Tapes #21 and 22

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#22 - All of Side 1 and 1 to 527 of Side 2

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

October 18, 1968

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Tenth Meeting, October 18, 1968

Minutes

Members Present: Senator John D. Burns, Chairman
Representative Edward W. Elder
Mr. Robert Chandler
Mr. Bruce Spaulding

Also Present: Mr. Donald L. Paillette, Project Director
Justice Gordon Sloan, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Miss Kathleen Beaufait, Deputy Legislative Counsel (arr. 1:30 p.m.)

The meeting was called to order by Chairman John D. Burns at 10:00 a.m. in Room 309 Capitol Building, Salem.

Minutes of Meeting of August 9, 1968

Mr. Chandler moved, seconded by Mr. Spaulding, that the minutes of the meeting of August 9, 1968, be approved as submitted and the motion carried unanimously.

Meeting of September 23, 1968

Arson and Related Offenses; Preliminary Drafts Nos. 3 and 3a. Mr. Paillette read aloud the minutes of the meeting of September 23, 1968, beginning at the bottom of page 4. The decisions made at that meeting with respect to the arson draft were discussed and Chairman Burns explained that, because Mr. Chandler and Mr. Spaulding had been unable to be present, the committee had attempted to conform their recommendations to the guidelines expressed by the members at their meeting of August 9. Chairman Burns then advised that since all members of the subcommittee were present at today's meeting, a motion would be in order approving adoption of the arson draft as endorsed by those present at the meeting on September 23. Mr. Chandler so moved, the motion was seconded by Representative Elder and carried unanimously.

Forgery and Related Offenses; Preliminary Draft No. 1. Mr. Paillette read aloud the minutes of the meeting of September 23, pages 6 through 9, relating to the forgery draft. Chairman Burns said the committee had reviewed the draft and raised some questions with respect to it but made no recommendations for amendment.

Approval of Minutes. There being no objection, Chairman Burns indicated that the minutes of the meeting of September 23, 1968, would stand approved as read.

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

Section 1. Forgery and related offenses; definitions. Mr. Chandler asked if the definitions of "complete written instrument" and "incomplete written instrument" were intended to differentiate between degrees of the crime of forgery and was told by Mr. Paillette that the difference in degree would be determined by the nature of the instrument forged and not the manner in which the forgery was committed. In reply to a question by Chairman Burns, he explained that it would be forgery in the first degree to alter a payroll check that had been completed and also forgery in the first degree to complete a payroll check that had been partially completed because both crimes were concerned with the same type of written instrument.

Mr. Chandler asked if it would be possible to draw a single definition broad enough to encompass the first three subsections of section 1. Mr. Paillette said it would probably be possible but the definitions of "falsely make" and "falsely complete" were made clearer by inclusion of subsections (1), (2) and (3) and this language would also assist the court in giving clearer instructions to the jury. He pointed out that, as noted in the New York commentary, the draft would provide that forgery could be committed by any one of the five following separate acts:

(1) By falsely making a complete written instrument.
(2) By falsely making an incomplete written instrument.
(3) By falsely completing an incomplete written instrument.
(4) By falsely altering an incomplete written instrument.
(5) By falsely altering a complete written instrument.

Mr. Paillette explained that the definitions section was derived principally from the New York code but noted that the proposed draft differed from New York in that it contained a definition of "utter" and uttering would be one manner in which the crime of forgery could be committed.

Mr. Chandler said he could see the need for differentiation between falsely making, falsely completing and falsely uttering but did not see the need to create different kinds of written instruments. He asked if subsection (1) containing the definition of "written instrument" would suffice without subsections (2) and (3). Mr. Paillette replied that subsections (4), (5) and (6) employed the terms "complete written instrument" and "incomplete written instrument" and in order to have a comprehensive code, each term about which there might be some question should be defined. If the definitions in subsections (4), (5) and (6) were adopted, he said, it was advisable

to employ a definition of "complete written instrument" and "incomplete written instrument" in order to make the meaning clear in these latter definitions which enunciated the different ways in which forgery could be committed.

Chairman Burns suggested that the period in subsection (1) be deleted and the following inserted: ", whether or not completed and fully drawn with respect to every essential feature thereof." The proposed amendment, he said, would replace subsections (2) and (3) and would not require further amendment of the subsequent subsections. Mr. Chandler commented that the draft as drawn was definite and precise and was perhaps the best way to handle the definitions. Other members of the committee indicated that had no objection to the manner in which section 1 was drafted.

Chairman Burns said he had a question with respect to the definition of "utter." Historically, he said, uttering had been a separate crime and embodied a separate concept from forgery. Uttering was the passing or attempting to pass of a forged instrument and was unrelated to the other seven subsections in section 1. Mr. Paillette replied that there was some question as to whether uttering and forgery were separate crimes in Oregon and called attention to his commentary on page 6 of the draft which discussed this problem.

One Oregon case, State v. Swank, 99 Or 571, 195 P 168 (1921), held that the forgery of an instrument and the uttering of a forged instrument were separate and distinct crimes. However, in Dougharty v. Gladden, 217 Or 567, 341 P2d 1069 (1959), cert. den. 361 U.S. 867, the court held that the statute "clearly states but a single crime which may be committed by committing forgery or uttering, or both, as these crimes were known to the common law." Mr. Paillette noted that it was the intent of the draft to clarify this point by making forgery a single crime, and uttering would be one manner in which the crime of forgery could be committed. As far as the current statutes were concerned, he said, the punishment was the same for both uttering and forging. Inasmuch as the legislature had looked at the crimes as being equally serious, the proposed draft would not change legislative intent in this respect but it would clarify the case law. He also informed the committee that ORS 165.105 (making, forging or counterfeiting writing or money) and ORS 165.115 (uttering a forged instrument) were originally contained in one section, OCLA 23-560, but had been bisected in 1953 when ORS was compiled.

Chairman Burns pointed out that the intent to injure or defraud was contained in the preface to section 2 and asked what other intent would need to be proven in the case of uttering. He was told by Mr. Paillette that under section 2 the intent to utter a forged instrument which the actor knew to be forged would also have to be shown.

Chairman Burns inquired if the proposed statute should also contain the provision that the actor uttered the instrument "as true and genuine" as provided in the present statute. Mr. Paillette

replied that simply tendering a forged check for payment was sufficient evidence that it was tendered as "true and genuine" under the present statute as well as the draft; it was not necessary to prove that the actor actually said the check was good. Therefore, he didn't think the phrase added anything to the definition of the crime.

Mr. Paillette pointed out that New York equated uttering with possession and combined the two in a single statute, but uttering was graded the same as the crime of forgery. He said he felt there was a likelihood that when the Commission graded the forgery offenses, they might not feel that possession, in view of Oregon's historical position and the existing law in this regard, should be treated as severely as either forging or uttering. Chairman Burns expressed agreement with this rationale.

Mr. Paillette pointed out that the New York code contained a provision, section 170.35, that a person could not be charged with both possession of a forged instrument and forgery with respect to the same instrument. Section 170.30 stated "A person is guilty of criminal possession of a forged instrument . . . when . . . he utters or possesses any forged instrument . . . " Uttering was included with possession and the punishment was the same under the New York section, but he did not feel it was necessary to include a provision such as New York section 170.35 in the proposed draft inasmuch as uttering was equated with forgery and not possession. The committee expressed agreement with this rationale.

Mr. Chandler moved that section 1 of the forgery draft be approved without amendment. Representative Elder seconded and the motion carried unanimously.

At a later point in the meeting, during the discussion of section 3, Justice Sloan expressed further concern over the use of "written instrument" in subsections (2) and (3) of section 1. In a situation where one was charged with forging a written instrument which was a deed, he asked if the allegation would have to state whether the instrument was complete or incomplete. He noted that section 3 said, "if he violates section 2 and the written instrument . . . " and advised that the written instrument in and of itself was not complete. He contended that because the definition section segregated "complete" and "incomplete" written instruments, section 3 was not clear in its meaning when referring to a "written instrument." Justice Sloan urged that the definition of "written instrument" state that the term included a complete or an incomplete written instrument so that when the term was used in the draft, it would mean any kind of a written instrument.

After further discussion, Mr. Chandler moved, seconded by Mr. Spaulding, that the following be inserted after "or the equivalent thereof," in section 1 (1): "whether complete or incomplete,". The motion carried unanimously. The committee agreed to retain subsections (2) and (3) of section 1.

At a still later point in the meeting, while the committee was discussing section 7 (criminal simulation), question arose concerning the definition of "utter" in section 1 (7) wherein the draft referred to a written instrument only while section 7 was concerned with forged paintings, antiques, art objects, etc. which could not be classified as written instruments. Chairman Burns suggested that "utter" be defined to include such objects in order to make section 1 (7) applicable to section 7.

Following a brief discussion, Mr. Chandler moved, seconded by Representative Elder, that "or other object" be inserted after "tender a written instrument" in subsection (7) of section 1. The motion carried unanimously.

Mr. Chandler then moved that section 1 as amended be approved. Representative Elder seconded and the motion carried without opposition.

Section 2. Forgery in the second degree. Chairman Burns noted that section 2 covered only those crimes not included under forgery in the first degree. Mr. Chandler moved, seconded by Mr. Spaulding, that section 2 be approved and the motion carried without opposition.

Section 3. Forgery in the first degree. Mr. Chandler indicated that the draft was attempting to categorize the crime by the type of instrument forged rather than by dollar amount. This approach, he said, would place in the same category a forgery of a codicil to a will involving a $5 pocket knife or one involving $500,000 worth of government bonds; both crimes would be subject to the same range of penalties.

With respect to subsection (4), Mr. Chandler asked what records were "required or authorized by law to be filed" and Chairman Burns gave a deed or a will as examples of this type of document. Mr. Spaulding inquired if there was a statute barring the filing of any piece of paper. In the absence of a statute to that effect, he said, the filing might not constitute public notice but it would still be authorized to be filed. Mr. Paillette explained that the draft was attempting to indicate that it was forgery in the first degree to forge an instrument in one of these categories, whether or not that instrument had been filed. He cited the case of State v. Brantley, 201 Or 637, 271 P2d 668 (1954), where the question arose as to whether a certificate of nomination was a public record within the meaning of the statute before it had been filed. The court said:

> "A 'public record', strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference. . . . The statute itself determines that until

such time as the certificate of nomination has passed from the hands of the person in possession thereof to the county clerk, the public in general has no interest therein. Therefore, the forgery of a certificate of nomination must be the forgery of that document after it has become such a public record by being filed, and not before."

Mr. Spaulding suggested subsection (4) be amended to read: "A public record or an instrument which, if filed, would be a public record."

Mr. Paillette noted that the annotation, "What Constitutes a Public Record or Document within the Statute Making Forgery Thereof an Offense," 69 ALR 2d 1095, said:

"A public record has been defined as a record required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done. In accordance with this definition, the courts have generally held that various papers were public records within the meaning of a statute making the forgery of such records an offense where it appeared that the particular papers in question were either expressly required by law to be kept or filed, or were necessary or convenient to the discharge of the duties of a public official . . . papers prior to being so filed or recorded have generally been held not to constitute public records within such a statute."

Chairman Burns read the definition of "public record" in ORS 192.005 (5):

"'Public record' means a document, book, paper, . . . or other material . . . made, received, filed or recorded in pursuance of law or in connection with the transaction of public business . . . "

Representative Elder suggested "or authorized" be stricken from subsection (4) and Mr. Spaulding explained that the committee was attempting to get at the forgery of a document before it was filed, which document, when filed, would be a public record. The question, he said, was whether a document was a public record before it was filed.

Chairman Burns indicated that the draft attempted to put the sanction of first degree forgery on a person who would forge either a public record or an instrument that would be a public record whether it was filed or not. Mr. Chandler urged that the statute avoid the possibility of prosecuting someone on a first degree forgery charge for forging something that served no public purpose or injured no one.

Chairman Burns said he could not conceive of an instrument that would not fall into the categories delineated in subsection (3). He proposed to retain only "a public record" in subsection (4) and if the instrument did not fall within the provisions of subsection (3), the crime would be second degree forgery.

Mr. Paillette commented that the Brantley case involving a certificate of nomination had prompted inclusion of the disputed language in subsection (4) and if that language were deleted, the proposed statute would not cover such a situation. He reminded the committee that to commit the crime of forgery, an intent to injure or defraud was required and this should meet the objection expressed by Mr. Chandler.

Mr. Spaulding asked if the Brantley situation would be covered by a document which would affect a legal status as set forth in subsection (3) and Mr. Paillette noted that was new language which did not appear in the existing statute and would probably cover a certificate of nomination.

After further discussion, Mr. Chandler moved, seconded by Representative Elder, that subsection (4) be amended to read:

"A public record; or"

The motion carried.

Mr. Spaulding objected to the phrase "or purports to be" in the opening paragraph of section 3. Mr. Paillette replied that forgeries purported to be something they were not and this was the thing that was wrong with them. Mr. Spaulding agreed this was the case after they were forged but this paragraph spoke of the instrument before it was forged. The question, he said, was whether a fake instrument could be forged. Mr. Paillette indicated there could be instances where an instrument fake to begin with was forged with intent to defraud and Mr. Spaulding agreed to retain the phrase since it would relieve the prosecutor of being required to prove that the instrument was in fact valid in its inception.

Chairman Burns called attention to page 8 of the minutes of September 23, 1968, which referred to the omission from the draft of "plat, draft or survey of land" as used in ORS 165.105 (7). The committee decided that the language in subsection (3) referring to a document which affected "a legal right, interest, obligation or status" would cover "plat, draft or survey of land." Chairman Burns indicated that the comment to this section should state that the committee felt the language in ORS 165.105 (7) was redundant and subsection (3) was intended to cover that situation.

Chairman Burns asked if a forged prescription was covered in section 3 and noted that New York included a provision prohibiting forged prescriptions under forgery in the second degree. Mr. Paillette expressed the view that if the committee wished to include prescriptions in the forgery draft, a separate provision would have to be added. Justice Sloan commented that the majority of forged prescriptions would involve narcotics and the subject might more appropriately be included under the Narcotics Act. Mr. Paillette advised that ORS 474.170 (1) (b)(obtaining drugs unlawfully) now covered that situation.

Mr. Chandler remarked that if section 2 were amended to state "with intent to injure, defraud or deceive," prescriptions would then be covered by section 2. Mr. Paillette replied that he believed the New York provision in this respect was too broad and pointed out that the *mens rea* element in the proposed forgery draft was the same as presently contained in the Oregon law; i.e., to injure or defraud. He said he would oppose the insertion of "deceive" in section 2 because the draft would then include acts amply covered elsewhere in the code. Mr. Spaulding was of the opinion that all dangerous drugs should be covered, whether or not they were narcotics, and urged that the integrity of prescriptions be protected.

Mr. Paillette advised that he could find nothing in the Health Code which covered a forged prescription for anything other than a narcotic or a dangerous drug. He called attention to a section in the Narcotics Act, ORS 475.100 (3), relating to dangerous drugs, which stated:

> "No person shall wilfully make any false statement in any prescription, order, report or record required by this section; or, by fraud, deceit, misrepresentation or subterfuge, obtain or attempt to obtain any drug or the administration of any drug included under subsection (1) of this section."

Chairman Burns asked if inclusion of a similar provision in section 2 would cause a conflict. Mr. Spaulding observed that such a provision didn't belong in the forgery draft because it did not embody a concept to injure or defraud but probably should be contained in another part of ORS.

Mr. Chandler suggested that the Commission's report to the legislature indicate that there was a loophole in the statutes in this area, but the Commission had not included it in its code revision because the members felt the provision did not properly belong in the criminal code. Chairman Burns expressed the view that the committee should agree on a solution and make a specific recommendation to the legislature because of their familiarity with the problem. He indicated that he would write to the Oregon Medical Association and

attempt to obtain specific facts on the existence and scope of the problem of forged prescriptions, and the committee agreed to defer further action until more information was available to them. They were also in agreement that the question was not related to the chapter on Crimes Against Property.

Chairman Burns pointed out that the preface to New York section 170.15, forgery in the first degree, contained a phrase at the end of the opening paragraph which was not included in the Oregon draft: "or which is calculated to become or to represent if completed." Mr. Spaulding indicated that the amendment to section 1 (1) approved by the committee made it unnecessary to include that language and the committee concurred.

Mr. Chandler moved, seconded by Representative Elder, that section 3 as amended in subsection (4) be approved. The motion carried unanimously.

Section 4. Criminal possession of a forged instrument in the second degree. Mr. Paillette explained that under ORS 165.120 five years was the maximum penalty for a forged evidence of debt. Section 4 would include all forged instruments as the term was defined in section 1 (8) and did not combine uttering with possession as the New York code did.

Mr. Spaulding noted that the New York code said "utters or possesses" a forged instrument. Chairman Burns remarked that uttering was more severe than possession and under the present law was equivalent to forgery insofar as the sanction was concerned.

Mr. Chandler moved, seconded by Representative Elder, that section 4 be approved without amendment and the motion carried unanimously.

Section 5. Criminal possession of a forged instrument in the first degree. Mr. Paillette explained that section 5 raised the crime to first degree if the forged instrument was of the type specified in section 3.

Mr. Spaulding moved that section 5 be adopted. Mr. Chandler seconded and the motion carried without opposition.

Mr. Paillette noted that ORS 165.160 covered possession of counterfeit coins and should have been listed under the existing law citation because the definition of "forged instrument" would include counterfeit coins. In drafting both sections 4 and 5, he said, he had assumed that these two sections would continue to be less serious crimes than forgery under the present law. Possession of a forged instrument was actually an inchoate crime, Mr. Paillette said, because it constituted the step preparatory to committing the crime of

uttering. These sections, however, fit into this chapter in the same manner as possession of burglary tools fit into the burglary chapter and were more appropriately included here than in the chapter on inchoate crimes.

Section 6. Criminal possession of a forgery device. Chairman Burns asked if section 6 were new to the Oregon code and Mr. Paillette replied that ORS 165.125 proscribed the manufacture or possession of forgery devices. It was interesting to note, he said, that the maximum punishment provided under ORS 165.125 was five years imprisonment whereas ORS 165.165 employed essentially the same language except that it covered devices for making counterfeit coins and there the maximum punishment provided for ten years imprisonment. He pointed out that the draft section combined these two ORS sections and called attention to his commentary on page 16 setting forth the modifications contained in the proposed draft.

Representative Elder moved, seconded by Mr. Chandler, that section 6 be approved and the motion carried unanimously.

Section 7. Criminal simulation. Representative Elder asked if the copyright laws would cover the crime of criminal simulation and Mr. Paillette explained that the section was aimed at forged paintings, antiques, art objects, etc. Transactions of this type, he said, now take place all over the world and if such a crime were committed in Oregon, it should be covered by the criminal statute. He pointed out that the purpose of section 7 was to stop the crime before an actual sale of the object was made or before the theft had been completed.

Following amendment to section 1 (7) to make the definition of "utter" conform to section 7 [see page 5 of these minutes], Mr. Chandler moved that section 7 be approved. Mr. Elder seconded and the motion carried unanimously.

Section 8. Fraudulently obtaining a signature. Mr. Paillette explained that the only existing law close to the provisions of section 8 was contained in ORS 165.205 having to do with false pretenses. The conduct covered by section 8, he said, would not fall under the preceding forgery sections because the document discussed in this section was executed by someone who had the authority to do so. An example of the type of conduct intended to be covered, he advised, would be an actor who fraudulently persuaded the maker to sign a check which was complete except for the signature. Chairman Burns reviewed the OMFP draft and noted that the Commission had done away with the requirement for a false token. He asked if anyone could conceive of a situation under section 8 which would not be covered by OMFP. Mr. Paillette replied that in doing away with the false token, the phrase "or who obtains or attempts to obtain the signature of any person to any writing, the false making of which would be punishable as

forgery," now contained in ORS 165.205, had not been retained in the draft sections.

Mr. Chandler cited as an example of the type of thing which would be covered by section 8 a situation where someone prevailed upon Aunt Minnie to change her will to leave her money to him rather than to the Oregon Historical Society. In that example, Chairman Burns said, section 8 would be putting the district attorney into a civil lawsuit. Mr. Paillette expressed doubt that this would be the result to any greater extent than under the present false pretenses statute. Falsely obtaining a signature to a will would now be criminal under ORS 165.205, he said, and section 8 would not make any great departure from present law.

Chairman Burns inquired concerning the phrase "misrepresentation of fact." There could, he said, be a misrepresentation of law and suggested that the words "of fact" be deleted. Mr. Paillette replied that he had not intended to make the term as broad as the definition of "deception." Mr. Spaulding said he would oppose deleting "of fact" in section 8. Mr. Paillette suggested it would be possible to prohibit the kind of conduct section 8 was most concerned with, where there was an intent to defraud or injure, by omitting the second statement referring to a misrepresentation of fact.

Representative Elder asked what kind of a set of circumstances would be required to prove intent to defraud or knowledge that the instrument was false. Mr. Chandler replied that the proof of intent would rest entirely in the minds of the jury, and Mr. Paillette said that in most cases the kind of evidence the district attorney would have in the absence of a confession would be circumstantial.

Representative Elder expressed concern that section 8 might have a direct effect on insurance adjusters, for example, who were daily faced with the problem of obtaining signatures from clients, and adjusters could not always have all the facts surrounding every situation before the signature was obtained on the release document.

Chairman Burns suggested section 8 might more appropriately fall within the consumer protection statutes, but Mr. Chandler was of the opinion that fraudulently obtaining a signature should be a crime and should be included in the criminal code. He commented in response to Representative Elder's concern that before an injured party could prosecute an insurance adjuster or the company he represented, he would have to persuade the district attorney and in some cases the grand jury that he had a cause of action.

After further discussion, Mr. Chandler moved, seconded by Mr. Spaulding, that section 8 be approved without amendment. The motion carried. Representative Elder abstained from voting because, while he was in favor of the concept of section 8, he wanted to have an opportunity to obtain more information on the subject before voting in favor of the motion.

Next Meeting

Mr. Paillette outlined the work yet to be done on Crimes Against Property -- bad checks, credit cards, deceptive business practices, manufacture or possession of slugs for vending machines plus several minor sections. Chairman Burns indicated he would like to complete Crimes Against Property before the next full Commission meeting on November 21 and 22. The committee agreed that their next meeting would be held on November 8.

The meeting was adjourned at 3:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission