Chapter 161

General Provisions

161.015

NOTES OF DECISIONS

1. Person

Under former similar statute a municipality was a person within a meaning of a statute allowing a person to bring action against nuisance. City of Roseburg v. Abraham, (1880) 8 Or 509.

Under former similar statute there could be a criminal libel against a corporation where statute used the word "person." State v. Hosmer, (1914) 72 Or 57, 142 P 581, 814.

161.025

NOTES OF DECISIONS

1. Under former similar statute

A statute was to be construed according to the fair import of its terms with a view to effect its object and promote justice, and not strictly, as required at common law. State v. Brown, (1879) 7 Or 186, 210; State v. Turner, (1898) 34 Or 173, 181, 55 P 92, 56 P 645; State v. Dunn, (1909) 53 Or 304, 99 P 278, 100 P 258; State v. Collis, (1966) 243 Or 222, 413 P2d 53; State v. Gann, (1969) 254 Or 549, 463 P2d 570.

The statute did not allow enlargement of a statute by construction nor extension by implication. Kirk v. Farmers' Union Grain Agency, (1922) 103 Or 43, 202 P 731; State v. Brantley, (1954) 201 Or 637, 271 P2d 668.

The intent of the legislature had to be followed as far as possible in construing a statute. Oregon, Calif. & E. R. Co. v. Blackmer, (1936) 154 Or 388, 59 P2d 694.

The statute abrogated the common-law rule that criminal statutes must be strictly construed in favor of the accused. State v. Anthony, (1946) 179 Or 282, 169 P2d 587, cert. denied, 330 US 826, 67 S Ct 865, 91 L Ed 1,276.

FURTHER CITATIONS: Varley v. Consol. Tbr. Co., (1943) 172 Or 157, 139 P2d 584; State v. Opie, (1946) 179 Or 187, 170 P2d 736; State v. Moore, (1951) 192 Or 39, 233 P2d 253; McKee v. Foster, (1959) 219 Or 322, 347 P2d 585; State v. Gilmore, (1964) 236 Or 349, 388 P2d 451; State v. Sisney, (1968) 250 Or 198, 440 P2d 372; State v. Fogle, (1969) 254 Or 268, 459 P2d 873; State v. Jones, (1971) 4 Or App 447, 479 P2d 1020.

ATTY. GEN. OPINIONS: Construction of "obstructed visibility," 1958-60, p 63; construing platting statutes, 1962-64, p 188; construing motor vehicle anti-noise law, 1966-68, p 360; regulating protective headgear of motorcyclists on private property, 1966-1968, p 548; construing Anti-Price Discrimination Law, (1970) Vol 35, p 393.

161.035

NOTES OF DECISIONS

A former statute similar to subsection (4) had the same effect as a savings clause in a repealing Act. Ibach v. Jackson, (1934) 148 Or 92, 35 P2d 672.

FURTHER CITATIONS: State v. Holland, (1954) 202 Or 656, 277 P2d 386.

161.045

ATTY. GEN. OPINIONS: Right of convict to veterans' bonus, 1920-22, p 501.

161.085

NOTES OF DECISIONS

1. Under former similar statute

(1) Wilfully. "Wilfully" was equivalent to "knowingly." Wong v. City of Astoria, (1886) 13 Or 538, 11 P 295; State v. Nease, (1905) 46 Or 433, 80 P 897.

"Wilfully" meant with a purpose or willingness to commit the act or omission. State v. Nease, (1905) 46 Or 433, 80 P 897.

Shooting a trespassing cow which was trying to break into hay corral was for sufficient cause and thus not wanton. State v. Klein, (1920) 98 Or 116, 193 P 208.

An information which charges that a person "wilfully and unlawfully" performed an act is equivalent to alleging that he "knowingly" did so. State v. Hulsey, (1970) 3 Or App 64, 471 P2d 812.

(2) With malice. The word "maliciously" was broader than term "wilfully" and necessarily included it. Kellogg v. Ford, (1914) 70 Or 213, 139 P 751.

The killing of trespassing animal was not malicious when there was no evidence that defendant knew or had hostility for owner. State v. Klein, (1920) 98 Or 116, 193 P 208.

The word "malice" did not necessarily mean that which proceeds from a hateful or revengeful disposition; if the conduct was unjustifiable and caused the injury complained of, malice in law would be implied. Roberts v. Cohen, (1922) 104 Or 177, 206 P 293.

An act which had a tendency to vex, injure or annoy another was within the definition of malice. State v. Metcalf, (1929) 129 Or 577, 596, 278 P 974.

It was improper to use the statutory definition of malice in a felony murder prosecution. State v. Smith, (1969) 1 Or App 153, 458 P2d 687, Sup Ct review denied.

(3) Wrongfully. "Wrongfully" meant that the act was done in violation of right, or without authority of law. State v. Nease, (1905) 46 Or 433, 80 P 897.

(4) Signature. A printed signature attached to an interest coupon payable to bearer was sufficient. Toon v. Wapinitia Irr. Co., (1926) 117 Or 374, 243 P 554.

Signature of testatrix was sufficient where she held pen but her hand was guided by another. In re Estate of Heaverne, (1926) 118 Or 308, 246 P 720.

FURTHER CITATIONS: McHargue v. Calchina, (1915) 78 Or 326, 336, 153 P 99; Peterson v. Cleaver, (1928) 124 Or 547, 265 P 428; State v. Pugh, (1935) 151 Or 561, 51 P2d 827; Linkhart v. Savely, (1950) 190 Or 484, 227 P2d 187; State v. Rice, (1956) 206 Or 237, 291 P2d 1019; State v. Pac. Powder Co., (1961) 226 Or 502, 360 P2d 530, 83 ALR2d 1111.

ATTY. GEN. OPINIONS: Applicability of criminal statutes using word "person" to municipality, 1930-32, p 630; use by judge of rubber stamp in affixing signature, 1940-42, p 265; judge writing signature in pencil, 1940-42, p 265; use of mechanical device for signing checks, 1940-42, p 418; fine as real or personal property, 1950-52, p 40.

LAW REVIEW CITATIONS: 16 OLR 93; 17 OLR 289.

161.125

NOTES OF DECISIONS

1. Under former similar statute

In determining whether a killing was done with deliberation or premeditation, the jury could consider the voluntary intoxication of defendant in connection with the facts generally. State v. Zorn, (1892) 22 Or 591, 30 P 317; State v. Weaver, (1899) 35 Or 415, 58 P 109.

Drunkenness did not excuse accused, but it could be considered by the jury in determining the purpose, motive, or intent with which he committed the crime, to fix the degree of guilt. State v. Zorn, (1892) 22 Or 591, 30 P 317; State v. Blodgett, (1907) 50 Or 329, 92 P 820.

Voluntary intoxication could not reduce a homicide to manslaughter. State v. Weaver, (1899) 35 Or 415, 58 P 109; State v. Morris, (1917) 83 Or 429, 163 P 567.

Where there was evidence tending to show that accused in consequence of drunkenness was insane and deprived of the capacity for deliberation and premeditation, argument of the district attorney ridiculing the plea of insanity was held to be reversible error. State v. Blodgett, (1907) 50 Or 329, 92 P 820.

In prosecution for assault with intent to commit rape, court properly refused to instruct that defendant had drunk so much liquor that commission of acts was impossible without consent of prosecutrix. State v. Melchor, (1936) 155 Or 225, 62 P2d 829.

Intoxication meant intoxication from the use of alcohol, drugs or any other toxic substance. State v. Roisland, (1969) 1 Or App 68, 459 P2d 555.

In a specific intent case, where the evidence warranted it and the jury had been clearly instructed on the necessity for proof of intent, it was not error to use an instruction based on the whole of the statute. State v. Matinka, (1970) 2 Or App 499, 468 P2d 903, Sup Ct **review denied.**

FURTHER CITATIONS: Leland v. State, (1951) 343 US 790, 72 S Ct 1002, 96 L Ed 1302, affirming 190 Or 598, 227 P2d 785; State v. Commedore, (1964) 237 Or 348, 391 P2d 644; State v. Abel, (1965) 241 Or 465, 406 P2d 902.

161.150

NOTES OF DECISIONS

Under former similar statute as a general rule, the least degree of concert or collusion between the parties to an illegal transaction made the act of one of them the act of all. State v. Fichter, (1961) 226 Or 526, 360 P2d 278; State v. O'Donnell, (1962) 229 Or 487, 367 P2d 445; State v. Cantrell, (1970) 1 Or App 454, 463 P2d 593.

FURTHER CITATIONS: State v. Shannon, (1965) 242 Or 404, 409 P2d 911; State v. Doster, (1967) 247 Or 336, 427 P2d 413.

161.155

NOTES OF DECISIONS

1. Under former statute similar to paragraphs (2)(a) and (b)
   (1) In general
   (2) Aiding and abetting
   (3) Employer, employe and officers
   (4) Indictment and instructions
   (5) Presence; complicity
2. Under former statute similar to paragraph (2)(c)

1. Under former statute similar to paragraphs (2)(a) and (b)

(1) In general. The statute was held constitutional. State v. Steeves, (1896) 29 Or 85, 43 P 947; State v. Branton, (1899) 33 Or 533, 56 P 267.

The provision abrogated the distinction between an accessory before the fact and a principal. State v. Silverman, (1934) 148 Or 296, 36 P2d 342; State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

State was not required to elect between whether defendant committed criminal act or aided and abetted its commission. State v. McLaren, (1925) 115 Or 505, 237 P 969; State v. Weitzel, (1937) 157 Or 334, 69 P2d 958.

The distinction between principals in the first and second degree was abolished by the statute. State v. Silverman, (1934) 148 Or 296, 36 P2d 342.

When a statute could not be violated by a woman as a principal she could be properly indicted as a principal if the indictment stated that she aided and abetted a man who violated the statute. State v. Goesser, (1955) 203 Or 315, 280 P2d 354.

Where criminal statute was directed only at males, females could not be guilty of crime by aiding and abetting. State v. Bearcub, (1970) 1 Or App 579, 465 P2d 252.

(2) Aiding and abetting. If two or more persons conspired to commit a criminal act to effectuate a common purpose, although only one actually committed the deed, the other or others have aided or abetted. State v. Moczygemba, (1963) 234 Or 141, 379 P2d 557; State v. Howard, (1971) 5 Or App 643, 485 P2d 439.

One could be convicted of a felony as a principal on proof that a crime was committed, and that he either immediately participated therein or aided or abetted its commission though not present. State v. Lewis, (1909) 51 Or 467, 94 P 831.

The statute did not eliminate the issue of fact as to whether the defendant aided and abetted his codefendant. State v. Keelen, (1922) 103 Or 172, 203 P 306, 204 P 162.

One who could not alone commit a crime since not within the class against whom statute was directed, could be criminally responsible by aiding and abetting another. State v. Frazer, (1922) 105 Or 589, 209 P 467. **Distinguished in** State v. Bearcub, (1970) 1 Or App 579, 465 P2d 252.

It was no defense that defendant aided the criminal act only because of threats of coercion of immediate danger to life and limb. State v. Weston, (1923) 109 Or 19, 38, 219 P 180.

An accessory after the fact was not an aider and abettor. State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

An aider and abettor was one who advised, counseled, procured or encouraged another to commit a crime, though not personally present at the time and place of the commission of the offense. State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

It was not necessary to establish the defendant personally received and concealed the property; only that he aided and abetted in that crime. State v. Cain, (1962) 231 Or 616, 373 P2d 1004.

The statute did not make the consent and solicitation of an abortion by the mother culpable. State v. Barnett, (1968) 249 Or 226, 436 P2d 821, 34 ALR3d 852.

(3) Employer, employe and officers. The proprietor was guilty of an unlawful sale of liquor though the sale was by his employe in his absence and without his knowledge. State v. Brown, (1914) 73 Or 325, 144 P 444; State v. Wilbur, (1917) 85 Or 565, 166 P 51, 167 P 569.

The person who counsels or procures another to commit a crime was properly deemed a principal. State v. Steeves, (1896) 29 Or 85, 43 P 947.

Where there was conversion by trust company made with knowledge, consent and acquiescence of the officers they were guilty as principals. State v. Ross, (1910) 55 Or 450, 104 P 596, 106 P 1022, 42 LRA(NS) 601.

Where corporation violated Blue Sky Law, its president could be criminally liable where he acted jointly with and in behalf of the corporation. State v. Fraser, (1922) 105 Or 589, 209 P 467.

An unlicensed person purchasing pelts could not avoid liability because acting as the agent of an unlicensed principal. State v. Rubenstein, (1924) 112 Or 179, 228 P 918.

The employment of others to commit an assault and battery constituted aiding and abetting the crime. State v. Enloe, (1934) 147 Or 123, 31 P2d 772.

Employe of licensee could be held for criminal violation of license law if he sold liquor other than that permitted by license. State v. Cook, (1936) 154 Or 62, 58 P2d 249.

(4) Indictment and instructions. An indictment for aiding and abetting another could charge accused directly as principal or set out the facts constituting the offense precisely as they occurred. State v. Fraser, (1922) 105 Or 589, 209 P 467; State v. Kubli, (1926) 118 Or 5, 244 P 512; State v. Glenn, (1963) 233 Or 566, 379 P2d 530. State v. Glenn, supra **distinguished in** State v. Blackwell, (1965) 241 Or 528, 407 P2d 617.

An instruction that all persons concerned in the commission of a crime, whether they directly committed the act constituting the crime or knowingly aid and abet in its commission, were principals was not erroneous. State v. Drury, (1927) 120 Or 546, 252 P 967; State v. Frohnhofer, (1930) 134 Or 378, 293 P 921.

One present, aiding and abetting in the commission of a felony could be convicted on an indictment charging him directly with the commission of the act. State v. Kirk, (1883) 10 Or 505.

Indictment charging defendant with being accessory before and after the fact was bad for duplicity. State v. Hinkle, (1898) 33 Or 93, 54 P 155.

An instruction that defendant would be guilty if he aided or assisted another in effecting the sale of liquor in violation of law was not error. State v. Carmody, (1907) 50 Or 1, 91 P 446, 1081, 12 LRA(NS) 828.

A single woman could be indicted as a principal for participation in the act of adultery with a married man. State v. Case, (1912) 61 Or 265, 122 P 304.

An indictment properly charged one with sale of liquor without reference to his servant who actually made it. State v. Weiss, (1912) 63 Or 462, 128 P 448.

(5) Presence; complicity. Purchaser of liquor was not accomplice of seller. State v. Edlund, (1916) 81 Or 614, 160 P 534; State v. Busick, (1919) 90 Or 466, 177 P 64.

Where defendant was indicted as principal, all evidence of his complicity was admissible. State v. Moran, (1887) 15 Or 262, 14 P 419.

The conviction of one person charged as principal in the commission of a crime did not operate as an acquittal of another separately charged as principal in the commission of the same crime. State v. Branton, (1899) 33 Or 533, 56 P 267.

One who at request and with money of minor went to saloon and bought beer and brought back to minor was principal in illegal sale. State v. Gear, (1914) 72 Or 501, 143 P 890.

Where there was a common criminal enterprise, each confederate was liable for every act of accomplices in furtherance of joint purpose. State v. Brown, (1925) 113 Or 149, 231 P 926.

Defendant was properly held for complicity in operating distillery where he rented his property with knowledge of this use and allowed his horses to be used in hauling the still and supplies. State v. Delaplain, (1930) 132 Or 627, 287 P 681.

Defendant was properly convicted of assault although not present at time of attack where he had helped seize victims and transported them to hotel. State v. Carroll, (1936) 155 Or 85, 62 P2d 830.

A a general rule, the least degree of concert or collusion between the parties to an illegal transaction made the act of one of them the act of all. State v. Cantrell, (1970) 1 Or App 454, 463 P2d 593.

Evidence that defendant was outside store during robbery, waved to robber and left with him was sufficient for jury to infer defendant was an accomplice in the robbery and responsible as a principal. State v. Miller, (1970) 2 Or App 408, 467 P2d 973, Sup Ct **review denied.**

2. Under former statute similar to paragraph (2)(c)

An information for aiding a prisoner to escape did not need to allege the facts showing the prisoner's guilt. State v. Daly, (1902) 41 Or 515, 70 P 706.

Where information charged accused with aiding prisoner in attempt to escape, allegation was sufficient after verdict as to prisoner's intent to escape where attempt was made. Id.

The statute was not unconstitutional as imposing cruel or unusual punishment. Kelley v. Meyers, (1928) 124 Or 322, 263 P 903, 56 ALR 661.

Hospital patient was shown to have been in custody. State v. Roisland, (1969) 1 Or App 68, 459 P2d 555.

FURTHER CITATIONS: State v. Keller, (1933) 143 Or 589, 21 P2d 807; State v. Downing, (1949) 185 Or 689, 205 P2d 141; State v. Dixon, (1958) 212 Or 572, 321 P2d 305; State v. McDonald, (1961) 231 Or 48, 365 P2d 494; State v. Bengtson, (1961) 230 Or 19, 367 P2d 363, 96 ALR2d 150; State v. Freeman, (1962) 232 Or 267, 374 P2d 453; State v. Fleming, (1962) 232 Or 412, 375 P2d 831; State v. Shannon, (1965) 242 Or 404, 409 P2d 911; State v. Jones, (1968) 249 Or 601, 439 P2d 887; State v. Gibson, (1968) 252 Or 241, 448 P2d 534; State v. Thompson, (1969) 253 Or 430, 452 P2d 754; State v. Stephenson, (1970) 2 Or App 38, 465 P2d 720; State v. Fitz, (1970) 2 Or App 383, 468 P2d 898.

ATTY. GEN. OPINIONS: Criminal liability of hotel manager who permits barbering on Sunday, 1920-22, p 433; necessity that accused be present in state when crime was committed by accomplice, 1932-34, p 665; liability of employer of plumber illegally working without permit, 1940-42, p 243.

LAW REVIEW CITATIONS: 2 OLR 155, 176; 17 OLR 118.

161.190 to 161.265

NOTES OF DECISIONS

1. Under former similar statute
   (1) Justifiable homicide (ORS 163.100)
      (a) In general
      (b) Self defense
         (A) Threats
         (B) Danger to defendant
      (c) Defense of another
   (2) Excusable homicide (ORS 163.110)
   (3) Use of force to prevent crime to person or property (ORS 145.110)

1. Under former similar statute

(1) Justifiable homicide (ORS 163.100)

(a) In general. "Justifiable" and "excusable" as used to define homicide were often treated as synonyms by cases and textwriters. State v. Gray, (1905) 46 Or 24, 79 P 53; State v. Weston, (1923) 109 Or 19, 219 P 180.

Where the plaintiff's intestate was accidentally shot by one of two police officers shooting at an escaping prisoner; the burden was on plaintiff to show that shooting was without justification. Askay v. Maloney, (1919) 92 Or 566, 179 P 899; Anderson v. Maloney, (1924) 111 Or 84, 225 P 318.

The burden of proof was upon the defendant to show that the killing was justifiable. State v. Bertrand, (1868) 3 Or 61.

Where filly in possession of defendant was contended for by deceased as property of his wife, defendant was not justified in killing. State v. Tarter, (1894) 26 Or 38, 37 P 53.

It was not "justifiable" to kill one lawfully driving automobile on public highway although defendant thought deceased had just stolen his watermelons. State v. Trent, (1927) 122 Or 444, 252 P 975, 259 P 893.

(b) Self defense. If the defendant provoked the quarrel or fatal encounter, he could not invoke self defense as justification for the killing unless he attempted to withdraw. State v. Hawkins, (1890) 18 Or 476, 23 P 475; State v. Gray, (1905) 46 Or 24, 79 P 53; State v. Doherty, (1908) 52 Or 591, 98 P 152.

A person at a place where he could lawfully be, if not the aggressor in a conflict, was not obliged to retreat from the assailant. State v. Gibson, (1903) 43 Or 184, 73 P 333; State v. Gray, (1905) 46 Or 24, 79 P 53; State v. Goodager, (1910) 56 Or 198, 106 P 638, 108 P 185.

The defendant invoking self defense must have made reasonable efforts to avoid the attack if possible without danger to himself. State v. McCann, (1903) 43 Or 155, 72 P 137; State v. Gibson, (1903) 43 Or 184, 73 P 333; State v. Gray, (1905) 46 Or 24, 79 P 53; State v. Remington, (1907) 50 Or 99, 91 P 473; State v. Barnes, (1935) 150 Or 375, 44 P2d 1071.

Apparent or real necessity for taking life was fundamental to the right of self defense. State v. Doherty, (1908) 52 Or 591, 98 P 152.

The plea of not guilty permitted the introduction of evidence to show a killing in self defense. State v. Mack, (1911) 57 Or 565, 112 P 1079.

(A) Threats. Evidence of threats of deceased although not communicated to defendant were admissible to show who was the aggressor. State v. Tarter, (1894) 26 Or 38, 37 P 53; State v. Doris, (1908) 51 Or 136, 94 P 44, 16 LRA(NS) 660.

Prior threats were admissible where they would show defendant was under apprehension of imminent peril. State v. Dodson, (1870) 4 Or 64.

It was not error for court to refuse to admit evidence of threats by deceased which were not communicated to defendant. Id.

Where deceased and another attacked defendant, evidence of prior threats by either was admissible. State v. Horseman, (1908) 52 Or 572, 98 P 135.

(B) Danger to defendant. When the danger has passed or ceased to be imminent the right to kill in resistance ceased under the statute. State v. Conally, (1869) 3 Or 169; State v. Yee Guck, (1921) 99 Or 231, 195 P 363.

The existence of the right of self defense depended upon the showing as to whether or not there was ground for a reasonable belief on the part of the defendant that he was in danger of death or great bodily harm. State v. Morey, (1894) 25 Or 241, 248, 35 P 655, 36 P 573; State v. Finch, (1909) 54 Or 482, 103 P 505.

The danger must have appeared to be imminent in order to justify the killing. State v. Smith, (1903) 43 Or 109, 71 P 973; State v. Yee Guck, (1921) 99 Or 231, 195 P 363.

The defendant must have been under a reasonable belief of harm, not just an honest belief. State v. Morey, (1894) 25 Or 241, 35 P 655, 36 P 573.

An instruction that the danger must have been "absolute, imminent, and unavoidable" was not erroneous when elsewhere qualified. State v. Porter, (1897) 32 Or 135, 157, 49 P 964.

Evidence of the dangerous and quarrelsome character of deceased whether or not known to defendant was admissible to show who was the aggressor. State v. Thompson, (1907) 49 Or 46, 88 P 583, 124 Am St Rep 1015.

The fact of defendant's being armed and his explanations were admissible as bearing on whether he was the aggressor and his purpose in being armed. State v. Doris, (1908) 51 Or 136, 94 P 44, 16 LRA(NS) 660.

If decedent expressed an intent to strike accused if he repeated abusive language, and on a repetition did strike him, accused having thereupon shot decedent, cannot establish self defense, unless he in good faith attempted to withdraw from the conflict. State v. Doherty, (1908) 52 Or 591, 98 P 152.

Defendant must have reasonably believed that he was in danger of death or great bodily harm to be entitled to assert self-defense. State v. Hansen, (1970) 3 Or App 378, 474 P2d 17.

The defendant must have been under a reasonable belief of harm, not just an honest belief. State v. Lawton, (1970) 4 Or App 109, 476 P2d 821, Sup Ct **review denied.**

(c) Defense of another. Imminent danger to the person defended must have been apparent to the defendant in order to excuse the killing of the deceased. State v. Young, (1908) 52 Or 227, 96 P 1067, 132 Am St Rep 689, 18 LRA(NS) 688; State v. Yee Guck, (1921) 99 Or 231, 195 P 363.

Threats of the deceased against the defendant were not admissible when defendant's justification was that he was defending another. State v. Marshall, (1899) 35 Or 265, 57 P 902.

The circumstances had to be such that the wife had the right to use force in her own defense, for the husband to justifiably take life of her assailant. State v. Young, (1908) 52 Or 227, 96 P 1067, 132 Am St Rep 689, 18 LRA(NS) 688.

Danger to a person who was present at the time and place of the killing was essential for justification of defending another. Id.

Where the defendant believed his mother was in a house into which deceased was firing and that her life was in danger, an instruction that defendant in such circumstances had a right to shoot in her defense should have been given. State v. Walsworth, (1909) 54 Or 371, 103 P 516.

The use of a gun by a parent in an attempt to recover his daughter from another, when the daughter had voluntarily left her parents and was in no danger, was not justified. State v. Nodine, (1953) 198 Or 679, 259 P2d 1056.

(2) Excusable homicide (ORS 163.110). Where defendant's theory of homicide case was that he killed deceased with fists, he was entitled to instruction as to excusable homicide. State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761.

It was not excusable homicide where defendant killed a person when he thought gun was loaded with rice or wheat. State v. Trent, (1927) 122 Or 444, 252 P 975, 259 P 893.

The trial judge did not need to give instructions on excusable homicide when no evidence had been introduced to excuse the killing. State v. Kader, (1954) 201 Or 300, 270 P2d 160.

The statute expressed the legislative intent to exclude crime of involuntary manslaughter committed through negligence while lawfully correcting a child or servant. State v. England, (1960) 220 Or 395, 349 P2d 668, 89 ALR2d 392.

(3) Use of force to prevent crime to person or property (ORS 145.110). A defendant could not justify himself in doing more for the defense of another person than the latter could do for himself. State v. Yee Guck, (1921) 99 Or 231, 195 P 363; Linkhart v. Savely, (1951) 190 Or 484, 227 P2d 187.

One to rely on self defense had to avoid the attack if he could do so without danger to himself; but where an assault was precipitated without provocation and was such as to indicate to a reasonable mind that the danger to life or the infliction of great bodily harm was imminent, the party assailed was justified in killing the aggressor if necessary and need not retreat or resort to expedients less violent. State v. Gibson, (1903) 43 Or 184, 73 P 333.

A homicide had to be justified on the ground of self defense unless it was made to appear that accused had been put in imminent danger by another, and that the killing was done to prevent the apparent commission of a felony by that other on accused. State v. Smith, (1903) 43 Or 109, 71 P 973.

A husband had the right to resist an assault about to be made on his wife and to use reasonable force, but the circumstances had to be such that the wife had the right to use such force in her own defense. State v. Young, (1908) 52 Or 227, 96 P 1067, 132 Am St Rep 689, 18 LRA(NS) 688.

If policeman not known as such to defendant was recklessly firing his pistol endangering bystanders, force could be used in disarming him. State v. Steidel, (1921) 98 Or 681, 194 P 854.

It was not necessary to plead self defense. Id.

When the danger passed or ceased to be imminent, the right to kill in resistance ended. State v. Yee Guck, (1921) 99 Or 231, 195 P 363.

Where woman slapped defendant for calling her a dirty dog, he was justified in striking back only if blow was necessary for self protection. Silfast v. Matheny, (1943) 171 Or 1, 136 P2d 260.

Self-defense was authorized where "bodily harm", as opposed to "great bodily harm," was threatened. State v. Hansen, (1970) 3 Or App 378, 474 P2d 17.

In defending one's property the owner could only use such force as appeared reasonably necessary for that purpose. State v. Laurel, (1970) 4 Or App 122, 476 P2d 817, Sup Ct review denied.

Whether excessive force had been used in defense of property was a question of fact. Id.

In the absence of statutory authority the use of force intended or likely to cause death or great bodily injury was never authorized in defense of property as such. Id.

FURTHER CITATIONS: State v. Olds, (1890) 19 Or 397, 24 P 394; State v. Bartmess, (1898) 33 Or 110, 54 P 167; State v. Rader, (1919) 94 Or 432, 186 P 79; State v. Holbrook, (1920) 98 Or 43, 188 P 947, 192 P 640, 193 P 434; Buck v. Ice Delivery Co., (1934) 146 Or 132, 29 P2d 523; State v. Anderson, (1956) 207 Or 675, 298 P2d 195; State v. Ruff, (1962) 230 Or 546, 370 P2d 942; State v. Joseph, (1962) 230 Or 585, 371 P2d 689.

ATTY. GEN. OPINIONS: Constitutionality of proposed legislation permitting use of "any means necessary" to protect life or property, (1971) Vol 35, p 697.

LAW REVIEW CITATIONS: 11 OLR 401; 23 OLR 69, 85.

161.235 to 161.245

NOTES OF DECISIONS

Under former similar statute firing a gun was not justifiable where the arrest could be secured by less dangerous means. Lander v. Miles, (1868) 3 Or 35.

Under former similar statute shooting at an escaping felon was found to be necessary and proper to effect the arrest. Askay v. Maloney, (1919) 92 Or 566, 179 P 899.

FURTHER CITATIONS: Rich v. Cooper, (1963) 234 Or 300, 380 P2d 613.

ATTY. GEN. OPINIONS: Extent to which special agent can take possession of personalty or enter on private property to arrest criminals, 1936-38, p 424.

161.295

NOTES OF DECISIONS

1. Under former similar statute

The statute established a conclusive presumption that a person having sufficient mental capacity to know that an act was wrongful and unlawful was capable of governing his conduct by that knowledge and of resisting any impulse to violate the law. State v. Hassing, (1911) 60 Or 81, 86, 118 P 195; State v. Garver, (1950) 190 Or 291, 225 P2d 771, 27 ALR2d 105; Leland v. State, (1951) 343 US 790, 72 S Ct 1002, 96 L Ed 1302, affirming 190 Or 598, 227 P2d 785; State v. Schroeder, (1968) 249 Or 469, 438 P2d 1023.

The M'Naghten rule, which defines insanity as the lack of ability to know the nature or quality of the act done or to distinquish between right and wrong in regard to that act, was incorporated in the statute. State v. Gilmore, (1965) 242 Or 463, 410 P2d 240; State v. Bostrom, (1970) 2 Or App 466, 467 P2d 970, 469 P2d 645.

The court was not bound by the opinion of the medical experts. Cannon v. Gladden, (1962) 203 F Supp 504.

FURTHER CITATIONS: State v. Wallace, (1942) 170 Or 60, 131 P2d 222; Newton v. Brooks, (1967) 246 Or 484, 426 P2d 446; State v. Haggblom, (1968) 249 Or 676, 439 P2d 1019; State v. Sinclair, (1969) 253 Or 453, 454 P2d 858.

LAW REVIEW CITATIONS: 50 OLR 41-56; 5 WLJ 556-569; 6 WLJ 373-375, 395-418.

161.305

NOTES OF DECISIONS

1. Under former similar statute

(1) Insanity. Where the defense was insanity, the burden of proof always remained with the defendant. State v. Hansen, (1894) 25 Or 391, 35 P 976, 36 P 296; State v. Riley, (1934) 147 Or 89, 30 P2d 1041.

Appointment of a guardian over a person of unsound mind by a court of competent jurisdiction was admissible as evidence of his insanity. Schindler v. Parzoo, (1908) 52 Or 452, 97 P 755.

Drunkenness alone was not insanity; the mind must from continued drunkenness be in diseased state such as delirium tremens. State v. Trapp, (1910) 56 Or 588, 109 P 1094.

The presumption that a person once adjudicated insane continued insane did not shift the burden of proof, but imposed on the state the burden of going forward with the evidence on the issue of insanity. State v. Garver, (1950) 190 Or 291, 225 P2d 771, 27 ALR2d 105.

(2) Instructions. The omission of the word "intent" in a charge otherwise substantially in the language of the statute was not reversible error, where the defendant was charged with assault with intent to kill and was convicted of assault with a deadly weapon. State v. Lavery, (1899) 35 Or 402, 58 P 107.

The court properly refused to instruct that if jury acquitted defendant by reason of insanity, the court could confine him to lunatic asylum. State v. Daley, (1909) 54 Or 514, 103 P 502, 104 P 1.

There was no testimony which would make instruction on insanity necessary. State v. Graysox, (1928) 126 Or 560, 270 P 404.

It was error for court to refuse to instruct that person cnce adjudicated insane will be presumed to continue insane. State v. Garver, (1950) 190 Or 291, 225 P2d 771, 27 ALR2d 105.

FURTHER CITATIONS: State v. Murray, (1884) 11 Or 413; State v. Hansen, (1894) 25 Or 391, 35 P 976, 36 P 296; State v. Trapp, (1910) 56 Or 588, 109 P 1094; State v. Butchek, (1927) 121 Or 141, 253 P 367, 254 P 805; State v. Riley, (1934) 147 Or 89, 30 P2d 1041; State v. Grieco, (1948) 184 Or 253, 195 P2d 183; Leland v. State, (1951) 343 US 790, 72 S Ct 1002, 96 L Ed 1302, aff'g 190 Or 598, 227 P2d 785; State v. William Lester Schleigh, (1957) 210 Or 155, 310 P2d 341; Syphers v. Gladden, (1962) 230 Or 148, 368 P2d 942; State v. Haggblom, (1968) 249 Or 676, 439 P2d 1019; State v. Hays, (1969) 1 Or App 347, 462 P2d 702; State v. Canaday, (1970) 2 Or App 390, 467 P2d 666, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 8 OLR 190; 9 OLR 309; 49 OLR 24; 33 OLR 262; 37 OLR 84; 4 WLJ 68.

161.319

NOTES OF DECISIONS

1. Under former similar statute

The court, in charging that the jury in finding defendant not guilty on the ground of insanity should state that fact in the verdict, properly refused to charge that the court on such a verdict had to, if it considered the defendant's being at large dangerous, order him committed to a lunatic asylum. State v. Daley, (1909) 54 Or 514, 103 P 502, 104 P 1.

A person seeking release under the statute had to prove by a preponderance of the evidence (1) that he had the mental capacity to understand the difference between right and wrong, and (2) that with reasonable probability he would control his behavior so that his liberty would not be a danger to the public in the reasonably foreseeable future. Newton v. Brooks, (1967) 246 Or 484, 426 P2d 446.

FURTHER CITATIONS: State v. Branton, (1899) 33 Or 533, 56 P 267.

ATTY. GEN. OPINIONS: Discharge from commitment of person "Not Guilty by Reason of Insanity," 1964-66, p 88; authority of superintendent of Oregon Fairview Home to grant leaves to inmates, 1964-66, p 102.

LAW REVIEW CITATIONS: 49 OLR 28-35; 4 WLJ 68-72, 74-76.

161.360 to 161.370

CASE CITATIONS: State v. Gilmore, (1966) 242 Or 463, 410 P2d 240.

LAW REVIEW CITATIONS: 33 OLR 277.

161.360

NOTES OF DECISIONS

1. Under former similar statute

No constitutional right of defendant was violated although defendant was examined for insanity against his will. State v. Nelson (dicta), (1939) 162 Or 430, 92 P2d 182.

It was a question for the discretion of the trial court whether there were sufficient grounds to believe that the defendant was insane. Id.

The denial of a motion for a hearing as to sanity was not prejudicial where the defendant had the question as to his insanity submitted upon the trial. Id.

Whether an insanity hearing was advisable or necessary was within the discretion of the trial judge reasonably exercised. State v. Taylor, (1960) 224 Or 106, 355 P2d 603; State v. Arndt, (1970) 1 Or App 608, 465 P2d 486.

The court was not bound by the opinion of the medical experts. Cannon v. Gladden, (1962) 203 F Supp 504.

Defendant could not be ordered to answer incriminating questions during a pretrial psychiatric examination. Shepard v. Bowe, (1968) 250 Or 288, 442 P2d 238.

FURTHER CITATIONS: Syphers v. Gladden, (1962) 230 Or 148, 368 P2d 942; State v. Unsworth, (1963) 235 Or 234, 384 P2d 207; State v. Canady, (1970) 2 Or App 390, 467 P2d 666, Sup Ct **review denied;** State v. Gilmore, (1965) 242 Or 463, 410 P2d 240.

ATTY. GEN. OPINIONS: Inquiry into sanity under this section, 1946-48, p 172; liability for care and maintenance of criminal defendant committed to state public hospital before trial, 1958-60, p 264; fees for examinations made by staff physicians of Oregon State Hospital, 1958-60, p 359; authority of court to send, and Oregon State Hospital to accept, defendants for mental examination, 1960-62, p 132; presumption of validity of order of commitment, 1960-62, p 244; commitment of persons accused of crime, 1962-64, p 365; discharge from commitment of person "not guilty by reason of insanity," 1964-66, p 88; authority of superintendent of Oregon Fairview Home to grant leaves to inmates, 1964-66, p 102; witness fees for Oregon State Hospital physicians, 1966-68, p 551.

LAW REVIEW CITATIONS: 49 OLR 15-17, 230-233; 4 WLJ 64-67.

161.370

NOTES OF DECISIONS

Under a former similar statute a court could not be ousted of jurisdiction over a person held to answer a criminal charge by the finding of another court in a civil proceeding that the person accused of crime was mentally ill. Syphers v. Gladden, (1962) 230 Or 148, 368 P2d 942.

FURTHER CITATIONS: State v. Nelson, (1939) 162 Or 430, 92 P2d 182; State v. Taylor, (1960) 224 Or 106, 355 P2d 603; State v. Bostrom, (1970) 2 Or App 466, 467 P2d 970, 469 P2d 645.

ATTY. GEN. OPINIONS: Commitment of insane criminals to state institution, 1940-42, p 233, 1946-48, p 172; liability for care and maintenance of criminal defendant committed to state public hospital before trial, 1958-60, p 264; fees for examinations made by staff physicians of Oregon State Hospital, 1958-60, p 359; authority of court to send, and Oregon State Hospital to accept, defendants for mental examination, 1960-62, p 132; presumption of validity of order of commitment, 1960-62, p 244; commitment of persons accused of crime, 1962-64, p 365; discharge from commitment of person "not guilty by reason of insanity," 1964-66, p 88; authority of superintendent to grant leaves to inmates, 1964-66, p 102; witness fees for Oregon State Hospital physicians, 1966-68, p 551.

LAW REVIEW CITATIONS: 33 OLR 277; 49 OLR 15-24, 230; 4 WLJ 64-67.

161.405

NOTES OF DECISIONS

1. Under former similar statute

Employing and paying a man to burn another's barn constituted an attempt to commit the crime, though the person employed had no intention of carrying out the plan. State v. Taylor, (1906) 47 Or 455, 84 P 82, 8 Ann Cas 627, 4 LRA(NS) 417.

One charged with only the attempt was convicted where

evidence tended to prove the substantive offense. State v. Harvey, (1926) 119 Or 512, 249 P 172.

To constitute an attempt there had to be an intent to commit the attempted crime and an ineffectual act performed in an effort to commit the crime. State v. Duffy, (1931) 135 Or 290, 295 P 953.

Where defendant attempted to commit manslaughter by abortion by the curetting of the womb but failed because of a tubal pregnancy, he was guilty of a criminal attempt to commit the substantive offense. State v. Elliott, (1955) 206 Or 82, 289 P2d 1075.

When defendant obtained gun from his auto, although he may not have had present ability to inflect injury on his wife, he had proceeded far beyond preparation and was properly indicted for attempted assault. State v. Wilson, (1959) 218 Or 575, 346 P2d 115, 79 ALR2d 587.

Even if assault with intent to commit rape and attempted rape were construed as identical offenses, the punishment was the same and the sections were not unconstitutional as a denial of equal protection. Delaney v. Gladden, (1968) 297 F2d 17.

When on the evidence the defendant could be convicted in a lesser degree of the offense charged or of an included offense, the court, on its own motion if not requested, was required to give instructions which embraced all degrees of the particular offense and all included offenses to which the evidence was applicable. State v. Olson, (1969) 1 Or App 90, 459 P2d 445. **But see** State v. Andrews, (1970) 2 Or App 595, 469 P2d 802, Sup Ct **review denied.**

The statute was limited to attempts that were not covered by any other statute. State v. Eddins, (1971) 5 Or App 277, 482 P2d 757.

FURTHER CITATIONS: State v. Wilson, (1928) 127 Or 294, 271 P 742; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614, cert. denied, 379 US 947; State v. Moore, (1971) 4 Or App 548, 480 P2d 458; Sanchez v. Cupp, (1971) 4 Or App 606, 480 P2d 714, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Eligibility for parole of person convicted of attempt to commit crime, 1924-26, p 257; "attempted involuntary manslaughter," 1936-38, p 70.

LAW REVIEW CITATIONS: 49 OLR 318.

161.435

NOTES OF DECISIONS

Under former similar statute the words "procure," "solicit" and "entice," each imported an initial, active and wrongful effort. State v. Norris, (1917) 82 Or 680, 162 P 859.

Under former similar statute a threat was a menace of such a nature and extent as to unsettle the mind of the person on whom it operated, and to take away from his acts that free, voluntary action which alone constituted consent. State v. Hamre, (1967) 247 Or 359, 429 P2d 804.

FURTHER CITATIONS: State v. Delaney, (1960) 221 Or 620, 351 P2d 85; State v. Cunningham, (1969) 252 Or 654, 452 P2d 315; State v. Frye, (1970) 2 Or App 192, 465 P2d 736; State v. Patterson, (1970) 3 Or App 480, 475 P2d 91.

LAW REVIEW CITATIONS: 16 OLR 278.

161.450

NOTES OF DECISIONS

1. Under former similar statute

A direct agreement was not necessary to establish a conspiracy but one could be proved by showing the declarations, acts and conduct of the conspirators. State v. Ryan, (1905) 47 Or 338, 82 P 703, 1 LRA(NS) 862; State v. Meidel, (1966) 245 Or 100, 420 P2d 386.

The acts or declarations of a conspirator made in furtherance of a common design were admissible against his coconspirators. State v. Ryan, (1905) 47 Or 338, 82 P 703, 1 LRA(NS) 862; State v. Caseday, (1911) 58 Or 429, 115 P 287; State v. Weitzel, (1937) 157 Or 334, 69 P2d 958.

If several persons entered into a conspiracy to commit a crime and in furtherance of that common design they committed another crime, all were guilty of the latter crime. State v. Goodloe, (1933) 144 Or 193, 24 P2d 28; State v. Weitzel, (1937) 157 Or 334, 69 P 958.

The declarations of a fellow conspirator, although made before the defendant joined the lawless association, were admissible against him. State v. Caseday, (1911) 58 Or 429, 115 P 287.

While the general rule was that declarations of conspirators after the end of the conspiracy were not admissible against a coconspirator, the conspiracy did not terminate until a disposition was made of the stolen articles. State v. Gardner, (1961) 225 Or 376, 358 P2d 557.

Evidence of a plea of guilty by a coconspirator was admissible if it was clearly not for the purpose of proving the guilt of the defendant and was for another proper purpose. State v. Cole, (1968) 252 Or 146, 448 P2d 523.

FURTHER CITATIONS: State v. Fichter, (1961) 226 Or 526, 360 P2d 278; State v. Middleton, (1970) 2 Or App 70, 465 P2d 913; State v. Pomroy, (1971) 4 Or App 564, 480 P2d 450.

161.515

NOTES OF DECISIONS

1. Under former similar statute

Common law offenses were not recognized in Oregon but reference could be made for definitions of statutory offenses. State v. Ayers, (1907) 49 Or 61, 88 P 653, 124 Am St Rep 1036, 10 LRA(NS) 992.

Conviction under a city ordinance was not conviction of a crime. State v. Crawford, (1911) 58 Or 116, 113 P 440, Ann Cas 1913A, 325; Redsecker v. Wade, (1914) 69 Or 153, 134 P 5, 138 P 485, Ann Cas 1916A, 269.

Punishment provisions were an integral part of a criminal statute. State v. Pirkey, (1955) 203 Or 697, 281 P2d 698.

Late filing of financial reports under the Corrupt Practices Act was not a crime. State v. Johnson, (1969) 1 Or App 363, 462 P2d 687.

FURTHER CITATIONS: Baxter v. State, (1907) 49 Or 353, 88 P 677, 89 P 369; Kalich v. Knapp, (1914) 73 Or 558, 600, 142 P 594, 145 P 22, Ann Cas 1916E, 1051; Reynolds v. Shobe, (1967) 245 Or 578, 423 P2d 182.

ATTY. GEN. OPINIONS: Misdemeanor as crime, 1922-24, p 285; petit larceny as crime, 1922-24, p 435; disqualification of notary after conviction of crime, 1944-46, p 64; describing crime of unlawful assembly, 1960-62, p 419; violation of city ordinance, 1964-66, p 284; simultaneous charges under ORS 482.300 and 482.650, 1966-68, p 459.

LAW REVIEW CITATIONS: 3 OLR 185, 188.

161.525

NOTES OF DECISIONS

1. Under former similar statute

The word "crime" included both felonies and misdemeanors. State v. Bacon, (1886) 13 Or 143, 9 P 393, 57 Am Rep 8; State v. Newlin, (1917) 84 Or 323, 165 P 225.

Every crime was either a felony or misdemeanor. State

v. Crawford, (1911) 58 Or 116, 113 P 440; State v. Rader, (1919) 94 Or 432, 467, 186 P 79.

Where sentence was for imprisonment and fine and defendant was paroled by court before serving in penitentiary, the conviction was for felony. State v. Swikert, (1913) 65 Or 286, 132 P 709.

The punishment inflicted, not that authorized, determined whether crime was felony or misdemeanor. In re Enright, (1938) 160 Or 313, 85 P2d 359.

Only the circuit court had jurisdiction over the crime of assault being armed with a dangerous weapon and until a determination was made, after sentence was imposed, as to the nature of the crime the procedure applicable to felonies was employed. State v. Steagall, (1958) 214 Or 116, 328 P2d 142.

Although the sentence imposed was a term in the county jail, the former conviction was for a felony, since the only penalty provided was imprisonment in the penitentiary. State v. Commedore, (1964) 239 Or 82, 396 P2d 216. Overruling In re Enright, (1959) 219 Or 342, 374 P2d 103.

FURTHER CITATIONS: State v. Butler, (1920) 96 Or 219, 186 P 55; State v. Sisney, (1968) 250 Or 198, 440 P2d 372; State v. Capitan, (1970) 2 Or App 338, 468 P2d 533; State v. Jones, (1971) 4 Or App 447, 479 P2d 1020.

ATTY. GEN. OPINIONS: Burglary as felony, 1946-48, p 245; imposition of sentence as determinative of whether conviction is for felony or misdemeanor, 1956-58, p 183; authority of state police to arrest for violation of a city ordinance, 1964-66, p 105; construing "felony" in insurance licensing law, 1964-66, p 370; furnishing a gun to any child between the ages of 12 and 14 years, (1968) Vol 34, p 350.

LAW REVIEW CITATIONS: 50 OLR 116; 2 WLJ 476.

161.545

NOTES OF DECISIONS

A former similar statute applied where a statute did not declare that proscribed acts were a misdemeanor. State v. Gaunt, (1885) 13 Or 115, 9 P 55.

LAW REVIEW CITATIONS: 2 EL 212.

161.665

NOTES OF DECISIONS

Under former similar statute a defendant acquitted on a criminal charge was not entitled to his costs and disbursements. Eisen v. Multnomah County, (1897) 31 Or 134, 49 P 730; State v. Amsden, (1917) 86 Or 55, 61, 166 P 942, 167 P 1014.

Under former similar statute a defendant who believed that the costs against him were erroneous could apply to the court by motion to correct the errors. Whitley v. Murphy, (1874) 5 Or 328, 20 Am Rep 741.

FURTHER CITATIONS: State v. Keelen, (1922) 103 Or 172, 203 P 306, 204 P 162, 164; State v. Combs, (1970) 3 Or App 260, 473 P2d 672.

ATTY. GEN. OPINIONS: Payment of fees where the defendant elects to go to jail rather than pay the fine and costs assessed against him, 1924-26, p 464; propriety of taxing, against a person convicted of driving a motor vehicle while intoxicated, the fee of a physician who examined him, 1936-1938, p 158.

161.685

NOTES OF DECISIONS

1. Under former similar statute

A justice of peace could order a defendant imprisoned if his fine was not paid. State v. Sheppard, (1888) 15 Or 598, 16 P 483; Ex parte McGee, (1898) 33 Or 165, 167, 54 P 1091.

The imprisonment was not a punishment for the crime, but simply a means of enforcing the payment of the fine for which it was a substitute. State v. Sheppard, (1888) 15 Or 598, 600, 16 P 483.

The statute prescribed the only mode by which a convicted person, who has been sentenced to pay a fine, could be legally discharged from custody. Kelley v. Tillamook County (1923) 107 Or 607, 215 P 176, 29 ALR 4.

The sheriff was charged with the duty to imprison the convicted person until the fine had been satisfied, either by payment or by imprisonment for the prescribed time, and no court officer could accept security in lieu of money payment of a fine. Id.

Where the judgment failed to state that the defendant should be imprisoned upon making default in payment of the fine, it was sufficient to require the imprisonment of defendant until the fine was satisfied. Harlow v. Clow, (1924) 110 Or 257, 223 P 541.

A prisoner was entitled to be released on payment of portion of fine not satisfied by time already served. In re Murphy, (1926) 119 Or 658, 250 P 834, 49 ALR 384.

FURTHER CITATIONS: Williams v. Florida, (1970) 399 US 78, 138, 90 S Ct 1893, 26 L Ed 2d 446, 475; Williams v. Illinois, (1970) 399 US 235, 255, 90 S Ct 2018, 26 L Ed 2d 586, 601.

ATTY. GEN. OPINIONS: Discharge of indigent as a satisfaction of fine or discharge of lien, 1936-38, p 490; authority of justice of peace to grant parole after prisoner has commenced serving sentence, 1938-40, p 315, 1946-48, p 59; right to discharge as indigent, 1940-42, p 249; enforcement of criminal judgment when defendant not in county, 1954-56, p 90; imprisonment in penitentiary in lieu of fine, 1960-62, p 349; compelling appearance of accused, enforcing payment of fine, (1969) Vol 34, p 829; agency responsible for costs, supervision of prisoners on litter patrol, (1969) Vol 34, p 889.

LAW REVIEW CITATIONS: 7 WLJ 60.

161.725

NOTES OF DECISIONS

1. Under former similar statute
   (1) Indeterminate sentence for sex offenders (ORS 137.111 to 137.115)
      (a) Constitutionality
   (2) Habitual Criminal Act (ORS chapter 168)
      (a) In general
      (b) Constitutionality
      (c) "Conviction"
      (d) "Former felony" conviction

1. Under former similar statute

(1) Indeterminate sentence for sex offenders (ORS 137.111 to 137.115). The court was not bound by the opinion of the medical experts. Cannon v. Gladden, (1962) 203 F Supp 504.

An attempt to commit a sex crime fell within the statute. Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614, cert. denied, 379 US 947.

A jury was not required in order to determine the facts under which the statute was applicable. State v. Dixon, (1964) 238 Or 121, 393 P2d 204.

(a) Constitutionality. Even though the statute was

mandatory, failure of the court to have defendant examined by a psychiatrist and otherwise to comply with the sexual psychopath statutes was not a denial of due process. Kloss v. Gladden, (1962) 233 Or 98, 377 P2d 146; Enyart v. Gladden, (1962) 233 Or 37, 377 P2d 25.

No substantial rights of defendant were affected by his failure to receive copies of the report by registered mail where copies were furnished defense counsel, used in cross-examination of the psychiatrist at the presentence hearing, and received in evidence without objection. State v. Burnett, (1961) 228 Or 556, 365 P2d 1060.

Furnishing defendant a copy of the report of the psychiatrist was not essential to due process. Good v. Gladden, (1963) 233 Or 437, 378 P2d 994.

The sentence was not unconstitutional as cruel and unusual punishment. State v. Dixon, (1964) 238 Or 121, 393 P2d 204.

(2) Habitual Criminal Act (ORS chapter 168). The determination of the status of the defendant as a habitual criminal was not part of the trial of the principal offense. State v. Custer, (1965) 240 Or 350, 401 P2d 402.

(a) In general. The pendency of an appeal did not operate to prevent the district attorney from proceeding under the Act. State v. Romero, (1969) 1 Or App 217, 461 P2d 70; State v. Young, (1970) 1 Or App 562, 463 P2d 374, Sup Ct **review denied**; O'Neal v. Cupp, (1971) 92 Or App Adv. Sh. 1401, 485 P2d 1119.

The district attorney was required to proceed within a reasonably prompt period of time after the pertinent information became known. State v. Romero, (1969) 1 Or App 217, 461 P2d 70; State v. Holbert, (1970) 1 Or App 552, 464 P2d 834; State v. Steffes, (1970) 2 Or App 163, 465 P2d 905, Sup Ct **review denied**; O'Neal v. Cupp, (1971) 92 Or App Adv Sh 1401, 485 P2d 1119.

The filing of an information by the district attorney charging prior convictions on felonies was a continuation of the original prosecution for forgery, to determine the penalty to be imposed, and the new sentence was valid, being for the crime of forgery and not for being an habitual criminal. Borders v. Alexander, (1948) 183 Or 488, 194 P2d 414.

The plea of former jeopardy had no application to a habitual criminal proceeding since being a habitual criminal is a status rather than an offense. State v. Moore, (1951) 192 Or 39, 233 P2d 253.

The trial court could not proceed to act under the Habitual Criminal Act until an information has been filed by the district attorney and served on the accused. Chase v. Gladden, (1962) 231 Or 469, 372 P2d 972, cert. denied, 371 US 896, 83 S Ct 197, 9 L Ed 2d 128.

Unreasonable delay by district attorney violated defendant's rights under the statute. State v. Romero, (1969) 1 Or App 217, 461 P2d 70; State v. Holbert, (1970) 1 Or App 552, 464 P2d 834.

A habeas corpus petitioner established his prima facie case by presentation of the record of his Oregon evidentiary hearing on the face of which appeared the fact: (1) he did not have counsel in two of his prior convictions, and (2) he was not contemporaneously advised on either occasion that he had a right to counsel supplied without cost to him. Schram v. Cupp (1970) 425 F2d 612, 436 F2d 692. Superseding Schram v. Gladden, 250 Or 603, 444 P2d 6.

(b) Constitutionality. Former Habitual Criminal Act was not unconstitutional as a cruel and unusual punishment nor as a law founded on principles of vindictive justice. State v. Hicks, (1958) 213 Or 619, 325 P2d 794, cert. denied, 359 US 917, 79 S Ct 594, 3 L Ed 2d 579.

The punishment provided by the statute being founded on an arguably rational basis, was not excessive. Jensen v. Gladden, (1962) 231 Or 141, 372 P2d 183.

This Act was constitutional within the prohibition against cruel and unusual punishment and within the due process provisions. State v. Custer, (1965) 240 Or 350, 401 P2d 402.

The statute was constitutional. State v. Poierier, (1965) 242 Or 384, 409 P2d 680.

(c) "Conviction." "Conviction" designated a particular stage in a criminal prosecution where the guilt of the defendant had been established. State v. Hoffman, (1963) 236 Or 98, 385 P2d 741; State v. Glenn, (1966) 245 Or 70, 420 P2d 60; State v. Killom, (1967) 246 Or 465, 425 P2d 746, cert. denied, 389 US 1050.

Conviction of crime in another state, government or country could not be considered in applying the former statute unless the foreign conviction was for a crime that would be a felony if committed within this state. State v. Grinolds, (1960) 223 Or 68, 353 P2d 851.

Nonessential allegations, in any form, should not be considered in defining the crime committed in another jurisdiction; only material allegations that would require proof to convict should be considered. Id.

In a habitual criminal proceeding the character of the conviction, felony or misdemeanor, was fixed by the initial sentence. State v. Cheek, (1966) 245 Or 232, 421 P2d 685.

The vacation of the initial sentence in order to impose an enhanced penalty did not affect the initial characterization of the conviction. Id.

As to the principal felony, "conviction" includes a determination of guilt followed by a suspended sentence and placement on probation. State v. Glenn, (1966) 245 Or 70, 420 P2d 60.

"Or otherwise rendered nugatory" as used in the statute required an accomplished act. Clark v. Gladden, (1967) 247 Or 629, 432 P2d 182.

The principal conviction was a felony for purposes of enhanced penalty because the sentence was imprisonment in the penitentiary although it was in the discretion of the trial court to make the conviction a misdemeanor by imposing other punishment. State v. Capitan, (1970) 2 Or App 338, 468 P2d 533.

For the purposes of the Oregon Habitual Criminal Act, the California and the Minnesota statutes describing the crime of burglary could not sustain a felony conviction in the state. State v. Edwards, (1970) 3 Or App 179, 471 P2d 843, Sup Ct **review denied.**

(d) "Former felony" conviction. Defendant was not entitled to a jury trial relative to prior convictions. State v. Hoffman, (1963) 236 Or 98, 385 P2d 741; State v. Ellis, (1964) 238 Or 104, 392 P2d 647; State v. Griffin, (1964) 238 Or 103, 392 P2d 642; State v. Edwards, (1970) 3 Or App 179, 471 P2d 843, Sup Ct **review denied.**

The court could not take judicial notice of prior convictions even if they occurred in the same court on a preceding day. Chase v. Gladden, (1962) 231 Or 469, 372 P2d 972, cert. denied, 371 US 896, 83 S Ct 197, 9 L Ed 2d 128.

Although the sentence imposed was a term in the county jail, the former conviction was for a felony, since the only penalty provided was imprisonment in the penitentiary. State v. Commedore, (1964) 239 Or 82, 396 P2d 216; Commedore v. Gladden, (1969) 416 F2d 21. State v. Commedore, supra, overruling In re Enright, (1959) 219 Or 342, 374 P2d 103.

The mistaken allegation of the Oregon statute that was allegedly violated was surplusage and did not void the court's finding that the conviction was a prior conviction as contemplated by the Act. State v. Glenn, (1966) 245 Or 70, 420 P2d 60.

FURTHER CITATIONS: State v. Smith, (1929) 128 Or 517, 273 P 323; State v. Long, (1945) 177 Or 530, 164 P2d 452; State v. Durham, (1945) 177 Or 574, 164 P2d 448; Macomber v. State, (1947) 181 Or 208, 180 P2d 793; Castle v. Gladden, (1954) 201 Or 353, 270 P2d 675; Little v. Gladden, (1954) 202 Or 16, 273 P2d 443; State v. Cory, (1955) 204 Or 235, 282 P2d 1054; State v. Little, (1955) 205 Or 659, 288 P2d 446,

290 P2d 802, cert. denied, 350 US 975, 100 L Ed 845, 76 S Ct 454; State v. Waterhouse, (1957) 209 Or 424, 307 P2d 327; State v. Johnson (1957) 209 Or 476, 307 P2d 351; Landreth v. Gladden, (1958) 213 Or 205, 324 P2d 475; State v. Casson, (1960) 223 Or 421, 354 P2d 815; Admire v. Gladden, (1961) 227 Or 370, 362 P2d 380; Holland v. Strawn, (1962) 233 Or 64, 377 P2d 1; State v. Gidley, (1962) 231 Or 89, 371 P2d 992; Bevel v. Gladden, (1962) 232 Or 578, 376 P2d 117; Tuel v. Gladden, (1963) 234 Or 1, 379 P2d 553; Hirte v. Gladden, (1963) 235 Or 45, 383 P2d 993; State v. Blacker, (1963) 234 Or 131, 380 P2d 789; Speers v. Gladden, (1964) 237 Or 100, 390 P2d 635; Holland v. Gladden, (1964) 239 Or 57, 396 P2d 222; State v. Harp, (1965) 239 Or 481, 398 P2d 182; Gladden v. Gidley, (1964) 337 F2d 575; State v. Howell, (1965) 240 Or 558, 402 P2d 89; State v. Williams, (1965) 242 Or 192, 408 P2d 936; Spencer v. Texas, (1966) 385 US 554, 586, 87 S Ct 648; State v. Cartwright, (1966) 246 Or 120, 418 P2d 822; State v. Calvin, (1966) 244 Or 402, 418 P2d 821; State v. Knighten, (1967) 248 Or 465, 435 P2d 305; Doane v. Gladden, (1967) 246 Or 183, 424 P2d 234; Jensen v. Gladden, (1968) 250 Or 499, 443 P2d 626; Dixon v. Gladden, (1968) 250 Or 580, 444 P2d 11; State v. Adkins, (1968) 250 Or 374, 443 P2d 233; Commedore v. Gladden, (1969) 416 F2d 21; Holbert v. Gladden, (1969) 253 Or 435, 455 P2d 45; McDonald v. Cupp, (1969) 254 Or 107, 458 P2d 427; Schram v. Gladden, (1970) 425 F2d 612; Lundgren v. Cupp (1969) 1 Or App 334, 462 P2d 447; Nealy v. Cupp, (1970) 2 Or App 240, 467 P2d 649; Wheeler v. Cupp, (1970) 3 Or App 1, 470 P2d 957, Sup Ct **review denied**; State v. Wickenheiser, (1970) 3 Or App 509, 475 P2d 422; State v. Bouthillier, (1970) 4 Or App 145, 476 P2d 209, Sup Ct **review denied**; State v. Goddard, (1971) 5 Or App 454, 485 P2d 650; State v. Emery, (1971) 4 Or App 527, 480 P2d 445.

ATTY GEN. OPINIONS: Former operation of parole statutes on habitual criminal sentences, 1938-40, p 338, 1940-42, pp 298, 469, 1942-44, p 90, 1946-48, pp 33, 189; eligibility for parole, 1946-48, pp 346, 383; application of section generally, 1946-48, p 355; presentence examination of sex offenders, 1952-54, p 176; fact finding by court before sentencing, 1956-58, p 97; meaning of "costs," 1956-58, p 261; witness for and salary of doctor who testifies, 1958-60, p 22; extent diagnostic examination by division is immune from civil suit, 1966-68, p 540; witness fees for Oregon State Hospital physicians, 1966-68, p 551.

LAW REVIEW CITATIONS: 32 OLR 52; 36 OLR 159; 37 OLR 84; 39 OLR 342; 50 OLR 115; 5 WLJ 113.