to a person within such proximity of the victim that he would be in a position to aid the person committing the robbery in exerting force upon the victim. Senator Burns seconded the

motion and it carried unanimously.

Mr. Knight then moved that section 3 be approved with the deletion of subsection (4). Mr. Thornton seconded and this motion also carried without opposition.

Arson and Related Offenses; Preliminary Draft No. 4; November 1968

Section 1. Arson and related offenses; definitions. Senator Burns indicated that arson was the most difficult subject Subcommittee No. 1 had undertaken. They spent a great deal of time in attempting to classify the property to be protected by the arson statutes and had finally adopted a definition of the term "protected property." He called attention to the commentary concerning this term on page 1 of the draft.

Mr. Paillette explained that throughout the arson sections the committee's intention was to build upon the two-pronged basic rationale behind the crime of arson; (1) the protection of public life and safety and (2) the protection of particularly cherished property. The inclusion of forest land in the definition of "protected property," he said, was a departure from existing law in that the intentional setting of a forest fire under this draft would be arson in the first degree and would upgrade that crime considerably from existing law so far as penalties were concerned. The subcommittee's thought was that in the state of Oregon a forest fire intentionally set could cause serious economic injury to the state coupled with the added risk of danger to human life. The definition of "protected property," he said, was quite similar to the definition of "building" in the Burglary Article and also similar to the definitions of "building" in the Connecticut and New York codes, set out on page 2 of the draft. All the definitions were aimed at the protection of structures and buildings where people were actually present.

Mr. Knight asked if "customarily occupied by people" was intended to mean a building where people lived or slept. A store, he said, was customarily occupied by people in the daytime but not in the nighttime. Mr. Paillette replied that this was the area the subcommittee had spent the most time on and the problem had been approached from a number of different directions. They had finally decided upon the language in the draft which did not limit the protected property to a dwelling house type of property and purposely avoided reference to buildings where people slept overnight because it was the concensus of the committee that there were structures occupied at night where people did not sleep and the burning of such a structure should be looked upon as serious since people were likely to be in it most of the time.

Tape 2 begins here:

Senator Burns called attention to the minutes of Subcommittee No. 1, September 22, 1968, pages 2 through 5, where this subject was discussed and also pointed out the discussion of the subcommittee in the minutes of August 9, 1968, pages 11 and 12.

Senator Burns suggested the discussion of the Commission begin with section 5 and work backward through the draft, and the members concurred.

Section 5. Arson in the first degree. Judge Burns said that under the definition of "protected property" the burning of a car, a telephone booth, a hamburger stand or an automatic laundry would be first degree arson and, as a matter of policy, he did not agree with that concept. The burning of a telephone booth, he said, was not as serious as the burning of someone's home, and the person who burned a telephone booth should not be treated as a first degree arsonist. Mr. Tanzer said he applauded the subcommittee's decision to get away from the dwelling house concept but agreed with Judge Burns that the "customarily occupied" phrase was overly broad.

Mr. Thornton concurred in Judge Burns' comment that the burning of a telephone booth or a hamburger stand should not be first degree arson and expressed approval of the New York arson statute. Mr. Knight noted that to be guilty of first degree arson under the New York statute, someone would have to be in the building at the time the fire was started.

A brief recess was taken at this point and upon resuming the meeting Mr. Paillette advised, in response to a question by Judge Burns, that Professor Kadish was scheduled to arrive in Salem on the following day about 11:00 a.m. and it was planned to devote the rest of the day to his discussion. It was obvious at this point in the meeting that the agenda for November 21 would not be completed by the end of the day and the members agreed to meet the following morning at 9:45 a.m. to continue their work session pending Professor Kadish's arrival.

The committee then resumed their discussion of the arson draft and Chairman Yturri suggested that the definition of "protected property" be revised to state that the term would mean "any structure, place or thing where the defendant knows or under the circumstances should have known that the presence of a person therein is a possibility" and also retain therein the definition of "public buildings" and "forest land" as stated in section 1 (1). Mr. Knight said he understood it was the subcommittee's intent to place the burden on the defendant to make certain that no person was in the building he burned rather than placing the burden on the state to prove that the defendant had endangered human life when he burned the building.

Mr. Paillette explained that the rationale of the subcommittee was that it made no difference whether anyone was in the building if that structure was of the type customarily occupied by people so that it would not be mere chance that would determine whether the defendant would be charged with first degree arson. This, he said, was also the rationale of the Model Penal Code. If by a stroke of luck no one was in the building at the time he burned it, he would not be treated differently than someone who burned a building where he knew there was someone present at the time of the burning. Mr. Paillette was of the opinion that the New York approach to first degree arson placed an incredible burden on the state to prove that the defendant knew or should have known the building would be occupied.

In response to Judge Burns' earlier criticism, Senator Burns said he was not as concerned about the burning of a hamburger stand as he was about the danger of someone being in that structure who might be burned as a result

of the fire. If the hamburger stand were a structure that could reasonably be said to be customarily occupied, he said, there was an argument in favor of placing it within the class of protected property. He added that he would not consider a telephone booth to fall within the definition of the type of structure that would be customarily occupied by people.

Judge Burns called attention to the affirmative defense in New York, section 150.10 (2), and while he was not generally in favor of affirmative defenses in the criminal code, he said, it might help to solve the Commission's problem if the draft were to provide that it was an affirmative defense if the defendant could show that the building or structure he burned was of a type that at the time or place in question was not likely to be occupied. A provision to that effect, he said, would take care of a hamburger stand after it was closed for the day or a camper parked in someone's backyard rather than in a park where it was likely to be in use.

Mr. Paillette pointed out that under the proposed section 5 (2) it would be first degree arson if any kind of property were burned which placed another in danger so that in the camper situation if a person were endangered by the burning, the crime would be first degree arson. If a restaurant customarily hired a janitor to clean the building in the nighttime, that too would be covered even though the building was not customarily used as his dwelling. The subcommittee's definition was designed, he said, to get at the situation where through sheer luck no one was present at the time of the fire, but if the property was of the class defined, the crime would nonetheless be first degree arson and it would not be a bonus to the defendant if he were lucky enough to burn it at a time when there was no one on the premises.

Senator Burns said the Commission should make the basic policy decision of whether they wished first degree arson to go so far as to protect all types of structures in which people were customarily found. This, he said, could conceivably include a hamburger stand; it would probably not include a telephone booth nor a hamburger stand at 3:00 a.m. when it customarily closed at 10:00 p.m.

Chairman Yturri asked if it would solve the problem to say "customarily occupied by people at the time of the fire or explosion." Mr. Knight asked if that language would cover the janitor who arrived at 6:00 p.m. when the office personnel customarily left the building at 5:00 p.m. Chairman Yturri replied that the building would be considered to be customarily occupied if the janitor were in the building and the burden should be on the arsonist to make sure the building was not ordinarily occupied at the time he set the fire. Senator Burns commented that the judge trying a case under that language would have the discretion of submitting a first degree charge to the jury if he felt under the facts and circumstances that the structure was of the type customarily occupied by people.

Professor Platt pointed out that when the Commission was discussing an arsonist, they were talking about a particular kind of criminal, a pyromaniac, which raised some interesting problems with respect to the care the Commission was taking in diluting the mens rea elements of the crime. The pyromaniac, he said, was not concerned with who was in the building at the time he set the fire; his purposes were completely unrelated to the Commission's concern that

the arsonist make sure the building was unoccupied before setting the fire. This discussion became especially appropriate at this time, he said, because the subcommittee studying the Responsibility Article would soon recommend to the Commission the doctrine of partial responsibility which said that short of insanity, a defendant may prove that, because of mental disease or defect, he could not form the intent element necessary for his conviction. For this reason, Professor Platt said, in an entirely different context the Commission was perhaps unduly concerned with being too strict if a broad definition of the element of the crime of arson were drawn. He expressed approval of the draft as submitted by the subcommittee.

Judge Burns said he was prepared to withdraw his objections to section 5 (1) and to approve the definition provided the commentary made it clear that protected property did or did not include, according to the determination of the Commission, a business structure at 3:00 a.m. which customarily closed at 10:00 p.m. Under the proposed statute as presently drawn, he said, "customarily occupied by people" would mean the structure was "protected property" 24 hours a day. Senator Yturri expressed the view that it would be preferable to clarify the definition in the statute rather than in the commentary.

Mr. Tanzer inquired if the state would have to prove there was normally a janitor in the building at 3:00 a.m. under the draft and Senator Burns replied that such was not the intent of the subcommittee. Mr. Tanzer indicated he was impressed by Professor Platt's statement concerning the pyromaniac and perhaps the definition should be overly broad so that the statute would encompass a great deal and the judge would then have discretion as to whether the act caused a very dangerous situation or one that was not so dangerous.

Mr. Collier asked if section 5 (2) created a potential situation where the setting of any fire, anywhere, at any time, could conceivably be raised to the status of first degree arson and Mr. Paillette replied affirmatively and added that was the specific intent of the subcommittee consistent with the rationale of the entire arson statute -- to protect people regardless of where or when the fire was set.

Chairman Yturri commented that the meaning of "customarily occupied by people" was causing the Commission a great deal of concern. If the definition were not amended, he said, the phrase would encompass a very broad area and he expressed agreement with Judge Burns' interpretation of the phrase which was that if a place was customarily occupied five hours a day, it would be occupied by people for the purposes of the draft around the clock. If the Commission wanted to accommodate the view expressed by Judge Burns earlier that someone burning a hamburger stand when no one was present should be treated differently than someone burning that stand when he knew someone was there, even though that situation could be taken care of by the sentencing powers of the court, Chairman Yturri said he would personally feel it would be an improvement if a provision with respect to time were added; namely, if the property were customarily occupied by people "at the time of the fire or explosion."

Judge Burns asked what Chairman Yturri would do to subsection (2) if his

proposal were adopted and was told by the Chairman that no revision would be necessary because "protected property" would be defined in section 1.

Judge Burns observed that with Chairman Yturri's suggested amendment, a hamburger stand at 3:00 a.m. would not be "protected property" if a janitor was not customarily there at that time, and the Chairman concurred. Mr. Tanzer asked if the premises would be "customarily occupied" if a janitor were regularly employed one specific night each week and the Chairman replied that the court would submit that question to the jury.

Mr. Tanzer expressed concern over Chairman Yturri's proposed amendment because the district attorney would have to prove the time of the fire which could be difficult in some cases. He asked if it would be arson to burn a beach cabin in the middle of the week which was customarily occupied only on the week end. The Chairman replied that he thought such an act should be arson whether or not the cabin was occupied and he thought it would be arson under the proposed definition. Judge Burns said he would agree that such an act should be first degree arson but did not agree that such a cabin would be "protected property" if the Chairman's amendment were adopted.

Mr. Paillette expressed the view that the rationale of the Model Penal Code was sound and that rationale was to avoid making a capricious circumstance an element of the crime that would upgrade it to first degree. If the definition were pinned down to a particular time, a chance element would be injected into the statute. He indicated that the chief concern should be that the building or structure was of the class which was customarily occupied rather than to be concerned with the specific building.

Mr. Thornton reiterated his dissatisfaction with the entire arson draft and contended that the New York arson statute would be more acceptable providing the definition section were altered to some degree. He also expressed dislike of the term "protected property" and objected to its use particularly because it had no prior judicial construction or interpretation.

Chairman Yturri asked Mr. Paillette what he found wrong with the New York statute. Mr. Paillette replied that the New York first degree arson statute said the actor had to damage a building; that there had to be a person in the building at the time of the fire; and that the defendant knew of his presence or the circumstances were such as to render the presence of a person therein a reasonable possibility. The subcommittee, he said, felt this placed quite a burden on the state to prove not only that there was a person in the building at the time but, further, to prove that the defendant knew or should have known about it. The members also objected to making the crime first degree arson for the reason that there happened by mere chance to be somebody in the building at the time. In answer to a question by the Chairman, Mr. Paillette said the primary purpose of the subcommittee was not to ease the burden on the prosecution but to protect people, and they felt it would be more protection to human safety to define the class of property which fell within the definition of protected property even though there might not actually be anyone in the building at the time of the crime.

The Commission recessed at 4:40 p.m.

November 22, 1968

Members Present: Senator Anthony Yturri, Chairman
Representative Dale M. Harlan, Vice Chairman
Judge James M. Burns
Mr. Frank D. Knight
Senator Thomas R. Mahoney
Mr. Robert Y. Thornton

Absent: Senator John D. Burns
Mr. Robert Chandler
Mr. Donald E. Clark
Representative Edward W. Elder
Representative Carrol B. Howe
Representative James A. Redden
Mr. Bruce Spaulding

Staff: Mr. Donald L. Paillette, Project Director
Miss Jeannie Lavorato, Research Counsel

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

Also Present: Mr. Jacob B. Tanzer, Chairman, Bar Committee on Criminal Law and Procedure
Justice Gordon Sloan, Oregon Supreme Court
Mr. Donald R. Blensly, Yamhill County District Attorney
Mr. Lou L. Williams, Columbia County District Attorney
Professor Donald Brody, University of Oregon School of Law

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

Arson and Reckless Burning; Preliminary Draft No. 4; November 1968

Section 5. Arson in the first degree. The Chairman advised that Judge Burns had prepared a proposal to submit to the Commission this morning designed to solve some of the problems which had been discussed on the previous day.

Judge Burns explained that the phrase "customarily occupied by people" in the definition of "protected property" was of crucial importance at both the nonsuit stage and at the instruction stage of a trial. The Commission would presumably decide either that it was a phrase on which the court should instruct or that it needed no further definition and could be defined by jurors acting as people with commonsense. In any event, the fact finder would have to decide whether "customarily occupied by people" was or was not applicable so as to enhance the crime to first degree arson. He said it appeared to him that the best way to approach the problem was to add to the commentary and also make some revision in the statute itself. He suggested the commentary read:

"The aim of the Commission is to protect human safety; thus we enhance burning of buildings customarily occupied by people to first degree arson because of the risk to human life or safety. Further we recognize the severe danger from fires occurring during riots or civil disturbances and we recognize that the complexity of urban society makes it necessary to use phraseology such as we have used. We further recognize, however, that some buildings and things are customarily occupied by people at some times and places and not at others. For example, a laundromat or a hamburger stand would not normally be customarily occupied by people after regular business hours. A camper in the woods would customarily be occupied but would not be customarily occupied while parked in the owner's backyard. As a consequence and to solve this problem of the phrase "customarily occupied by people", the Commission feels it appropriate to provide a reduction of the degree of the crime only where the defendant is able to prove that under the circumstances of the time and place the building was not then and there customarily occupied by people and further the circumstances at the time and place were such as to render the fact of nonoccupancy reasonably probable.

"The Commission does not regard a telephone booth as a building or structure customarily occupied by people."

Judge Burns then proposed to add to section 5 this wording:

"If the defendant proves by a preponderance of the evidence that the building, structure or thing was, by reason of circumstances of time and place when [and where] the fire or explosion occurred, not then and there customarily occupied by people, and that the circumstances were such as to make such fact of nonoccupancy reasonably probable, the crime shall be reduced to arson in the second degree."

Judge Burns said the proposed language in effect related to both first and second degree arson, but it would take care of the problem which disturbed him on the previous day; namely, that the burning of a laundromat or a hamburger stand at night would be first degree arson. He commented that not all arsonists were psychotics and if the defendant wanted to reduce his culpability, he could present evidence that the building he burned was not customarily occupied by people at the time he burned it in order to reduce the charge to second degree under the proposed language.

Professor Platt objected to the preponderance of evidence burden placed on the defendant by Judge Burns' proposed addition to section 5. He was of the opinion it posed a serious constitutional question because it approached the point of making the defendant prove his innocence. Even if it were not a due process violation, he thought it was not the proper course for a new code to take. The Commission should avoid, he said, placing the burden of proof on the defendant; the state was much better able to bear that kind of burden.

Judge Burns said that as a general policy he agreed with Professor Platt and

he agreed that the proposal was poor policy essentially, but in this particular case everything the Commission had said assumed that the defendant was guilty of at least second degree arson. The only question was whether to make all the acts listed in section 5 first degree where the building was one of a particular class. Using the burning of a laundromat as an example, the defendant would in any event be guilty of second degree arson. The proposed language would say in effect that generally the Commission wanted to deter those who were inclined to burn buildings customarily occupied by people by making that the most severe degree of arson, but they wanted to provide a partial escape hatch to reduce the degree in cases where the actual fire did not reasonably jeopardize human safety.

Senator Mahoney commented that he agreed with both speakers but in the crime of arson the results were so horrendous that if the defendant was guilty, he saw no objection to requiring him to carry the burden of the preponderance of proof as to the degree of the crime.

Chairman Yturri suggested that instead of revising section 5, the following might be added to the commentary to satisfy Professor Platt's objections:

> "The Commission feels that if the state fails to prove beyond a reasonable doubt that the building, structure or thing was, by reason of circumstances in time and place when the fire or explosion occurred, then and there customarily occupied by people, or that the circumstances were such as to make such fact of occupancy reasonably probable, the crime shall be reduced to second degree."

Professor Platt indicated he was not objecting to the treatment of the subject suggested by Judge Burns but was raising the preponderance issue.

Mr. Knight said that when a building was burned which might have people in it, the Commission should make certain that the burden was on the defendant to see that there were no people in that building before he burned it. Chairman Yturri indicated his proposal would do exactly that.

Mr. Paillette commented that if a defendant were charged with first degree arson for burning protected property, the very fact that it was protected property was a material element of the crime and that fact would have to be proved by the state beyond a reasonable doubt. If the state failed to prove that fact but proved the other elements of the crime, it would be a lesser included offense and would drop to second degree arson. Judge Burns said that under those circumstances the judge would probably submit the question to the jury but he doubted that the judge would direct a verdict for first degree arson. Mr. Paillette indicated he would be inclined to agree with Professor Platt that the language proposed by Judge Burns to be added to section 5 would present a constitutional due process question.

Professor Platt said the Commission could say, "It is an affirmative defense that the building, structure or thing was not then and there customarily occupied." This language would leave the burden with the state beyond a reasonable doubt but would make the defendant introduce "some evidence" and the matter would then be left to the court to decide whether or not that evidence was sufficient for a conviction.

Miss Lavorato suggested the Commission follow the approach of the Michigan proposed statute which avoided stating the provision as an affirmative defense by saying:

> "A person does not commit the crime of arson in the first degree if:
>
> "(a) The building or thing was by reason of the circumstances of time and place [when and where the fire or explosion occurred] not then and there customarily occupied by people; and
>
> "(b) That the circumstances were not such as to make such fact of nonoccupancy reasonably probable.
>
> "The burden of injecting the issue is on the defendant but this does not shift the burden of proof."

Professor Platt said this proposal followed his suggestion but was achieved by different language. He suggested, however, that the last sentence of the proposal be revised to include an affirmative defense. Judge Burns commented that when New York and Michigan employed an affirmative defense, it was a complete defense to that particular crime whereas all the Commission was attempting to do was to shift the crime downward one degree. Chairman Yturri proposed to say that the act was an affirmative defense to the charge of arson in the first degree.

After further discussion, Professor Platt said he would like to amend his previous statement and oppose the insertion of the language suggested by Miss Lavorato. The affirmative defense, meaning that some evidence must be introduced by the defendant but the burden would be on the state to prove the charge beyond a reasonable doubt, should be used but it was only justified in the unique situation where some information was within the knowledge of the defendant only. There could be some very peculiar situations where only the defendant could know about the evidence and therefore should produce that evidence; the state should not be forced to do that.

Mr. Knight pointed out that the Commission was getting away from the rationale the subcommittee began with which was to place the burden on the defendant to make sure that no one was in the building before the fire was started. Judge Burns suggested that if that approach was to be maintained, section 1 could be amended to say that "'customarily occupied by people' means a building, structure or thing which at the time and place when the fire or explosion occurred, was then and there customarily occupied or that the circumstances were such as to make the fact of occupancy reasonably probable." The definition would then be stated affirmatively and the burden of proof would be on the state and would include the definition to be used by the court when ruling on motions for nonsuit and when instructing the jury.

At this point Mr. Paillette announced that he had just talked by phone to Professor Kadish who had called from the airport in Oakland. The plane he was to board was delayed in its flight from Los Angeles by fog and had just arrived in Oakland where it had a flat tire. Since no crews would be available to replace the wheel until afternoon, Professor Kadish had canceled his trip and would try to

make arrangements to appear before the Commission at another time. Mr. Paillette indicated he had communicated this information to Senator Burns who was in Portland awaiting Professor Kadish's arrival and Senator Burns was leaving immediately for Salem in order to be in attendance at this afternoon's Commission session.

Chairman Yturri then suggested that the Commission place in the commentary all the matters they had been discussing rather than attempting to amend the statute. He proposed to remove the reference to preponderance of evidence and to insert in the commentary the language suggested by Judge Burns plus language of the nature Miss Lavorato proposed. If question then arose as to the meaning of "customarily occupied by people," the fact finder could turn to the commentary to determine the intent and purpose of the statute. The court could instruct the jury in accordance with that stated purpose and intent, and the jury would make the decision. He pointed out that the jury decided other issues between the state and the defense and this question would then become one more determination for them to make.

Mr. Knight asked how much weight the commentary would actually carry. Chairman Yturri suggested, and Justice Sloan concurred, that the statute include a statement that the Commission expected the courts to use the commentary. Professor Platt said he had recently read an article citing an Illinois Supreme Court decision which held for the first time that the comments to the Illinois Penal Code were acceptable and would be used in the Supreme Court of Illinois. Chairman Yturri noted that Oregon had similar precedent in a case handed down within the last year in which the court had explored the legislative committee minutes to ascertain the intent of the law. Judge Burns made a further suggestion with respect to the matter to be included in the commentary and after further discussion a recess was taken for the purpose of allowing Judge Burns to prepare in written form the language he had suggested.

When the Commission reassembled following the recess, Mr. Paillette read the following suggested commentary which Judge Burns had prepared:

> "The aim of the Commission is to protect human life and safety, by enhancing the degree of arson to first degree when the thing involved is a building, structure or thing which is typically occupied by people. The risk to human life or safety is especially great where such items are set afire. Further, the Commission recognizes the danger from fires which occur during riots or civil disturbances, and which occur in many types of structures, buildings or things which vary greatly due to the complexity of our urban society. Some buildings, structures or things are customarily occupied by people at some times and places, and not at others; e.g., a laundromat or hamburger stand are not normally occupied by people after business hours; likewise, a camper in the woods would normally be occupied, while it would not, while parked in the owner's backyard. We expect, [illegible] guidelines in defining the phrase 'customarily occupied by people.'
>
> "In instructing jurors, or in ruling on motions for judgment of acquittal, etc., therefore, we expect the following meanings to be used:

"A building, structure or thing is customarily occupied by people, for purposes of the arson section, if:

"(a) By reason of circumstances of time and place when the fire or explosion occurs, people are normally in the building, structure or thing; or,

"(b) Circumstances are such as to make the fact of occupancy by persons reasonably probable [possible].

"Therefore, it will normally be a jury question whether the state has proved that the building, structure or thing is 'customarily occupied;' the jury will be appropriately instructed that if they find it is, the crime would be first degree; if not, it would be second degree."

Judge Burns indicated that Mr. Paillette had pointed out that the proposed commentary should explain more explicitly that the statute related to a class of buildings, structures or things and not merely to one or two specific items. He said there might also be circumstances other than motions for acquittal where question would arise as to the meaning of the term and suggested that the commentary should not be so severely limited in that respect but should be revised to say that wherever the question arose, the meaning would be as outlined in the commentary and once the definition of "customarily occupied by people" was used, the jury would interpret it.

Justice Sloan suggested that using a laundromat as an example might also limit the commentary and Judge Burns agreed that the commentary should not be so specific as to say a laundromat or a hamburger stand. It might be better, he said, to say "some types of things such as boats, campers, etc."

Judge Burns then moved that the proposed commentary be amended along the lines indicated by the discussion bearing in mind that some further work on grammar would be necessary by the reporter and that it be added to the commentary for either section 1 or section 5 of the arson draft. Representative Harlan seconded the motion.

Mr. Paillette asserted that as a general policy matter the Commission should bear in mind that the weight the commentary might ultimately be given by the courts should not be overemphasized even though it was an important part of legislative history. New York, he said, had an annotated code including their commentary as did Illinois, but Oregon's commentary would not be included with the statute in all probability. ORS was not an annotated code and when the Commission faced a troublesome problem, he urged that if at all possible the solution be codified. Judge Burns said he assumed that ultimately the criminal code would be printed in a booklet similar to Michigan's proposed final draft with the commentary easily available.

Chairman Yturri indicated that the final commentary would appear in some form and while it would not go into ORS, it would be readily available in printed form. Professor Platt said the legislature could require Legislative Counsel to include the commentary to each section in the annotations to ORS and Chairman Yturri agreed.

Since a quorum was not present to vote on Judge Burns' motion, the Commission recessed for lunch at 12:00 noon.

Tape 3 begins here:

The meeting was resumed at 1:45 p.m. with the following members present: Chairman Yturri, Representative Harlan, Senator Burns, Judge Burns, Mr. Knight, Senator Mahoney. Also present were: Justice Arno Denecke, Mr. Blensly, Mr. Tanzer, Miss Lavorato, Mr. Paillette, Professor Brady, Professor Platt and Mr. Williams.

Judge Burns explained to Senator Burns, who had not been present at the morning session, that the motion pending before the Commission was to amend his suggested commentary which was designed to provide a reasonably definite guideline or explanation for juries, judges and lawyers as to the meaning of "customarily occupied by people" and left the decision to the trier of the fact in any given case. The commentary would not impose a burden on the defendant and would not clutter up the section with an affirmative defense, he said.

Senator Burns said he found nothing objectionable with following this course and would vote for the motion, but he said he had grave reservations about placing this type of information in the commentary. The Commission should try, he said, to say clearly in the statute exactly what was meant and intended but in this one particularly difficult situation he agreed that the proposed statement in the commentary might be a satisfactory solution. Chairman Yturri agreed and said the Commission had made every effort to place the definition in the statute itself but had finally concluded the same result would be achieved by approaching the problem in this manner and placing intent and purpose of the statute in the commentary.

Mr. Knight said he would prefer to use "possible" rather than "probable" in paragraph (b) of the proposed commentary because "possible" implied the subcommittee's objective of placing the burden on the defendant to make certain there was no one in the building at the time he set the fire.

Judge Burns then added to his previous motion and moved to approve section 5 with the addition of the amended commentary plus an amendment in paragraph (b) of the commentary to state " . . . the fact of occupancy by persons a reasonable possibility." This commentary, he said, might ultimately be included in section 1 rather than section 5. Representative Harlan seconded the motion.

Senator Mahoney indicated he would prefer to say "a reasonable probability" and Mr. Thornton was in favor of adopting the New York arson statute rather than adopting the commentary.

Vote was then taken on the motion which carried. Voting for the motion: Judge Burns, Senator Burns, Mr. Chandler, Representative Harlan, Mr. Knight, Chairman Yturri. Voting no: Senator Mahoney, Mr. Thornton.

Section 4. Arson in the second degree. Senator Burns explained that section 4 was designed to reach such structures as a barn, a woodshed or other nonoccupied building. He called attention to the fact that section 4 was similar to the existing second degree arson statute, ORS 164.030. Second degree arson, he said, would be limited to any building which did not qualify under first degree arson with the element of intentional burning of that structure.

Judge Burns asked if coverage was provided for intentional burning of a structure or thing and Mr. Paillette replied that a thing as such was not covered. The subcommittee felt, he explained, that damage of cars, campers and boats, even though it might be committed by use of fire, would be adequately covered under Criminal Mischief and it was not necessary to make such an act "arson."

Judge Burns inquired if a problem would be caused by employing the term "building" in second degree arson when "structure, place or thing" was used in the definition section. Mr. Paillette replied that the rationale was that it should not be arson to burn a "thing" unless some other consideration was involved such as danger to human life or protected property.

Mr. Knight commented that arson in the second degree would undoubtedly be classified as a felony so burning a shed would be a felony whereas burning a car would fall under Criminal Mischief and he asked whether Criminal Mischief would be classified as a misdemeanor. Mr. Paillette replied that this decision had not yet been made and it might well be that the highest form of Criminal Mischief would ultimately fall into a felony category.

At this point a delegation from the Oregon State Investigators'Association visited the Commission meeting and was welcomed by the Chairman.

Senator Burns said that if the intentional burning of a car did not rise to the dignity of first degree arson because of the definition section, it would fall under the Criminal Mischief statute but if the state were unable to prove the car was intentionally burned, the state would then be entitled to seek a lesser included instruction for reckless burning under section 3 of the arson draft. The subcommittee, he said, had held a long discussion about whether this situation involved a Pirkey problem as far as making the Criminal Mischief statute applicable to fire cases and had ultimately concluded that no such problem existed. He asked Mr. Paillette if he would agree that reckless burning of personal property would fall within the arson section and was told it would fall within reckless burning under the definition because "property of another" would include "personal property."

Mr. Paillette, speaking in opposition to section 4, indicated that under earlier drafts of the arson statute burning of a building where there was no other consideration involved would not have been arson. He thought there was merit in the rationale that the offense was not arson simply because a building was burned because it caused weird situations where a chickenhouse, for example, was burned and the mere fact that it happened to be a "building" made the burning the crime of arson under section 4. In reply to a question by Senator Mahoney, he said that damage by fire would include scorching.

Chairman Yturri asked if it was worse to burn down an old abandoned barn than to burn a 1968 car and Mr. Paillette replied that a person committed arson under section 4 because he burned a building. In all other draft sections the punishment was tied in with endangering the life of another or with protected property whereas in section 4 the crime was being called "arson" because fire or explosion was used to commit the crime and secondly because a building was involved. He said the direction of the Model Penal Code and many of the new

codes was to get away from the artificial characterization that burning a building was arson simply because the damage was perpetrated by means of fire. He objected to calling the burning of a building "arson," whether it was second degree or not, because the person was being labeled as an arsonist even though the crime was not of a serious nature. There were other provisions in the code which would more logically cover this type of crime, he said.

Originally, arson in the second degree was tied in with endangering protected property whereas first degree was tied in with actual damage to property or actual injury. Adoption of section 4, he indicated, contained a fundamental policy question to be decided by the Commission.

Senator Burns said he did not see how the lesser included situation could be taken care of unless there was a category of second degree arson. Mr. Paillette said he would agree a second degree category should be included but if his suggestion were adopted, it would be necessary to restructure the entire article.

Chairman Yturri said that in reading the New York statute it was apparent the revisors had gone through the same type of discussion this Commission was undergoing and had finally arrived at first degree arson being the situation where there had to be a person present in the building; second degree being the situation where there was a reasonable possibility someone was present; and third degree being the same as second degree under the proposed Oregon draft. Judge Burns said he would not be in favor of the New York approach because if the person could show at the trial that at the exact time of the burning of a dwelling there was no one in it, he could get a second degree conviction. Chairman Yturri replied that such a situation could be taken care of by the penalties attached to the section.

Representative Harlan asked Professor Platt if he was of the opinion that burning of personal property should be treated in the Criminal Mischief statute and was told that he agreed that crime did not belong in the arson statute. Mr. Knight said he did not object to calling a firebug an "arsonist." Chairman Yturri asked Mr. Paillette what he thought about sending the draft back to the subcommittee and Mr. Paillette said he would not object to that course providing the Commission gave the subcommittee some policy guidelines to follow. The basic policy consideration, he said, was whether the Commission wanted to make intentional burning of a building "arson" because it was a building which was burned.

Mr. Knight indicated he would favor classifying the burning of a building as some degree of arson and suggested one way would be to define a building or structure and include a monetary value as a point of departure between the varying degrees.

Senator Burns was of the opinion that to insert a monetary value in the code would only complicate the situation. He indicated he was not averse to the Model Penal Code definition of "occupied structure," but the subcommittee had discussed that definition at great length and did not agree with the MPC that burning a building for purposes of collecting insurance should be arson. The subcommittee felt that if the actor attempted to or did in fact defraud an insurance company by burning, the act would be covered under Theft by

Deception. The Model Penal Code made such a crime the highest degree of arson. Mr. Tanzer expressed agreement that a fire set for the purpose of collecting insurance should not be more aggravated than any other fire.

Chairman Yturri asked if a definition of "building" was contemplated and Mr. Paillette answered that the subcommittee contemplated "building" would have its ordinary meaning.

Senator Burns moved that section 4 be tentatively approved and Mr. Knight seconded the motion which carried unanimously with the following members voting: Representative Harlan, Senator Burns, Mr. Chandler, Judge Burns, Mr. Knight, Senator Mahoney and Chairman Yturri.

Section 3. Reckless burning. Chairman Mahoney asked if reckless burning would cover a situation where someone recklessly drove his car into another automobile and caused an explosion. Mr. Paillette said that reckless burning would probably cover that situation but the section was not written with that circumstance in mind. Senator Burns said the answer to Senator Mahoney's question would depend upon the definition ultimately attached to "recklessly." In an automobile accident situation, he said, there might be negligence involved and not recklessness. Professor Platt said that Senator Mahoney's example would not constitute "recklessness" under the Model Penal Code definition.

Mr. Tanzer asked why section 3 was not phrased in the same manner as section 4; namely, "A person commits the crime of reckless burning if by starting a fire or causing an explosion . . . . " He said such an approach would raise fewer problems when making section 3 a lesser included offense and secondly, it would more directly refer to the criminal act of starting a fire. Mr. Paillette explained that P.D. #1 had contained essentially the language suggested by Mr. Tanzer and the subcommittee had amended it by deleting "intentionally" and eliminating "starting a fire or causing an explosion".

Chairman Yturri asked Mr. Tanzer if it disturbed him that section 3 made no reference to an intentional act but did include a reckless act and was told by Mr. Tanzer that he thought intentional included reckless. Mr. Knight asked if there was a reasonable distinction between causing damage to property which would be prosecuted under the Criminal Mischief statute and recklessly or intentionally damaging property of another by fire. He suggested "or intentionally" be inserted in section 3. Mr. Paillette indicated that the section would then conflict with section 4. Judge Burns commented that it would also create a Pirkey problem to follow Mr. Knight's suggestion.

After further discussion, Senator Burns moved, seconded by Judge Burns, that section 3 be adopted. The motion carried. Voting for the motion: Senator Burns, Judge Burns, Mr. Chandler, Senator Mahoney and Chairman Yturri. Voting no: Representative Harlan and Mr. Knight.

Section 2. Unlawful use of fire. Senator Burns pointed out that the present Oregon law relating to arson was tied in with the civil law in so far as double and treble damages were concerned and the legislature in 1965 had amended the forestry code and made amendments to several of the civil sections affected by the arson sections. The subcommittee had, therefore, retained much of the present Oregon law in section 2 to avoid doing violence to civil liability

factors. Because the forestry code was amended so recently and because so much consideration had been given to it at that time, the subcommittee felt the civil aspect should not be disturbed and the best course would be to enact the present law with only slight modifications with respect to form. It was contemplated, he said, that violation of section 2 would be a misdemeanor, probably of the slightest degree.

Judge Burns asked if he understood Senator Burns to say that section 2 in effect would codify all of the present criminal penalties involved in any kind of a forest fire situation and would take all of the criminal penalties out of ORS chapter 477. Mr. Paillette replied that the criminal penalties were taken out of the penal code in 1965 and placed in the forestry code and the subcommittee had not contemplated taking them out of the forestry code.

Section 2, however, was not intended to replace the forestry sections on forest fires and all section 2 did was restate ORS 164.070. If section 2 were adopted, he said, ORS 477.090, specifically referring to double damages, would need to be amended to reflect the changes in section 2 but the duties imposed upon individuals to use reasonable care in preventing and controlling fires would remain unchanged. The section, he said, was not proposing any new law but had been included for the purpose of restating the existing law which was tied in with ORS 477.090. The courts had looked to ORS 164.070 for the standard of care in controlling fires.

Professor Platt indicated that subsections (2) and (4) purported to create a criminal act but did not define what harm was actually done by that act. The same situation existed in the present law and section 2 only preserved the problem, he said. He further objected to the use of the term "unlawfully" because it could not be defined and to use "negligently" and "accidentally" in the same section only complicated the meaning because no one could be expected to distinguish between the two as would be necessary in the general definition section if both terms were employed. He objected also to section 2 because it responded to a special interest group by continuing a statute with which the grass growers and the wheat interests were particularly concerned. He urged that the Commission return to its original policy of staying away from anything that suggested special interest legislation by employing general words of criminal definition. Professor Platt stated he did not think that under any circumstance should the Commission defend a criminal statute because it facilitated enforcement of civil law. Chairman Ytturri expressed agreement with Professor Platt.

Mr. Tanzer suggested that the Commission consider Model Penal Code section 220.1, subsection (3), called "Failure to Control or Report Dangerous Fire" and indicated "control or report" were the key words. Professor Platt agreed and noted that the section avoided the problem caused by employing words of culpability.

Senator Burns said he could not take objection to what Professor Platt had said but did not agree that the consideration of the subcommittee was to cater to any special interest group because certainly the applicability of section 2 would be very broad. He asked Professor Platt if he was of the opinion that a section should be included in the criminal code to cover negligent burning.

Professor Platt replied that it was desirable to have a section defining negligent burning and his comments did not go so far as to recommend elimination of section 2.

Senator Burns indicated the problem could be cured by taking ORS 164.070 out of the criminal code and transferring it to ORS chapter 477 or the problem could be referred to the Law Improvement Committee with the request that they take appropriate measures if they deemed the existence of ORS 164.070 important enough to incorporate it into the forestry code. Chairman Yturri commented they would not be doing a complete job of criminal revision if that course were adopted and said he would personally prefer to include the section in the arson draft.

Senator Burns moved that section 2 be rereferred to Subcommittee No. 1 and Judge Burns seconded the motion which carried unanimously.

Section 1. Arson and related offenses; definitions. Representative Harlan moved, seconded by Senator Burns, that section 1 be adopted.

Judge Burns noted that the terms "possessory or proprietary interest" were not defined. If a person burned his own property in which someone else held equitable title or a mortgage interest, he asked if that title or interest would constitute a "proprietary interest." Chairman Yturri replied affirmatively and commented that a contract seller's interest was contained in the balance of the money due him so he would also have a proprietary interest. Judge Burns asked if it would be a crime to burn a shed on property on which the bank held a mortgage and Chairman Yturri said he would consider that to be a proprietary interest. Judge Burns asked if under this statute it would be necessary for a farmer to obtain permission from the bank every time he wanted to burn an old shed and Chairman Yturri replied that this could be the case today under the terms of the mortgage; the mortgagee could not dissipate or do anything with the security without the consent of the mortgagor. Mr. Knight said it would also be a crime to burn a building if it were in the joint ownership of a husband and wife and both parties had not consented to the burning.

Judge Burns said he was concerned that by the use of this language the Commission might be bringing under the criminal code a variety of instances that wouldn't ordinarily be considered criminal. Chairman Yturri said he did not share Judge Burns' concern because "proprietary interest" as referred to in the draft wouldn't really be in existence until that particular matter was determined by the court and he thought that "proprietary" was sufficiently defined in common law to eliminate any possible difficulty the term might create. In reply to a question by the Chairman, Professor Platt and Mr. Tanzer said the use of the term did not disturb them.

Vote was then taken on Representative Harlan's motion to adopt section 1 and the motion carried unanimously.

Because the hour was late the Commission decided against considering the next item on the agenda, Forgery and Related Offenses. The meeting was

adjourned at 4:15 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission