Chapter 135

Arraignment; Pleadings of Defendant; Proceedings Thereon

135.010

CASE CITATIONS: Miller v. Gladden, (1959) 219 Or 538, 348 P2d 44.

ATTY. GEN. OPINIONS: Arraignment in county other than one in which indictment was returned, 1946-48, p 96.

135.020

NOTES OF DECISIONS

It is essential to conviction of a felony that the defendant be arraigned and that he plead or refuse to plead. State v. Walton, (1907) 50 Or 142, 91 P 490, 13 LRA(NS) 811; State v. Donahue, (1915) 75 Or 409, 144 P 755, 147 P 548.

When defendant's guilty plea is set aside, he is enabled to plead as he chooses. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

135.110

CASE CITATIONS: State v. Waymire, (1908) 52 Or 281, 97 P 46; State v. Sullivan, (1908) 52 Or 614, 98 P 493; State v. Holloway, (1910) 57 Or 162, 110 P 397, 791; State v. Harvey, (1926) 117 Or 466, 242 P 440.

135.130

CASE CITATIONS: State v. Williams, (1904) 45 Or 314, 77 P 965, 67 LRA 166; United States v. Dunbar, (1897) 83 Fed 151.

135.140 to 135.180

ATTY. GEN. OPINIONS: Compelling defendant to appear on a traffic offense (1968) Vol 34, p 290.

135.140

ATTY. GEN. OPINIONS: Compelling appearance in inferior courts, 1954-56, p 10.

135.150

NOTES OF DECISIONS

The failure of judge to specify any sum of money does not make the undertaking void where the omission is supplied by pleadings. State v. Hohnstein, (1925) 115 Or 466, 238 P 1112.

135.180

CASE CITATIONS: United States v. Dunbar, (1897) 83 Fed 151.

135.190

CASE CITATIONS: United States v. Dunbar, (1897) 83 Fed 151.

135.310

NOTES OF DECISIONS

That the court at the time of the arraignment of a minor informed him of his right to counsel will be presumed in habeas corpus proceedings. In re Loundagin, (1929) 129 Or 652, 278 P 950.

This section is to insure that defendant has representation when he takes any important action or makes any decision of consequence at arraignment. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

FURTHER CITATIONS: Alcorn v. Gladden, (1964) 237 Or 106, 390 P2d 625; Gidley v. Gladden, (1965) 237 F Supp 477.

LAW REVIEW CITATIONS: 44 OLR 257.

135.320

NOTES OF DECISIONS

The court should not appoint inexperienced counsel in a capital case, and the guaranteed right of a fair and impartial trial is denied if such counsel is appointed. State v. Bouse, (1953) 199 Or 676, 264 P2d 800.

This section is to insure that defendant has representation when he takes any important action or makes any decision of consequence at arraignment. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

FURTHER CITATIONS: Betts v. Brady, (1942) 316 US 455, 62 S Ct 1252, 86 L Ed 1595; State v. Boor, (1961) 229 Or 49, 365 P2d 103, 1075; State v. Blank, (1965) 241 Or 627, 405 P2d 373; Gebhart v. Gladden, (1966) 243 Or 145, 412 P2d 29.

ATTY. GEN. OPINIONS: Fees of court appointed counsel, 1960-62, p 301; county public defender office, (1970) Vol 34, p 1157.

LAW REVIEW CITATIONS: 44 OLR 258.

135.330

NOTES OF DECISIONS

Prior to the 1971 amendment, the statute entrusted the determination of the amount allowable to the discretion of the trial court, and its decision would not be disturbed in the absence of abuse. State v. Simms, (1970) 3 Or App 153, 471 P2d 821, Sup Ct **review denied.**

FURTHER CITATIONS: State v. Fowler, (1960) 225 Or 201, 357 P2d 279; United States v. Dillon, (1965) 346 F2d 633; State v. Apodaca, (1969) 252 Or 345, 449 P2d 445; Keene v. Jackson County, (1970) 3 Or App 551, 474 P2d 777, Sup Ct **review denied;** cert. denied, 402 US 995.

ATTY. GEN. OPINIONS: Fees of court appointed counsel, 1960-62, p 301; county public defender office, (1970) Vol 34, p 1157.

LAW REVIEW CITATIONS: 44 OLR 258, 270; 45 OLR 21; 47 OLR 181; 50 OLR 133.

135.340

NOTES OF DECISIONS

No demurrer can be taken to an indictment on the ground that defendant is not truly named; if he is misnamed, he must correct the mistake when called upon to plead. United States v. Howard, (1871) 1 Sawy 507, Fed Cas No. 15,402.

FURTHER CITATIONS: State v. Kibler, (1969) 1 Or App 208, 461 P2d 72.

135.350

NOTES OF DECISIONS

Where there was a journal entry showing the arraignment, a clerk's memorandum purporting to show that defendant stated his name to be another than that under which he was indicted was incompetent. State v. Louie Hing, (1915) 77 Or 462, 151 P 706.

FURTHER CITATIONS: State v. Fetsch, (1915) 85 Or 45, 165 P 1179.

135.410 to 135.440

LAW REVIEW CITATIONS: 2 EL 273.

135.410

NOTES OF DECISIONS

The postponement carries over with it defendant's right to move to set aside, demur or plead; it cannot prejudice defendant in any way. State v. Pool, (1890) 20 Or 150, 25 P 375.

An extension of the time to plead is an automatic extension to do those other things that the statutes provide may be done in answer to the indictment or information. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

FURTHER CITATIONS: State v. Smith, (1899) 33 Or 483, 55 P 534; State v. Keep, (1917) 85 Or 265, 166 P 936.

135.420

NOTES OF DECISIONS

Within the time allowed by the court to answer the indictment, defendant may move to set it aside. State v. Pool, (1890) 20 Or 150, 25 P 375; State v. Smith, (1899) 33 Or 483, 55 P 534.

Where defendant demurs without filing motion to set aside within time allowed by the court to answer indictment, he is precluded from taking objection for which a motion is otherwise appropriate. State v. Smith, (1899) 33 Or 483, 55 P 534; State v. McElvain, (1899) 35 Or 365, 58 P 525; State v. Swank, (1921) 99 Or 571, 195 P 168.

This section declares what the answer may be if time is allowed defendant to answer. State v. Pool, (1890) 20 Or 150, 25 P 375.

The postponement carries over with it defendant's right to move to set aside, demur or plead; it cannot prejudice defendant in any way. Id.

An extension of the time to plead is an automatic extension to do those other things that the statutes provide may be done in answer to the indictment or information. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

135.430

NOTES OF DECISIONS

A plea of insanity is not proper. State v. Branton, (1899) 33 Or 533, 56 P 267.

A plea in abatement is not authorized. State v. Gilliam, (1912) 62 Or 136, 124 P 266.

A motion to strike out part of an information is not proper. State v. Conklin, (1906) 47 Or 509, 84 P 482.

A stipulation admitting facts but denying crime is in effect a plea of not guilty. State v. Sullivan, (1908) 52 Or 614, 68 P 493.

FURTHER CITATIONS: State v. Standard, (1962) 232 Or 333, 375 P2d 551; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct **review denied.**

135.510 to 135.560

LAW REVIEW CITATIONS: 2 EL 274.

135.510

NOTES OF DECISIONS

A motion to set the indictment aside will not lie on any other ground than those prescribed by this section. State v. Whitney, (1879) 7 Or 386; State v. Kelliher, (1907) 49 Or 77, 88 P 867.

The requirement that the indictment be indorsed with the names of the witnesses examined before the grand jury is mandatory. State v. Andrews, (1899) 35 Or 388, 58 P 765.

The effect of prescribing the grounds upon which an indictment may be set aside is to limit the disqualification of grand jurors to such grounds. United States v. Mitchell, (1905) 136 Fed 896.

In a federal court this section is not controlling. Jones v. United States, (1908) 162 Fed 417.

FURTHER CITATIONS: State v. Justus, (1883) 11 Or 178, 8 P 337; State v. Pool, (1890) 20 Or 150, 25 P 375; State v. Gilliam, (1912) 62 Or 136, 124 P 266; United States v. Brown, (1871) 1 Sawy 531, Fed Cas No. 14, 671; State v. Waterhouse, (1957) 209 Or 424, 307 P2d 327; State v. McDonald, (1962) 231 Or 24, 361 P2d 1001; State v. Guse, (1964) 237 Or 479, 39 P2d 257; State v. Tucker, (1969) 252 Or 597, 451 P2d 471.

LAW REVIEW CITATIONS: 3 OLR 290, 306; 4 WLJ 174, 175; 5 WLJ 134.

135.520

NOTES OF DECISIONS

Where defendant demurs without filing motion to set aside within time allowed by the court to answer indictment, he is precluded from taking objection for which a motion is otherwise appropriate. State v. Smith, (1899) 33 Or 483, 55 P 534; State v. McElvain, (1899) 35 Or 365, 58 P 525; State v. Swank, (1921) 99 Or 571, 195 P 168.

A postponement carries over with it the defendant's right to make a motion to set aside indictment. State v. Pool, (1890) 20 Or 150, 25 P 375.

An objection that the indictment was not found and returned by the grand jury in the manner provided by statute is waived when not taken advantage of by motion to set aside the indictment. State v. Reinhart, (1895) 26 Or 466, 38 P 822.

An objection on appeal to a complaint in a recorder's court that it did not have indorsed thereon the names of the witnesses examined is tantamount to a motion to set aside the complaint and such motion is waived by interposing a demurrer. Gue v. Eugene, (1909) 53 Or 282, 100 P 254.

An extension of the time to plead is an automatic extension to do those other things that the statutes provide may be done in answer to the indictment or information. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

FURTHER CITATIONS: State v. Gauthier, (1925) 113 Or 297, 231 P 141; State v. Slim, (1932) 141 Or 174, 17 P2d 314.

135.530

NOTES OF DECISIONS

Indictment for murder in the first degree was properly resubmitted to the grand jury at the instance of the district attorney after capital punishment was abolished by former constitutional amendment. Ex parte Jung Shing, (1915) 74 Or 372, 145 P 637.

FURTHER CITATIONS: State v. Wright, (1927) 122 Or 377, 257 P 699, 259 P 298.

135.540

NOTES OF DECISIONS

Where an indictment is set aside on motion of the district attorney and case resubmitted to grand jury, the bail is not answerable to a new indictment. Hyde v. Cross, (1894) 25 Or 543, 37 P 59.

FURTHER CITATIONS: Ex parte Jung Shing, (1915) 74 Or 372, 145 P 637.

135.560

CASE CITATIONS: Ex parte Jung Shing, (1915) 74 Or 372, 145 P 637; State v. Wright, (1927) 122 Or 377, 257 P 699, 259 P 298.

135.610 to 135.700

LAW REVIEW CITATIONS: 2 EL 274.

135.610

NOTES OF DECISIONS

The demurrer is to be made subsequent to motion to set aside indictment. State v. Smith, (1899) 33 Or 483, 55 P 534.

The right of the state to appeal under ORS 138.060 is not limited to cases in which a demurrer is filed pursuant to this section and ORS 135.620. State v. Berry, (1955) 204 Or 69, 267 P2d 993, 267 P2d 995, 282 P2d 344, 282 P2d 347.

Use of a complaint rather than a Uniform Traffic Citation is not a defect such as can be reached by demurrer. State v. Powell, (1962) 233 Or 71, 377 P2d 7.

An extension of the time to plead is an automatic extension to do those other things that the statutes provide may be done in answer to the indictment or information. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

FURTHER CITATIONS: State v. Sullivan, (1908) 52 Or 614, 98 P 493; State v. Keep, (1917) 85 Or 265, 166 P 936; State v. Holland, (1954) 202 Or 656, 277 P2d 386; State v. Robinson, (1959) 217 Or 612, 343 P2d 886; State v. Hopkins, (1961) 227 Or 395, 362 P2d 378; State v. Tucker, (1969) 252 Or 597, 451 P2d 471.

135.620

NOTES OF DECISIONS

The state's failure at the time to object to an oral demurrer waived the requirements of this section. State v. Tucker, (1969) 252 Or 597, 451 P2d 471.

FURTHER CITATIONS: State v. Holland, (1954) 202 Or 656, 277 P2d 386; State v. Hopkins, (1961) 227 Or 395, 368 P2d 378.

135.630

NOTES OF DECISIONS

Failure to demur under subsection (2) waives all objections concerning the sufficiency of the indictment as to definiteness and certainty. State v. Holland, (1954) 202 Or 656, 277 P2d 386; State v. Hunt, (1970) 3 Or App 634, 475 P2d 596, Sup Ct **review denied.**

If a crime can be committed by more than one person, two or more persons may be jointly indicted for the commission of such a crime. State v. Berry, (1955) 204 Or 69, 267 P2d 993, 267 P2d 995, 282 P2d 344, 282 P2d 347.

Where it does not appear on the face of the indictment that the various crimes charged could not be part of the same transaction, a demurrer to the indictment must be overruled and, if some counts are to be eliminated, it must be done on trial. State v. Clipston, (1970) 3 Or App 313, 473 P2d 682.

The indictment did not charge more than one crime of nonsupport, but alleged several charges for the same act or transaction. State v. Tucker, (1969) 252 Or 597, 451 P2d 471.

FURTHER CITATIONS: State v. Waterhouse, (1957) 209 Or 424, 307 P2d 327; State v. Hopkins, (1961) 227 Or 395, 362 P2d 378; State v. Foster, (1961) 229 Or 293, 366 P2d 896; State v. Mims, (1963) 235 Or 540, 385 P2d 1002; State v. Anderson, (1965) 242 Or 457, 410 P2d 230; State v. Green, (1966) 245 Or 319, 422 P2d 272; State v. Katzberg, (1967) 247 Or 296, 428 P2d 170; State v. Barnett, (1967) 248 Or 614, 433 P2d 1018; State v. Sieckman, (1968) 251 Or 259, 445 P2d 599; State v. Leaton, (1970) 3 Or App 475, 474 P2d 768; State v. Freeman, (1971) 4 Or App 627, 481 P2d 638; State v. House, (1971) 5 Or App 519, 485 P2d 33, Sup Ct **review allowed.**

135.640

NOTES OF DECISIONS

1. In general
2. Charging more than one crime
3. Jurisdiction
4. Sufficiency of facts to constitute crime

1. In general

The objection that indictment does not conform to statutory requirements is waived by failure to demur. State v. Bruce, (1873) 5 Or 68, 20 Am Rep 734; State v. Du Bois, (1944) 175 Or 341, 153 P2d 521.

Objections which are exclusively to be taken by demurrer are waived by pleading to the merits. State v. Hopkins, (1961) 227 Or 395, 362 P2d 378; State v. Freeman, (1971) 4 Or App 627, 481 P2d 638.

An objection that an indictment for obtaining money by false pretenses does not sufficiently describe the false token must be taken by demurrer. State v. Bloodsworth, (1893) 25 Or 83, 34 P 1023.

By demurring to the complaint only on the ground that it does not state facts sufficient to constitute a crime, the defendant waives the objection that the facts are not set forth with sufficient particularity. State v. Goodall, (1916) 82 Or 329, 160 P 595.

Objection to the failure of an indictment to describe specifically the property which an accused is charged with intent to injure is waived where defendant did not demur. State v. Estabrook, (1939) 162 Or 476, 91 P2d 838.

The failure of indictment to set forth particular acts

constituting the offense charged is waived by failing to demur. State v. Smith, (1948) 182 Or 497, 188 P2d 998.

2. Charging more than one crime

The objection that more than one crime is charged is waived by failure to demur. State v. Jarvis, (1890) 18 Or 360, 23 P 251; State v. Lee, (1899) 33 Or 506, 56 P 415; State v. Carlson, (1901) 39 Or 19, 62 P 1016, 1119; State v. Reyner, (1907) 50 Or 224, 91 P 301.

3. Jurisdiction

An objection to the jurisdiction of the justice of the peace to try a prosecution for cruelty to animals may be first taken on appeal. State v. Goodall, (1916) 82 Or 329, 160 P 595.

4. Sufficiency of facts to constitute crime

The objection that the facts stated do not constitute a crime, may be taken for the first time in the appellate court and is not waived by failing to demur. State v. Mack, (1891) 20 Or 234, 25 P 639; State v. Lawrence, (1891) 20 Or 236, 25 P 638; State v. Martin, (1909) 54 Or 403, 100 P 1106, 103 P 512; State v. Hunt, (1970) 3 Or App 634, 475 P2d 596, Sup Ct **review denied.**

The objection that the facts stated in the indictment do not constitute a crime is not waived by failure to demur or move in arrest of judgment. State v. Lawrence, (1891) 20 Or 236, 25 P 638; State v. Martin, (1909) 54 Or 403, 100 P 1106, 103 P 512.

Failure of an indictment to state facts constituting a crime may be taken advantage of at the trial under a plea of not guilty. State v. Reyner, (1907) 50 Or 224, 91 P 301.

The objection that the facts stated do not constitute a crime is not waived by failure to demur to the indictment. State v. Estabrook, (1939) 162 Or 476, 91 P2d 838.

A motion to dismiss, because the indictment failed to state facts sufficient to constitute a crime, made after the state rested is permissible. State v. Zimmerlee, (1971) 5 Or App 253, 483 P2d 111.

FURTHER CITATIONS: State v. Miller, (1926) 119 Or 409, 243 P 72; State v. Berry, (1955) 204 Or 69, 267 P2d 993, 267 P2d 995, 282 P2d 344, 282 P2d 347.

LAW REVIEW CITATIONS: 37 OLR 85.

135.670

NOTES OF DECISIONS

If demurrer is upheld on appeal, the trial court retains discretion as to resubmission of the cause and such discretion is only subject to review for abuse. State v. Eddy, (1904) 46 Or 625, 81 P 94, 82 P 707.

When an indictment is dismissed and the matter resubmitted, the grand jury is free to indict for any crime of which it believes the defendant guilty. State v. Nichols, (1964) 236 Or 521, 388 P2d 739.

The words, "is a bar to another action for the same crime...", refer to a subsequent proceeding and not to a proceeding interrupted by ineffective legal action. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

FURTHER CITATIONS: State v. House, (1971) 5 Or App 519, 485 P2d 33, Sup Ct **review allowed.**

135.680

CASE CITATIONS: State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

135.690

CASE CITATIONS: State v. McDonald, (1961) 231 Or 24, 361 P2d 1001; State v. House, (1971) 5 Or App 519, 485 P2d 33, Sup Ct **review allowed.**

135.700

NOTES OF DECISIONS

Conviction was reversed where record failed to show that plea was entered after demurrer was overruled. State v. Walton, (1907) 50 Or 142, 91 P 490, 13 LRA(NS) 811.

135.810

NOTES OF DECISIONS

The plea is to be made subsequent to motion to set indictment aside. State v. Smith, (1899) 33 Or 483, 55 P 534.

An extension of the time to plead is an automatic extension to do those other things that the statutes provide may be done in answer to the indictment or information. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

FURTHER CITATIONS: State v. Sullivan, (1908) 52 Or 614, 98 P 493.

135.820

NOTES OF DECISIONS

1. In general
2. Guilty
3. Not guilty
4. Former jeopardy

1. In general

A plea of insanity is improper. State v. Branton, (1899) 33 Or 533, 56 P 267.

A plea in abatement is not a proper pleading. State v. Gilliam, (1912) 62 Or 136, 124 P 266.

Allowance of a motion in arrest of judgment does not act as an acquittal, and the entire proceedings may begin de novo. State v. Fowler, (1960) 225 Or 201, 357 P2d 279.

2. Guilty

A plea of guilty waives all defenses that could have been made at the trial. Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614, cert. denied, 379 US 947.

A plea of guilty is a judicial confession and comes within the established rule that the U.S. Constitution stands as a bar against the conviction of any person in an American court by means of a coerced confession. Dorsciak v. Gladden, (1967) 246 Or 233, 425 P2d 177.

The evidence did not support petitioner's allegation that his plea of guilty was coerced. Alcorn v. Gladden, (1964) 237 Or 106, 390 P2d 625.

When an involuntary confession was secured from the defendant and subsequently he pleaded guilty to the crime confessed, the plea will be presumed tainted by the confession and considered involuntary until the state has overcome such presumption. Dorsciak v. Gladden, (1967) 246 Or 233, 425 P2d 177.

3. Not guilty

Self-defense may be proved under plea of not guilty. State v. Steidel, (1921) 98 Or 681, 194 P 854.

4. Former jeopardy

The failure to plead former jeopardy constitutes a waiver of former jeopardy as a defense. State v. Monk, (1953) 199 Or 165, 260 P2d 474; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614, cert. denied, 379 US 947.

A plea of former jeopardy is not a plea to the merits.

State v. Garrett, (1961) 228 Or 1, 363 P2d 762; Barnett v. Gladden (dissenting opinion), (1964) 237 Or 76, 390 P2d 614, cert. denied, 379 U.S. 947.

There is no right of the state to appeal from a judgment sustaining a plea of former jeopardy. State v. Garrett, (1961) 228 Or 1, 363 P2d 762.

A plea of former conviction to a charge of carrying a weapon after prior guilt of a felony, was properly rejected where the conviction had been for the prior felony. State v. Wood, (1948) 183 Or 650, 195 P2d 703.

Defendant's plea of former jeopardy was properly rejected. State v. Unsworth, (1965) 240 Or 453, 402 P2d 507, cert. denied, 382 US 1014.

FURTHER CITATIONS: State v. Howe, (1895) 27 Or 138, 44 P 672; State v. Keep, (1917) 85 Or 265, 166 P 936; State v. Paquin, (1962) 229 Or 555, 368 P2d 85; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct **review denied;** State v. Miller, (1971) 5 Or App 501, 484 P2d 1132.

135.830

NOTES OF DECISIONS

The defense of a former conviction or acquittal must be raised at the trial to be available; it cannot be first raised on a motion for a new trial. State v. Houghton, (1904) 45 Or 110, 75 P 887.

The defense of former acquittal is waived where not taken advantage of at the proper time by a plea in bar to a second complaint. Gue v. Eugene, (1909) 53 Or 282, 100 P 254.

It is insufficient where transcript shows only that plea of former conviction was filed but fails to show that plea was read to court and recorded. State v. Holloway, (1910) 57 Or 162, 110 P 397, 791.

Proof that a plea was entered may not be made by a stenographer's statement preceding his report of the testimony. State v. Keep, (1917) 85 Or 265, 267, 166 P 936.

A plea of former conviction or acquittal to be sustained must be for the same identical act and crime. State v. McDonald, (1961) 231 Or 48, 365 P2d 494, cert. denied, 370 US 903, 82 S Ct 1247, 8 L Ed 2d 399.

Plea of former conviction was insufficient in form and substance. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173.

A statement of counsel during the trial, that he would enter a plea of former jeopardy on the facts which would prevent a prosecution of the offense at that time, did not meet the requirements of this section. State v. Nodine, (1927) 121 Or 567, 256 P 387.

FURTHER CITATIONS: State v. Howe, (1895) 27 Or 138, 44 P 672; State v. Young, (1927) 122 Or 257, 257 P 806; State v. Garrett, (1961) 228 Or 1, 363 P2d 762; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct **review denied.**

135.840

NOTES OF DECISIONS

A docket entry showed that a plea of guilty was interposed by the defendant in person when it recited that defendant appeared in person, as well as by his attorney, and pleaded guilty. Curran v. State, (1909) 53 Or 154, 99 P 420.

Circuit judge may accept plea of guilty in county other than that in which indictment was returned. Alexander v. Gladden, (1955) 205 Or 375, 288 P2d 219.

Subsection (2) was a confirmation, not a grant, of power. Id.

Requirements of a written request and notice to district attorney are not jurisdictional and can be waived by district attorney. Id.

Defendant's plea of guilty was entered freely and voluntarily and without any coercion. Barber v. Gladden, (1963) 220 F Supp 308, cert. denied, 84 S Ct 1654.

FURTHER CITATIONS: State v. Kingsley, (1931) 137 Or 305, 321, 2 P2d 3, 3 P2d 113.

ATTY. GEN. OPINIONS: Circuit judge accepting plea of guilty in county other than that in which indictment was returned, 1946-48, p 96.

135.850

NOTES OF DECISIONS

The question whether accused may withdraw his plea of guilty and interpose a plea of not guilty rests in the judicial discretion of the trial court, which will not be disturbed on review unless abused. Curran v. State, (1909) 53 Or 154, 99 P 420; State v. Lewis, (1925) 113 Or 359, 230 P 543, 232 P 1013; State v. Wiley, (1933) 144 Or 251, 24 P2d 1030; State v. Thomson, (1954) 203 Or 1, 278 P2d 142; State v. Little, (1955) 205 Or 659, 288 P2d 446, 290 P2d 802, cert. denied, 350 US 975, 76 S Ct 454, 100 L Ed 845; State v. Boor, (1961) 229 Or 49, 365 P2d 103, 1075; State v. Burnett, (1961) 228 Or 556, 365 P2d 1060.

Motion for withdrawal of plea of guilty should be supplemented by affidavit denying guilt or showing facts relied upon by defendant. State v. Wiley, (1933) 144 Or 251, 24 P2d 1030.

A withdrawn plea cannot be admitted in evidence in a subsequent trial involving the crime for which the plea was made. State v. Thomson, (1954) 203 Or 1, 278 P2d 142.

It is not error to refuse leave to withdraw the plea if defendant fully understood his rights, the nature of the charge against him, and the consequence of such a plea. State v. Burnett, (1961) 228 Or 556, 365 P2d 1060.

Court did not abuse discretion in refusing to allow withdrawal of plea of guilty. Curran v. State, (1909) 53 Or 154, 99 P 420; State v. Lewis, (1925) 113 Or 359, 230 P 543, 232 P 1013; State v. Wiley, (1933) 144 Or 251, 24 P2d 1030; State v. Little, (1955) 205 Or 659, 288 P2d 446, 290 P2d 802, cert. denied, 350 US 975, 76 S Ct 454, 100 L Ed 845.

A motion to withdraw a plea of guilty entered voluntarily with full knowledge of its meaning and possible consequences was not arbitrarily denied. State v. Gidley, (1962) 231 Or 89, 371 P2d 992.

FURTHER CITATIONS: State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

135.860

NOTES OF DECISIONS

Defendant's plea of not guilty denies every material allegation in the indictment; before conviction the state must establish every material allegation. State v. Young, (1908) 52 Or 227, 96 P 1067, 132 Am St Rep 689, 18 LRA(NS) 688; State v. Kingsley, (1931) 137 Or 305, 321, 2 P2d 3, 3 P2d 113.

A proceeding for contempt being quasi criminal in character, a plea of not guilty necessarily puts in issue all the material allegations of the affidavit charging the offense. State v. Lavery, (1897) 31 Or 77, 49 P 852.

135.870

NOTES OF DECISIONS

1. In general

The defendant has the right under the plea of not guilty to present every defense that he may have, including self defense and insanity. State v. Davis, (1914) 70 Or 93, 140 P 448.

Evidence that court of concurrent jurisdiction had prior

jurisdiction of the cause may be given under this section. State v. Young, (1927) 122 Or 257, 257 P 806.

The provision requiring notice of intention to present insanity defense was not unconstitutional as denying due process of law. State v. Wallace, (1942) 170 Or 60, 131 P2d 222.

Evidence of defendant's mental condition at time of giving confession was not admissible where no prior notice was given or good cause shown for failure to give prior notice. State v. Schleigh, (1957) 210 Or 155, 310 P2d 341.

Evidence of defendant's mental condition is not admissible for any purpose unless prior notice is given or good cause shown for failure to give prior notice. Id.

2. Insanity

(1) Prior to 1971 amendment. This section applied whether insanity was to be employed as defense, to reduce degree of crime or to mitigate the punishment. State v. Wallace, (1942) 170 Or 60, 131 P2d 222; State v. Jensen, (1957) 209 Or 239, 289 P2d 687, 296 P2d 618.

The apparent purpose of the phrase "insanity or mental defect" was to make sure that the section should require the giving of notice where mental disease was to be shown even though it was not of such character as to constitute insanity. State v. Wallace, (1942) 170 Or 60, 131 P2d 222.

The provision of this section as to insanity was a limitation upon the defendant only. Id.

"Insanity or mental defect" did not include intoxication, drugs or the like. State v. Schleigh, (1957) 210 Or 155, 310 P2d 341.

FURTHER CITATIONS: State v. Branton, (1899) 33 Or 533, 56 P 267; State v. Keep, (1917) 85 Or 265, 166 P 936; State v. Avent, (1956) 209 Or 181, 302 P2d 549; State v. Unsworth, (1963) 235 Or 234, 384 P2d 207; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614; Schildan v. Gladden, (1967) 246 Or 326, 424 P2d 240; State v. Smith, (1967) 248 Or 56, 426 P2d 463; State v. Bostrom, (1970) 2 Or App 466, 469 P2d 645; State v. Lemery, (1970) 3 Or App 339, 473 P2d 146, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 49 OLR 15, 229; 50 OLR 44.

135.880

NOTES OF DECISIONS

An acquittal by the direction of the court after the testimony of the state is concluded, on the ground that the indictment is fatally defective, will not support a plea of former jeopardy. State v. Littschke, (1895) 27 Or 189, 40 P 167.

FURTHER CITATIONS: State v. Young, (1927) 122 Or 257, 257 P 806.

LAW REVIEW CITATIONS: 18 OLR 36.

135.890

NOTES OF DECISIONS

The discharge of defendant upon what in effect was a demurrer will not bar another prosecution. Portland v. Stevens, (1947) 180 Or 514, 178 P2d 175.

If jeopardy is annulled for any reason, including the reasons set forth in this section, the proceedings stand on the same footing as if the defendant had never been in jeopardy. State v. Jones, (1965) 240 Or 546, 402 P2d 738.

FURTHER CITATIONS: State v. Young, (1927) 122 Or 257, 257 P 806; United States v. Farwell, (1948) 76 F Supp 35 (Alaska).

135.900

NOTES OF DECISIONS

Where a horse, saddle and bridle are stolen by defendant from the same person at the same time and place, a conviction of larceny of the saddle and bridle will prevent a subsequent prosecution for stealing the horse. State v. McCormack, (1880) 8 Or 236.

Where on an indictment for murder defendant is convicted of manslaughter he cannot thereafter be tried for murder, although a new trial is granted. State v. Steeves, (1896) 29 Or 85, 43 P 947.

FURTHER CITATIONS: United States v. Farwell, (1948) 76 F Supp 35 (Alaska); State v. Carlton, (1963) 233 Or 296, 378 P2d 557.