Tapes #20 and 21

#20 - 1 to end of Side 2
#21 - All of Side 1 and 1 to 45 of Side 2

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

September 23, 1968

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Ninth Meeting, September 23, 1968

Minutes

Members Present: Senator John D. Burns, Chairman
Representative Edward W. Elder
Mr. David Blunt representing Attorney General Robert Y. Thornton

Absent: Mr. Robert Chandler
Mr. Bruce Spaulding

Also Present: Mr. Donald L. Paillette, Project Director

Mr. Paillette informed the committee that Mr. Chandler had called him to report that he was ill and therefore unable to attend today's meeting. Inasmuch as Mr. Spaulding was trying a case and was also unable to be present, Mr. Blunt had agreed to attend in order to constitute a quorum present.

Chairman Burns and Mr. Paillette alternated in the reading of the minutes of Subcommittee No. 1 held on August 9, 1968, for the purpose of reviewing the committee's deliberations on Preliminary Draft No. 2; Arson and Reckless Burning. With respect to the discussion on page 10 of the minutes, Chairman Burns asked Mr. Paillette if he had resolved the constitutional question to which the Chairman and Justice Sloan referred. Mr. Paillette said he had determined to his own satisfaction that no equal protection problem existed and reported that he was in the process of writing a memorandum on State v. Pirkey, 203 Or 697, 281 P2d 698 (1955), which he would distribute to the Commission in the near future. He noted that there had been a number of cases on equal protection questions since the Pirkey decision was handed down.

Arson and Related Offenses; Preliminary Drafts Nos. 3 and 3a; September 1968

Mr. Paillette advised that Preliminary Draft No. 3 on arson and related offenses incorporated the suggestions the committee agreed on at their last meeting.

Title of Article. Chairman Burns reviewed the committee's discussion of August 9, 1968, with respect to entitling the chapter "Crimes by Fire" rather than "Arson," the purpose being to eliminate the possibility of someone convicted of negligent burning being tagged as an arsonist. Mr. Paillette's response was that when the chapter was put together in final form, the crimes would be codified under one chapter in any event and the person would not be labeled according to the chapter heading but would be called by the term used in the specific statute under which he was convicted. The committee agreed they had no objection to entitling the article "Arson and Related Offenses."

Section 1. Arson and related offenses; definitions. Chairman Burns asked what the basic difference was between Preliminary Draft No. 3 and Preliminary Draft No. 3a and was told by Mr. Paillette that rather than using "protected property," as suggested by the committee, P.D. #3a employed the terms "Class I property" and "Class II property." He had drafted these alternative definitions, he said, because the phrase "protected property" was apropos when it referred to first degree arson, but in drafting the section on arson in the second degree, he had found that it had to be stated in the negative which was an awkward way to draft a criminal statute. Rather than stating the elements of the crime, it became necessary to say that section applied if the property burned was not "protected property." Chairman Burns commented that the nomenclature in the definition section and in the second degree arson statute was more precise in P.D. #3a than in P.D. #3.

Mr. Paillette pointed out that Class II property under P.D. #3a included forest land and the result was that under P.D. #3 burning of forest land would be first degree arson and under P.D. #3a it would be second degree. He said it was his impression that the committee wanted the crime of intentionally setting a forest fire upgraded from the present law but he was not sure whether they wanted it to be arson in the first degree or in the second degree.

Representative Elder said he considered forest land to be land which could be occupied by people and, while it was not a structure, burning of that land would be likely to endanger a human life. Mr. Paillette explained that if people were endangered by the fire, it would be first degree arson under section 5 (2) regardless of the type of property involved.

Chairman Burns pointed out that on page 11 of the minutes of August 9, 1968, the "committee agreed that the criterion for first degree arson should be occupancy of the building rather than adaptation for overnight lodging and the number one consideration should be the danger to a human life." By including "structure, place or thing customarily occupied by people" in the definition section, the draft was including aircraft, railroad passenger cars, automobiles, boats, cars, etc.

Chairman Burns suggested the draft might be creating a difficult area by use of the broad phrase "structure, place or thing customarily occupied by people." If someone burned a boat or car, he said, he could be charged with first degree arson because the question of occupancy could arise. Mr. Paillette explained that the draft was attempting to describe property as a class customarily occupied by people rather than naming that property specifically. The intent of the draft was not that the state would have to show that a specific boat was customarily occupied but rather that it was the type of property which would be customarily occupied. This, he said, would have the effect of putting the actor on notice that the statute covered the kind of property that would be likely to have people in it.

After further discussion, Chairman Burns suggested that perhaps the earlier drafts which said "adapted for overnight accommodation of persons" contained a better test than "customarily occupied by people." He said there was no reason for making the offense of burning up a car with no one in it the same high degree of arson as endangering someone's life by fire.

Mr. Paillette advised that under the draft if the defendant intentionally set fire to a car and didn't kill the occupant, he would be guilty of first degree arson because he endangered a life. Under the present law he would be guilty of third degree arson in the same circumstance. Even without a definition of "protected property," the crime would still be first degree arson under section 5 if the burning endangered a person.

Chairman Burns said that the initial drafts contained the right idea in his opinion, namely, if the burning endangered human life, it should be first degree arson; if a dwelling type structure was involved, it should be first degree arson because it was a place which usually contained people; or if it was the burning of a public building, it should be first degree arson.

Mr. Blunt maintained that the draft should place the burden on the arsonist to be sure there were no people in the structure before he burned it, and Mr. Paillette replied the committee was attempting to do exactly that by including "customarily occupied by people" in the definition of "protected property." It was not the intent to require the state to have to prove, as New York and Michigan did, that not only was there someone in the building but that the defendant knew it or had good reason to know it. The committee had decided at its previous meeting that this would require too great a burden for the state to maintain.

In order to make a more precise test for occupancy than contained in P.D. #3a and to eliminate the possibility of charging a person with first degree arson for burning a barn or a similar structure, Chairman Burns proposed the following amendment adapted from the definition of "dwelling house" in the present law:

> "'Class I property' means any structure, place or thing customarily occupied by any person lodging therein, including 'public buildings' as defined by ORS 479.010."

He expressed the view that the definition in P.D. #3a was expecting too much of the courts in requiring them to define "customarily occupied by people." Mr. Paillette agreed that it was more precise to define structures that customarily had people lodging in them or dwelling in them overnight than to refer to something that was occupied. He pointed out that if someone was actually endangered by the burning, the district attorney could charge him under section 5 (2). The more difficult questions would arise, he said, when no one was endangered by the burning.

After further discussion, Chairman Burns decided section 1 of P.D. #3 was better than P.D. #3a because "Class II property" used the term "building" which was not defined in "Class I property." He then moved that section 1 (1) of P.D. #3 be amended to read:

> "'Protected property' means any structure, place or thing customarily occupied by any person lodging therein, including . . . (no further change)."

The motion failed for want of a second.

Mr. Paillette, commenting on Chairman Burns' reference to "building" as used in the definition of "Class II property", said the term had been used to avoid reference to a structure, place or thing that would not be customarily occupied. He said it seemed to him there were sound reasons for making the burning of a non-dwelling building arson in the second degree, as it was in the common law and also in the present Oregon law. If the draft were to say that it would be second degree arson to burn any place or thing not customarily occupied by people, the definition would then include stubblefields, wheat land, etc. and he did not want that in the definition even by implication. He explained that he had included this definition as a compromise provision for the committee to consider.

Mr. Paillette called attention to page 12 of the minutes of August 9, 1968, which indicated that "second degree arson should be the intentional burning of a building not customarily occupied by people and would include barns, railroad cattle cars, etc." He noted that second degree arson in P.D. #3a used "building" in accordance with the determination of the subcommittee to make it second degree arson to burn a building even though no one was in it at the time.

Chairman Burns remarked that in line with the traditional concept of arson and in line with what the other states were doing and what the Oregon code presently contained, P.D. #2 came closer to those concepts than either P.D. #3 or P.D. #3a. Mr. Paillette agreed but noted that it didn't come close to what the subcommittee had decided at its previous meeting.

Representative Elder said that because of the recommendations made at that meeting by Mr. Spaulding and Mr. Chandler, he would be opposed to adopting a draft other than P.D. #3.

Chairman Burns noted that Mr. Chandler had advocated that the burning of forest land should be first degree arson and asked Representative Elder if he agreed that burning of forest land should be included in the definition of "protected property" to make it first degree arson. Representative Elder said he thought section 5 (2) took care of the concern Mr. Chandler had expressed. He said he would favor adoption of P.D. #3 because it was the concept the subcommittee had recommended at its last meeting and avoided the problem previously discussed with respect to class II property in P.D. #3a.

Representative Elder then moved that section 1 of P.D. #3 be adopted without amendment. Chairman Burns seconded and the motion carried.

Preliminary Draft No. 3; Section 2. Negligent Burning; Alternate Section 2. Unlawful use of fire. Chairman Burns noted that section 2 accomplished Mr. Spaulding's suggestion that "negligently" be moved to subsection (1). Mr. Spaulding had also suggested that "accidentally" be deleted from subsection (2) and Mr. Paillette advised that particular amendment had not been voted on by the subcommittee. He observed that section 2 was an adaptation of existing statutes and if "accidentally" were deleted, by implication the statute would refer to the intentional starting of a fire. It was intended to refer specifically to an accidental act, he said. He maintained that if the actor permitted the fire to escape, it shouldn't make any difference who actually started the fire since the section was designed to prohibit the act of allowing the fire to escape. Chairman Burns expressed approval of retaining "accidentally" in section 2.

Mr. Paillette explained that the alternate sections were included in the draft because ORS 164.070 and 164.080 were tied in with Oregon law providing for treble damages in civil actions. The safest course the Commission could take, he advised, was to retain the existing ORS sections 164.070 and 164.080 to preclude the possibility of inadvertently changing the law as it presently relates to damages. He explained that he had captioned the section "Unlawful use of fire" because the present statute used the term "unlawful." He advised that "unlawful" was a poor drafting term because it was open to too many interpretations and it would be possible to set a fire unlawfully without violating a criminal statute; in other words, such an act could be "unlawful" without being a crime.

Chairman Burns said his personal preference would be to retain present Oregon law since it said substantially the same as the section on negligent burning. He asked if ORS 164.070 was redundant of 164.080 and was told by Mr. Paillette that section 3 required damage to property while section 2 did not. Mr. Paillette observed that it was almost impossible to imagine a hypothetical situation where there would be a violation of section 2 without some resulting damage to property of some kind. Section 3, he said, would be a more serious violation. However, reckless damaging of property was not limited to land; it could be reckless damage to personal property.

Chairman Burns moved that the committee adopt alternate section 2 in its entirety and eliminate section 2 entitled "negligent burning." Representative Elder seconded and the motion carried unanimously.

Preliminary Draft No. 3; Section 3. Reckless burning; Alternate Section 3. Damaging property by fire. Mr. Paillette observed that in ORS 164.080 the legislature appeared to be talking about a higher degree of culpability than in ORS 164.070 because they provided for a greater punishment and also required the element of injury. Section 3,

he said, included damage also and was essentially the same thing as ORS 164.080 but was broader in its language because it didn't use the phrase "starting a fire."

Chairman Burns moved that section 3, reckless burning, be adopted in lieu of alternate section 3, damaging property by fire, even though the section was somewhat redundant of section 2. Mr. Elder seconded the motion which carried.

Preliminary Draft No. 3; Section 4. Arson in the second degree. Chairman Burns asked if the general definitions would define "building" and was told by Mr. Paillette that this was a possibility. The term would only be used, he explained, in the arson and burglary articles.

Mr. Elder moved that section 4 be adopted, Chairman Burns seconded and the motion carried unanimously.

Preliminary Draft No. 3; Section 5. Arson in the first degree. Chairman Burns noted that section 5 was changed from P.D. #2 which said "causes bodily injury" whereas P.D. #3 said "places another person in danger of bodily injury."

Representative Elder asked if forest land was included in first degree arson and received an affirmative reply from Mr. Paillette.

Representative Elder moved, seconded by Chairman Burns, that section 5 be adopted and the motion carried unanimously.

Forgery and Related Offenses; Preliminary Draft No. 1; September 1968

Mr. Paillette informed the committee that Preliminary Draft No. 1 on forgery and related offenses contained the basic forgery sections but would later be supplemented by related fraud crimes including credit cards, bad checks, etc. He called attention to Article 224 of the Model Penal Code which entitled its chapter "Forgery and Fraudulent Practices" and related the subjects covered under that article. While the Oregon code may or may not ultimately contain comparable provisions, he said, the draft under consideration was more nearly like the New York Revised Penal Code than the MPC. He noted that the MPC commentary pointed out that if a penal code contained broad theft statutes, forgery provisions could probably be eliminated as a separate crime, but because the concept of forgery was so ingrained in law, because it was such a traditional crime and because the nature of forgery had come to have certain accepted, well defined meanings, he felt it would be difficult to eliminate the crime of forgery as such.

Section 1. Forgery and related offenses; definitions. Mr. Paillette explained that the definitions section defined the term "written instrument" in broad terms to include almost everything that

could possibly be the subject of a forgery. The definition in the draft was derived from the New York code, and the MPC definition was similar except that it used the term "writing" instead of "written instrument." He called attention to the commentary on page 2 of the draft which pointed out distinctions in the terms defined in section 1.

Chairman Burns asked why the phrase "evidence of value" had been used in section 1 (1) rather than "evidence of debt" as employed in ORS 165.110. Mr. Paillette replied that he didn't think of money as evidence of debt. As used in ORS 165.110, evidence of debt was employed in connection with checks, receipts, etc. He noted that the MPC used the term "symbols of value."

Section 2. Forgery in the second degree. The draft, Mr. Paillette noted, contained two ascending degrees of the crime of forgery while ORS contained only one degree of forgery but set forth many related crimes which amounted to varying degrees of forgery. Section 2 (2) differed from both New York and Michigan in that the proposed draft equated "uttering" with the forging of the check and in that respect retained the provisions of existing law. Criminal possession of forged instruments would be a lesser crime than the uttering or forging of an instrument, he said. He called attention to the ORS sections set forth on pages 5 and 6 of the draft listing crimes which sounded of forgery.

Chairman Burns read the definition of "utter" on page 2 of the draft followed by subsection (2) of section 2 on page 4. He noted that ORS 165.115 said " . . . knowingly utters or publishes as true and genuine . . . " He questioned whether the element of purporting the instrument to be true and genuine had been omitted from the definition. Mr. Paillette replied that the other codes did not define "utter" and he might have created problems by including that definition. Chairman Burns expressed the view that "utter" should be defined. "Uttering," Mr. Paillette said, was an ancient term without a clear definition. Some of the cases said the instrument didn't have to be negotiated to constitute an uttering and he had attempted to formulate a definition to encompass most anything that could be done with a written instrument.

Chairman Burns asked Mr. Paillette for an example of the type of instrument that would qualify under second degree forgery and was told that to falsify a diploma or to forge a railroad ticket would be examples of the type of crime which would fall under section 2. Representative Elder asked if the act would need to be one from which the actor derived a monetary benefit and received a negative reply from Mr. Paillette who added that an intent to defraud would have to be present. The main purpose of section 2, he said, was to cover a number of the crimes listed on pages 5 and 6 of the draft such as forging railroad tickets, counterfeiting a label, counterfeiting a serial number, etc.

Section 3. Forgery in the first degree. Forgery in the first degree, Mr. Paillette stated, was a restatement of forgery in the second degree and the crime was aggravated if it involved one of the written instruments enumerated in section 3.

Chairman Burns pointed out that coins and money were not enumerated in section 3 whereas they were included in both the New York code and the Model Penal Code. Mr. Paillette replied that there was no reason why coins and money could not be included if the subcommittee wished to do so but he thought the definition in section 1 (1), "article . . . constituting a symbol or evidence of value," was broad enough to include coins and money. Chairman Burns said that if the draft meant that coins were included as a subject of forgery, actually the proposal was saying that counterfeiting was forgery. Mr. Paillette replied that he thought a strong argument could be made to omit money and coins from the Oregon statute on the assumption that subject was adequately covered by federal statutes. From a prosecution standpoint it might be advisable to have it in the code, but it would probably be seldom used, he said.

In reply to a question by Chairman Burns, Mr. Paillette explained that a bad check would fall under forgery in the first degree, section 3 (3), because it would be a commercial instrument.

Mr. Paillette pointed out that the main difference between the MPC and the New York code as opposed to the proposed Oregon statute was that in New York and the MPC it was forgery in the first degree if the crime was of the type described in subsection (1) or (2) of section 3. In the present Oregon law the punishment was the same for all the acts set forth in section 3 and he believed it would do less violence to existing law if this concept were retained. From a policy standpoint, he said, it was difficult to say that one would do more damage to the public than the other and he had therefore decided to stay with what appeared to be the present legislative intent and make the crimes in subsections (1) through (5) equally severe. The language in the draft, he said, was not identical to ORS 165.105 but it was analagous and, where changed, the intent was to make it broader. He reported that nothing contained in the present law had been omitted and some new language had been added, namely in subsections (1) and (2).

Chairman Burns agreed there was no compelling necessity to make the distinctions contained in the New York code with respect to forging of securities, stocks, bonds, etc. New York, he said, would have a problem with these instruments which would be peculiar to that area because of the number of stock exchanges located there.

The Chairman pointed out that "plat, draft or survey of land" as set forth in ORS 165.105 had been omitted from the draft and thought this might not be advisable in view of the land speculations which had been taking place recently. Mr. Paillette said he thought that

phraseology would be covered by section 3 (3), but the Chairman expressed some doubt that this was the case. If the plat, draft or survey were attached to a title, it would be covered, he said, but he could conceive of other instances where the documents would be separated from the title.

Chairman Burns commented that Mr. Paillette had done a comprehensive job on the forgery draft but further study would be required and suggested the committee adjourn and discuss this subject in greater detail at its next meeting.

Next Meeting

The Chairman asked Mr. Paillette to set another meeting date as soon as possible.

The meeting was adjourned at 2:15 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission