Tape 22 - Side 1 - 1 to end
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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twenty-eighth Meeting, November 19, 1970

Members Present: Senator John Burns, Chairman
Mr. Robert Chandler
Mr. Bruce Spaulding
Representative Tom Young

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

Others Present: Hon. Virgil Langtry, Oregon Court of Appeals (Appearing at the request of the Univ. of Ore. Alumni).
Mr. Lee Johnson, Attorney General
Mr. Malcolm F. Marsh, Atty. at Law, Salem (Appearing at the request of the Univ. of Ore. Alumni).
Mr. John B. Leahy, Lane County District Attorney
Mr. Joe Willis, Law Clerk, Lane County District Attorney's Off.
Mr. Bradford J. Shiley, Special Asst. to Attorney General

Agenda: Burglary & Criminal Trespass - Proposed Amendment to Final Draft

Article 1. Preliminary - Time Limitations

The meeting was called to order by the Chairman, Senator John Burns, at 1:50 p.m., Room 315, State Capitol.

BURGLARY & CRIMINAL TRESPASS - PROPOSED AMENDMENT TO FINAL DRAFT

Chairman Burns noted the presence of Judge Langtry and asked if he would like to lead off the discussion on amendments proposed to Article 15 of the Proposed Criminal Code.

Judge Langtry related that he had become interested in this matter when approached by a representative of the University of Oregon Alumni Association who asked if he would help them by giving them any advice he could. The University's interest in the criminal trespass statute stems from the desire to have some specific statute which could be utilized to terminate student or nonstudent disturbances on University property. The Proposed Criminal Code, he said, does not appear to specifically cover this type of situation. The unlawful assembly and riot provisions in the Code would be valuable and helpful and section 205, tampering with public records, and the provisions in Article 24, Obstructing Governmental Administration, would be very specific in some circumstances. However, he continued, it would seem some amendment to the second degree criminal trespass section, section 139, and the definition section, section 135, might be helpful.

Judge Langtry suggested amending section 135 (3), line 3, by changing "and" to "or" and perhaps adding some language to the effect that the person refuses to leave when so ordered. Section 139 (1) would be amended by adding after the word "premises" the language, "or who remains after being ordered to leave by an authorized person". He noted this would leave undefined the term "authorized person" and perhaps the definition section of the Article would have to contain this.

Judge Langtry pointed out that the University of Oregon is a public college and that any statute devised should be broad enough to take care of situations arising at both public and private colleges.

Chairman Burns asked Judge Langtry to amplify his comment re the inapplicability of the provisions of the Proposed Code to private colleges.

Judge Langtry replied that a provision such as that in section 205, tampering with public records, would apply to a public university but might not apply to Willamette, for example. He thought it advisable to try to get the whole subject covered in a specific criminal trespass section rather than to try to rely on other sections of the Code as substitutes for such a provision.

Chairman Burns invited Mr. Malcolm Marsh, a member of the committee appointed by the University of Oregon Alumni to study the trespass problem, to make a statement.

Mr. Marsh's basic concern was about the old, commonlaw ab initio situation--where the person is on the premises for perfectly legal reasons but something happens and the situation then changes. There must be some kind of trespass development at that time, he said, and there should be no distinction between public and private institutions.

Judge Langtry observed that if he had any criticism of Mr. Leahy's proposed amendment to section 135 it would be that it was too lengthy; he had no quarrel with the legal points raised.

Mr. Lee Johnson outlined the changes proposed by his office to the amendment proposed by Mr. Leahy:

In subsection (3) (b), line 2, delete the language "with knowledge". In line 3, delete the word "generally". In subsection (3) (c), line 2, after "being", insert "lawfully"; after "in" and before "charge", delete "lawful"; after "charge" insert a period and delete the balance of the subsection. Amend subsection (5) to read: "'Person in charge' means a person, his representative, his employe or his agent who has lawful control of the premises by ownership, tenancy, official position or other legal relationship."

Mr. Johnson explained that the word "lawfully" was inserted in (3) (c) to meet up with problems arising when an illegal direction is made. The principal problem arising under subsection (5), he said, is the determination of who is authorized to order someone off the premises.

Chairman Burns noted that the terms "lawfully" and "official position" are not defined in the draft. He asked if the language "duly authorized" should be inserted before the word "representative" in line 1 of subsection (5). Mr. Johnson did not think this modification advisable in that it would then require the representative to have a written authorization. He also reported that Mr. Leahy was a little concerned about the use of the term "lawful" in subsection (3) (c) being a matter of proof by the state. Mr. Johnson suggested that perhaps this could be made an affirmative defense by express provision.

Rep. Young referred to the language "his representative" and "his agent" contained in the subsection (5) proposed by Mr. Johnson and asked if the two terms are not synonymous. Mr. Shiley observed that the problem of relying on "agency" is that there is then a concern about the scope of authority. If he had to choose between the two terms, he felt that "representative" was probably the better word. Mr. Willis added that he had used both terms in order to make it as broad as possible to be certain all possible bases were covered thus forestalling a possible technical defense that an order had been issued by the wrong person.

Mr. Johnson believed the draft submitted by Mr. Leahy, as amended by his office, would apply to both public and private universities.

Chairman Burns understood that under the amendment proposed by Mr. Leahy, subsections (1) and (2) and (3) (a) were essentially the same as originally set out in section 135. Mr. Leahy agreed. Chairman Burns also understood that the genesis of the proposed amendment was difficulties encountered on the University of Oregon campus.

Mr. Leahy agreed, noting that the intent of the proposed amendment is to make it clear that there is a public trespass bill and that public buildings can be subject to trespass even during business hours. This, he said, brings up First Amendment problems. When reading the First Amendment cases (the Logan Valley case, the cases on which it was based, and the Tanner case), lawful protest as opposed to illegal use of a public building had been his main concern. What are the limits to peaceful, legal protest (First Amendment protected protest) as opposed to disruption of the course of business in a public building, including shopping centers and parking lots--property that is legally private and yet has substantial usage and therefore has extended First Amendment privileges.

Mr. Leahy recognized the fact that his amended section 135 was lengthy but felt that if the specific reasons for a "lawful" direction were deleted in subsection (3) (c), as proposed by Mr. Johnson, there would be a very serious risk of making the statute too broad, too vague. When his proposed amendment was drafted, language from the Logan Valley case was taken to set out three specific instances in which a specific charge or direction to leave would be lawful. This is the purpose of the language found in (3) (c). There is conduct, he explained, that would be appropriate in a corridor or on the front steps of a building that would be inappropriate in someone's office.

Chairman Burns asked if Judge Langtry's amendment to the original subsection (3) of section 135 would not take care of this situation (change "and" to "or" in line 3).

Mr. Willis replied that he was concerned about a possible attack of vagueness if the language were not more specific. The person in lawful charge should be made clear so that the trespasser knows who can tell him to get out. Guidelines should be provided, also, for the person in charge so that he knows for what reasons he can order a person from the premises. This would prevent problems where the person being evicted has purported First Amendment rights.

Chairman Burns suggested amending subsection (3) of the Proposed Code to read:

> "'Enter or remain unlawfully' means to enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public or when the actor is not otherwise licensed or privileged to do so by a person in charge."

A subsection (5) defining "person in charge" would be added.

Chairman Burns asked Mr. Willis if this amendment would meet the objection he raised. Mr. Willis replied that he would have to look at the amendment more carefully but he was afraid that it would allow the person in charge to order someone off the premises for any reason at all and that person, if he did not leave, would suffer prosecution. As soon as there was a purported First Amendment right, problems would arise and he did not think it would be possible to obtain a conviction.

Mr. Johnson directed attention to the changes he had suggested in subsection (3) (c) of Mr. Leahy's amendment and stated that he did not think the charge of vagueness to the language "lawfully directed" was correct. If the charge of vagueness would apply, however, it would apply also to the language "lawful condition" found in subsection (3) (c) of the Leahy amendment. He did not find the term "lawful" that subject to attack and repeated his suggestion that it be an affirmative defense so that the burden would be on the defendant to prove that the direction given him was not lawful.

Judge Langtry was of the opinion that the term "lawful" was an adequate standard for guidance. In the implied consent statute, for instance, the term "reasonable" has been held to be sufficient guidance for a law enforcement officer and "lawful" is as specific as is the term "reasonable".

Mr. Johnson added that if the state could prove the person issuing the order was the person in charge, then about the only defense would be whether or not the person ejected had a constitutional right to be on the premises. If he did, he would not then have been lawfully directed.

Mr. Leahy said that the concern had been that the person giving the direction have legislative guidelines as to when he can give such an order.

Chairman Burns directed attention to the language "interferes with the normal function of the premises" appearing in subsection (3) (c) of the Leahy amendment and noted the charge of vagueness could also be leveled at this language. Mr. Leahy agreed. Chairman Burns observed that as a rule the lengthier the statute, the more things available for the defense to demur against.

Mr. Paillette advised the basic definitions employed in section 135 and, in fact, most of Article 15, were based on the New York Criminal Trespass Law of 1967. He recalled that in the earlier drafts of the Article the definition of "enter or remain unlawfully" had been much longer than that adopted by the Commission. The New York statute has been upheld by the New York Supreme Court and reads as follows:

> "....A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so. A perwon who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public...."

Mr. Paillette noted New York uses the terms "unlawful" and "or other authorized person" without further definition.

Mr. Johnson was of the opinion that the crime defined in subsection (3) (b) of the proposed amendment was not nearly as important as that defined in (3) (c). The critical thing, he said, is that someone have the authority to decide when a situation has become intolerable and to then

be able to give notice and state that those not complying will face prosecution. This is the real power that must be given to both public and private institutions.

Chairman Burns recalled that Judge Langtry had suggested a slight amendment was needed in section 139, criminal trespass in the second degree. He understood that if the Leahy amendment, amending section 135, definitions, were adopted it was not thought necessary to amend section 139, the substantive provision. Mr. Leahy said this was his feeling.

Mr. Spaulding remarked that subsection (3) (b), amended as suggested by Mr. Johnson, did not read correctly. Mr. Chandler agreed and suggested amending line 3 of the subsection by deleting "that" and inserting the word "when". Mr. Johnson concurred.

Mr. Shiley, elaborating on the matter of an affirmative defense, stated that he did not think it necessary to designate it as an "affirmative defense". He thought there would be an assumption that any command given by a person in authority is lawful and if it is contested by a defendant on a First Amendment ground, he would have to come forward and prove otherwise. Mr. Paillette agreed with this approach. Mr. Johnson suggested the commentary state this when the amendment is written for the Legislature so that it would be part of the legislative history.

Chairman Burns thanked those testifying on behalf of the amendments to Article 15, Burglary and Criminal Trespass, and announced a five minute recess of the subcommittee.

Chairman Burns thought the proposals set before the subcommittee re possible amendment to section 135 and section 139 should be discussed by the subcommittee while they were still fresh in mind.

Mr. Chandler recalled that when considering this Article in subcommittee the big discussion had come on section 135 (c). He understood the amendments were offered because there was concern about the language being too vague so that prosecutors would be in the same position as with the CTDM statute. Chairman Burns also recalled wrestling with the same problems in subcommittee and thought that if the subcommittee chose to go to a lengthier draft in an attempt to get around the constitutional problem, the suggestions made by Mr. Johnson made sense. If the long subsection (3) (c) proposed by Mr. Leahy were retained, he believed the provision would be more subject to an attack of vagueness.

Mr. Chandler objected to writing legislation for specific conditions which he felt would exist for short phases of time. The present code, he said, is full of provisions written for specific purposes--provisions which have long been outdated.

Chairman Burns pointed out that it must be kept in mind that there is a great deal of polarization in respect to the problem of campus unrest and many legislators plan to introduce legislation to get at these specific problems. The subcommittee must take a balanced view and if there is a problem anywhere, the statute language should be broad enough to cover it. The statute, however, should not be specifically aimed.

Mr. Chandler much preferred the Commission draft language to be considered by the House and Senate Judiciary Committees than to have a large number of bills introduced by individual legislators as this might result in the passage of a narrow, specific statute. Mr. Paillette agreed, noting the practical advantage of amending the Code through the Commission is that the amending is then done in an orderly fashion and can be written in the form and manner of the Revised Code.

Chairman Burns suggested the subcommittee consider the amendment proposed by Mr. Leahy on a subsection-by-subsection basis. He noted that subsections (1) and (2) were the same as those in the Proposed Criminal Code; the amendment really begins with subsection (3).

Mr. Chandler recalled that one of the valid points raised by Mr. Leahy with respect to sub (3) was the problem created when a building is open for business to the public but an entrant uses the building for a purpose other than that for which it was intended. The Leahy amendment seemed to give someone the authority to specifically state that while the building is open to the public, the entrant is not conducting business in the normal manner and must leave, otherwise he will be prosecuted.

Mr. Paillette remarked that one of the good points about the Leahy amendment is that it does attempt to define the phrase "open to the public".

Chairman Burns added that the Leahy amendment attempts to put a standard into the statute, one that is consistent and applicable and not subject to attack as being arbitrary. He recalled that when prosecuting such cases, in order to effectively prosecute a trespass case it was necessary to prove notice to the entrant by some lawfully authorized person. He did not think it possible to get away from this requirement no matter how elaborate a statute is drafted.

Mr. Chandler questioned the meaning of the phrase "licensed or privileged " to remain. Mr. Spaulding agreed that it is very difficult to decide who is licensed to enter a public building, how long he is entitled to remain and whether or not he is conducting proper public business there. Mr. Paillette observed that it was as Mr. Marsh had stated, the old trespass, ab initio question in that the entrant did not originally trespass but because of subsequent activity, the initial entry becomes, in effect, a trespass. Mr. Chandler understood

the proposed amendment was intended to apply not only to the situation where the entrant did something after he legally entered the building but also to the situation where someone else did something in the building which made his staying illegal.

Mr. Paillette did not feel the Leahy proposal, amended as suggested by Mr. Johnson, would do violence to the basic proposal set out in the Proposed Criminal Code, although he did question the use of the term "agent" contained in the Johnson suggestion. The ideas proposed, while much the same as those set out in the New York statute, improve upon it in that the amendments try to define the language "open to the public".

Mr. Paillette was of the opinion that if Judge Langtry's suggested amendment were applied to subsection (3) (a) of the Leahy proposal (delete the word "and" and insert "or"), the provisions contained in subsection (3) (b) would be unnecessary.

Mr. Spaulding recalled that Chairman Burns had suggested adding the language "by a person in charge" to (3) (a). The amended paragraph would then read: "To enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public or when the entrant is not otherwise licensed or privileged to do so by a person in charge." Mr. Paillette thought this amendment would almost require an express authorization by the person in charge before someone could enter a building and he questioned this was desirable.

Mr. Paillette favored amending the Leahy proposal as follows:

Subsection (3) (a): Delete "and" and insert "or".

Subsection (3) (b): Delete the entire paragraph.

Subsection (3) (c): Delete "(c)" and insert "(b)". In line 2, after "being" insert "lawfully", after "in" delete "lawful" and after "charge" delete the comma and insert a period. Delete the balance of line 2 and the rest of the paragraph.

Subsection (4): Retain the subsection as written.

Subsection (5): Amend to read as follows:

"(5) 'Person in charge' means a person, his representative or his employe who has lawful control of premises by ownership, tenancy, official position or other legal relationship."

Chairman Burns wondered if it were manifestly clear that when the term "premises" is used it is intended to mean "premises or any part of the premises." Mr. Spaulding thought this question was answered in subsection (1), the definition of "building". Mr. Paillette referred to a letter received during the week from Mr. Leahy's office suggesting that under subsection (6) of his proposal the definition of "premises" be further amended so that it would read:

> "'Premises' includes all or any part of any building and any real property, whether privately or publicly owned."

Mr. Chandler felt the suggested amendment unnecessary as he thought the definition of "building" contained in subsection (1) said the same thing.

Chairman Burns was satisfied that the definition of "building" would cover his question and supported Mr. Paillette's approach to amend (3), accept (4), amend (5) and to accept (6) as written.

Mr. Spaulding moved the amendment and Mr. Chandler seconded the motion.

Mr. Paillette asked if it would be desirable to make the draft a little more specific with respect to offices within a building in that a license to remain in part of a building might not be a license to go somewhere else in the building. Mr. Spaulding thought this problem was covered by the provisions of subsection (1).

Chairman Burns observed that the original draft of section 135, amended as suggested by Judge Langtry, might well be the best approach; however, he continued, if a First Amendment problem is thought possible, he did not believe violence would be done to the Article by putting in a standard.

Chairman Burns restated the motion moved by Mr. Spaulding and the motion carried unanimously by voice vote.

ARTICLE 1. PRELIMINARY - TIME LIMITATIONS

Mr. Paillette noted this draft is the first technical work done on criminal procedure. The proposed draft takes a little different approach from that contained in the present statute of limitations in that it tries to shred out the felonies a little more so that there would be different limitations for different felonies. Presently there is a flat, three year limitation for all felonies, except for murder and manslaughter. The draft, he continued, is based partly on the Michigan proposal but mainly on the Model Penal Code. The Michigan code is based on the MPC but is written differently.

Section 1. Time Limitations

Mr. Paillette explained that subsection (1) of section 1 would retain the present limitations, which, in fact, is no limitation, for murder or manslaughter.

Chairman Burns asked if treason was not also in this "no time limitation" category. Mr. Paillette replied that treason is treated separately in the draft. Under existing law it is treated as any other felony and would have the three year limitation. The draft treats treason the same as a Class A felony, thus increasing the present three year limitation to six years.

Chairman Burns believed the draft approach would result in the problem of district attorneys over-indicting in order to get within a statute with a longer time limitation. He could then try to reduce the charge. When the defense attorney did not go along with a motion to reduce and the case went to trial, the prosecution could obtain an instruction on a lesser included. He asked how other code revisions resolved this problem. Mr. Paillette replied that they had not resolved it. Mr. Spaulding commented that this was the reason for including manslaughter with murder in subsection (1). This would get rid of the question of manslaughter as a lesser included offense.

Mr. Spaulding asked if there had ever been a six year limitation on criminal cases and Mr. Paillette said there had not. Mr. Chandler asked if it were not true that, as a practical matter, if an indictment could not be obtained within three years, that it would be difficult to go to trial anyway in that it would be hard to obtain witnesses, etc. Mr. Spaulding thought there might be some cases where evidence would not be available for four or five years.

Chairman Burns believed the draft approach involved a public policy question and asked if dividing the offenses into different time limitation categories was not regressive in the sense that there would be disparate parts where formerly there had been but one flat, three year limitation.

Mr. Paillette explained that the MPC approach was to provide different periods based upon a number of things. He noted the MPC Commentary on Time Limitations states:

> "To the extent that length of periods of limitation can be rationalized at all they, like penalty provisions, must be viewed as compromises...it might be said that: (a) the more serious the offense, the greater the need for deterrence and the more undesirable to offer the possibility of escape

from punishment after a short period of limitation; or, (b) the more serious the offense, the greater the likelihood that the perpetrator is a continuing danger to society, and thus the need to incapacitate him whenever he is caught...."

Chairman Burns believed that as a prosecutor he would prefer having a flat period of time for felonies and a flat period of time for misdemeanors and violations. This has been the traditional way of doing it. The more parts there are, he continued, the more it lends itself to challenge.

Rep. Young stated that he was inclined to agree with Chairman Burns except for violations--he would hate to see them hanging around for two years. Chairman Burns asked the reason for setting the period for misdemeanors for more than a year. Mr. Spaulding remarked that the present statute sets two years for misdemeanors and he did not think it had created any particular injustices.

Chairman Burns was concerned about an election of remedies problem. With a period of six months for a violation and of two years for a misdemeanor, a prosecutor who would ordinarily charge for a violation will charge for a misdemeanor if the six month period has run out. Mr. Paillette acknowledged this was a valid point and one that the A.L.I. had not discussed in any of its commentary.

Rep. Young referred to subsection (3) (a) and asked if the exception it provides is based on the MPC. Mr. Paillette advised both the MPC and Michigan have provisions similar to that set out in (3) (a). It allows prosecution to be commenced within one year after discovery of an offense involving either fraud or the breach of a fiduciary obligation, however, in no case shall the limitation be extended by more than three years. Subsection (3) (b) covers an offense by an individual while in public office and allows commencement of prosecution while the defendant is in office or within two years thereafter. Again, the period of limitation could not be extended by more than three years.

Chairman Burns commented that here, again, there is the problem of defining a "public officer" or "employe". After discussion as to whether the provisions of (3) (b) should cover employes such as the courthouse janitor or a member of a rural fire district, it was determined that the subsection aimed at employes such as the deputy sheriff, the deputy district attorney, the deputy auditor, etc., and the type of crime committed by most janitors would not be the kind that could be concealed. The type of person concerned about is the one who because of his office is in a position to conceal his embezzlement.

Mr. Chandler moved the adoption of subsection (3) (b) and the motion carried unanimously by voice vote.

Mr. Chandler moved the adoption of subsection (3) (a) as written.

Mr. Paillette, replying to a question by Mr. Spaulding, stated the provisions in (3) (a) would apply when fraud was actually discovered by an aggrieved party or a person having a legal duty to represent an aggrieved party, not to a situation where someone should have discovered the fraud, as is true in fraud in civil cases.

The subcommittee meeting was recessed for five minutes.

Mr. Chandler repeated his motion to approve subsection (3) (a) and it carried unanimously by voice vote.

Mr. Chandler moved the approval of section 1 (3) in its entirety. This motion also carried unanimously on a voice vote.

Mr. Chandler moved approval of subsection (1) of section 1. The motion carried unanimously by voice vote.

Rep. Young asked if a violation covered ordinances. Mr. Paillette said that the penalty for a violation involved a fine only, not imprisonment, so that it would not matter whether the violation involved an ordinance or a state statute if the penalty provided was a fine only. He noted, also, that strict liability applies in violations, no culpability is required.

Rep. Young moved to amend subsection (2) (a) through (e) of section 1 to provide that the periods of limitation for treason and all felonies be three years, for misdemeanors, two years and for violations, six months. He suggested the existing language in ORS 131.110, with the addition of a sub (4) to cover violations, be used. The motion carried unanimously by voice vote.

Mr. Paillette explained that an amendment to the bill for the Proposed Criminal Code should be considered in that the Code creates a new offense, the violation, not covered under ORS 131.110. Courts might have a difficult time, until the new procedural code is enacted, in determining what kind of statute applies to a violation. The subcommittee agreed that Mr. Paillette should draft a bill amending ORS 131.110 by adding a subsection (4) providing for violations. This will then be submitted to the Commission for consideration.

Section 2. Time limitations; when offense is committed.

Mr. Paillette advised the provisions in section 2 are new and simply state when an offense is committed. Chairman Burns asked if the provision would create problems with respect to instructing a jury. Mr. Spaulding understood the Proposed Criminal Code provided for complicity in criminal conduct and asked if this did not make the last phrase in section 2 (1) unnecessary.

Mr. Paillette acknowledged this might be so. Subsection (1), he said, is concerned with the accomplice who is in on part of the commission of a crime but bails out before it is completed. Article 6, section 62, Inchoate Crimes, of the Proposed Criminal Code deals with this situation with respect to conspiracy and reads:

> "For the purpose of application of ORS 131.110:
>
> "(1) Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are completed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired."

The provisions in section 2 (1) of the time limitations draft would be a little broader in that it covers things other than conspiracies.

Mr. Spaulding questioned the meaning of the phrase "if a legislative intent to prohibit a course of conduct plainly appears" set out in section 2 (1). Rep. Young agreed that this could probably be argued about forever. Chairman Burns asked the derivation of the provision. Mr. Paillette advised it was derived from the MPC and the Michigan Code, adding that the provision is new so that there have been no cases decided under it.

Chairman Burns thought the provisions contained in section 2 (1) unduly confusing and unnecessary. Mr. Spaulding concurred.

Mr. Paillette referred to MPC commentary to section 1.07, Tentative Draft No. 5, and read:

> "An 'offense is committed' either (a) when every element occurs; or (b) in the case of continuing offenses, when the course of conduct or the defendant's complicity therein terminates. ...The continuing offense provision is more difficult. The draft in effect provides a presumption against a finding that an offense is a continuing one for purposes of time limitations. The assumption is that the continuing offense exception too freely applied is inconsistent with the purpose of time limitations. [Cited: State v. Ireland (1941) and Fogel v. United States (1947)].

> In the Ireland case, the defendant, an architect, was convicted of creating a public nuisance where a structure he designed in violation of the building code collapsed 13 years after it was built. The court held that the two year statute did not apply because it was a continuing offense. This seems wrong.... To the extent that a given offense does in fact proscribe a continuing course of conduct, no violence is done to the statute of limitations. Since the conduct extends within the period of limitation, it is subject to prosecution. The defendant can be convicted only once so long as the course of conduct continues. The only danger is in allowing evidence of events long past as proof of the offense alleged to have continued within the period of limitation. Most frequently litigated is the 'continuing conspiracy'."

Rep. Young moved to delete section 2. Mr. Paillette asked if the intent was to delete the provisions of section 2 (2) also. Mr. Spaulding was under the impression there is presently a general statute relating to the measurement of time, a statute that would apply to both civil and criminal cases.

Mr. Paillette referred to ORS 174.120 and read:

> "The time within which an act is to be done, as provided in the civil procedure statutes, is computed by excluding the first day and including the last unless the last day falls upon any legal holiday or on Saturday, in which case the last day is also excluded."

This provision, he noted, applies to civil matters only. He knew of no such statute applying to criminal cases.

Chairman Burns suggested that if the lack of such a statute for criminal matters is a problem, perhaps it could be solved by amending ORS 174.120 so that it would apply to both criminal and civil cases. Mr. Paillette maintained this type of provision should be placed in the procedural code, although it could be put into another section of the Time Limitations draft. It could very easily be made a part of the section covering tolling of statute.

Rep. Young stated he was willing to amend his motion so that only the provision in section 2 (1) would be deleted. The subcommittee decided to retain the provision contained in section 2 (2) and leave it up to Mr. Paillette to place it where it would best fit in the draft.

Section 3. Prosecution; when commenced.

Mr. Chandler moved the approval of section 3.

Mr. Spaulding asked what the existing law stated as to commencing prosecution. Mr. Paillette advised that ORS 131.130 states that:

> "An action is commenced, within the meaning of ORS 131.110 and 131.120, when the indictment is found and filed with the clerk of the court or, in cases triable without indictment, when the indictment or complaint is filed or lodged in the court or with the officer having jurisdiction of the action."

There is a recent case, he continued, State v. Miller, which states that although ORS 131.130 does not mention cases commenced by filing of an information, the provision in the statute relating to indictments is held to cover the situation where indictment is waived and an information is used.

Chairman Burns directed attention to the language "warrant or other process is issued" found in section 3 and asked the meaning of the phrase "other process". Would the return of an indictment be "other process"? Mr. Spaulding's understanding of section 3 was that a prosecutor would not be permitted to file an indictment and just let it lay for a year; he would have to obtain a warrant and it would have to be executed without unreasonable delay.

Chairman Burns suggested that perhaps the legislative history on the draft should reflect the intent that a "detainer" be within the meaning of "other process". Rep. Young asked if an "indictment" would be "other process" and Chairman Burns said he did not believe so.

Mr. Spaulding pointed out that under the present statute a prosecutor is able to file an indictment and stop the running of the statute of limitations and this does provide a time during which he can negotiate with the defendant and perhaps be talked into quashing the indictment and never issuing a warrant and arresting the defendant. This would not be possible under the proposed draft.

Mr. Paillette, complying to a request by Mr. Chandler to restate his reasons for drafting section 3, stated he thought it advisable to avoid use of terms such as "indictment", "information", etc., until it was determined what language was to be used in the procedure code. His intent, he continued, was to facilitate law enforcement, not impede it, and to give adequate notice to the defendant. It seemed to him the MPC approach was a reasonable one. One of their primary concerns was notice to the defendant.

Mr. Spaulding agreed that a secret indictment is rather inconsistent with giving a defendant his due. It would be possible for a prosecutor to wait until all defense witnesses were unavailable before issuing a warrant and the defendant would not have been aware of the secret indictment which stopped the running of the statute of limitations. Mr. Paillette agreed that it seemed unfair for a prosecutor to be able to toll the statute by filing an indictment and be able to let it lay in the files. Chairman Burns observed the defendant could move to dismiss the charge because of failure to promptly prosecute. Mr. Spaulding agreed that a delay in prosecution which does not have a reasonable explanation will usually result in the charge being dismissed by almost all judges.

Rep. Young held that when a time limitation stops running it should be when a defendant receives notice. He did not favor allowing an indictment to lay around the courthouse, even though it might allow time for a settlement to be worked out with a defendant without his being exposed to the public eye.

Mr. Chandler called for the question on his motion to adopt section 3 as written. The motion carried unanimously by voice vote (Chairman Burns not present).

Section 4. Time limitations; tolling of statute.

Mr. Paillette advised the provisions of section 4 are quite different from the present statute on tolling. ORS 131.120 reads:

> "If, when the crime is committed, the defendant is out of the state, the action may be commenced within the time provided in ORS 131.110 after his coming into the state. No time during which the defendant is not an inhabitant of or usually resident within the state, or during which he secretes himself therein so as to prevent process being served upon him, is a part of the limitation prescribed in ORS 131.110."

The proposed section 4, he continued, is a little tougher on the defendant since the period of limitation does not run during any time he "is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state...." The proposal provides a three year limit, however, which is not present in the existing statute.

Chairman Burns asked why it would not be possible to utilize the language contained in the civil statute on publication. Mr. Spaulding could see nothing wrong with retaining the language in ORS 131.120.

Mr. Chandler excused from the meeting.

Mr. Paillette acknowledged the present statute has apparently caused no problem in that there are no cases to speak of in the area of time limitations.

Chairman Burns favored retention of ORS 131.120. Mr. Spaulding favored adding the three year limitation provision set out in section 4 (1) of the draft to the provisons now contained in ORS 131.120. The subcommittee agreed to have Mr. Paillette draft a new section 4 (1) following this guideline.

Chairman Burns favored deleting the provisions contained in section 4 (2) in that he thought it gave the prosecution two shots at a defendant. He believed it an election of remedies provision. Mr. Spaulding thought the provision would allow the state more time by allowing it to charge a defendant with a more serious crime (having a longer limitation) and then to reduce the charge and thus get him on an offense which would normally have been tolled.

The subcommittee agreed the redrafted section on tolling of statute should not include the provisions set out in section 4 (2) of the draft and that the new section should conform to Mr. Spaulding's suggestion set out in paragraph two on this page.

The meeting was adjourned at 4:40 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission