

Chapter 132

Grand Jury and Indictments

Chapter 132

LAW REVIEW CITATIONS: 3 OLR 290; 10 OLR 101, 217, 295; 25 OLR 10; 1 EL 77-80.

132.010

NOTES OF DECISIONS

The jurisdiction of the grand jury is confined to crimes committed or triable in the county. *In re Kelly*, (1890) 46 Fed 653.

An objection to selection of grand jury must be made before a plea on the merits. *State v. Witt*, (1899) 33 Or 594, 55 P 1053.

FURTHER CITATIONS: *State v. Carlson*, (1900) 39 Or 19, 62 P 1016; *State v. Bock*, (1907) 49 Or 25, 88 P 318.

ATTY. GEN. OPINIONS: Lack of authority to investigate civil matters and policies, 1950-52, p 150.

LAW REVIEW CITATIONS: 2 OLR 30; 3 OLR 290; 10 OLR 101, 217, 295; 21 OLR 299; 25 OLR 11; 4 WLJ 172.

132.020

NOTES OF DECISIONS

An indictment by a jury formed under an unconstitutional law is void. *State v. Lawrence*, (1885) 12 Or 297, 7 P 116.

Where a grand jury is irregularly formed under a valid law, the indictment is not void. *State v. Witt*, (1899) 33 Or 594, 55 P 1053.

FURTHER CITATIONS: *State v. McReynolds*, (1957) 212 Or 325, 319 P2d 905.

LAW REVIEW CITATIONS: 39 OLR 136.

132.030

NOTES OF DECISIONS

The statutory provision that a juror shall not be sworn in any cause who has served as a juror within a year does not apply to grand jurors. *State v. Brown*, (1895) 28 Or 147, 41 P 1042.

The legislature may prescribe who are eligible as grand jurors and the method of determining their qualifications. *State v. Carlson*, (1900) 39 Or 19, 25, 62 P 1016, 1119.

The court has power to discharge a grand juror for good cause shown. *United States v. Mitchell*, (1905) 136 Fed 896.

FURTHER CITATIONS: *Jackson v. United States*, (1900) 42 CCA 452, 102 Fed 473.

LAW REVIEW CITATIONS: 23 OLR 69.

132.040

NOTES OF DECISIONS

An objection to a juror on the ground that he is drawn from a particular panel is a challenge to the panel. *State v. Dale*, (1880) 8 Or 229.

Under this section, it is presumed that the court, in impaneling the jury, conclusively determined the question of each grand juror's qualifications. *United States v. Mitchell*, (1905) 136 Fed 896.

An objection to a juror on the ground of unconstitutionality of the law under which the jury was drawn is a challenge to the panel. *State v. Ju Nun*, (1909) 53 Or 1, 97 P 96, 98 P 513.

FURTHER CITATIONS: *State v. Carlson*, (1900) 39 Or 19, 62 P 1016.

132.050

LAW REVIEW CITATIONS: 4 WLJ 172.

132.060

NOTES OF DECISIONS

By their oaths to make a true indictment, jurors are under a duty to return a new indictment if the former indictment is defective. *State v. Reinhart*, (1895) 26 Or 466, 38 P 822.

Before grand jurors can perform their duties, the oath set forth in this section must be administered to them. *State v. Guglielmo*, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann Cas 976, 69 LRA 466.

LAW REVIEW CITATIONS: 4 WLJ 176.

132.070

NOTES OF DECISIONS

The duty of the grand jury to return a new indictment where a former indictment is defective is not dependent upon a court order resubmitting the case to them. *State v. Reinhart*, (1894) 26 Or 466, 38 P 822.

ATTY. GEN. OPINIONS: Nature of the court's charge, 1930-32, p 655; propriety of investigation of the Oregon Liquor Control Commission by a grand jury, 1950-52, p 150.

132.080

NOTES OF DECISIONS

The clerk is not required to make a record of the evidence. *State v. Carothers*, (1914) 69 Or 382, 138 P 1077.

LAW REVIEW CITATIONS: 4 WLJ 172.

132.090

NOTES OF DECISIONS

The indictment will not be set aside because of the pres-

ence of an unauthorized person before the grand jury. *State v. Whitney*, (1879) 7 Or 386.

Where no objection is made until after verdict to the presence of an unauthorized person before the grand jury, there is no reversible error. *State v. Justus*, (1883) 11 Or 178, 8 P 337, 50 Am Rep 470.

A plea in abatement will not lie to an indictment on ground that an unauthorized person was present before the grand jury. *State v. Gilliam*, (1912) 62 Or 136, 124 P 266.

The indictment will not be quashed on the ground that the deputy district attorney was present before the grand jury. *State v. Brumfield*, (1922) 104 Or 506, 209 P 120.

FURTHER CITATIONS: *State v. O'Malley*, (1967) 248 Or 601, 435 P2d 812.

LAW REVIEW CITATIONS: 19 OLR 196; 4 WLJ 172.

132.110

NOTES OF DECISIONS

An indictment will not be set aside because the court excused a grand juror at his own request for reasons personal to himself. *State v. Bock*, (1907) 49 Or 25, 88 P 318.

132.120

NOTES OF DECISIONS

A nunc pro tunc order continuing the grand jury, which is entered in the journal after the indictment is found, validates an indictment made subsequent to an oral order continuing the grand jury. *State v. Doud*, (1950) 190 Or 218, 225 P2d 400.

This section was held constitutional. *State v. McReynolds*, (1957) 212 Or 325, 319 P2d 905.

FURTHER CITATIONS: *State v. Ryan*, (1925) 114 Or 91, 234 P 811.

132.130

CASE CITATIONS: *State v. Leonard*, (1869) 3 Or 157; *State v. Ryan*, (1925) 114 Or 91, 234 P 811.

132.210

NOTES OF DECISIONS

This section is for the protection of the grand jurors and does not prohibit a member from testifying that the defendant appeared before the grand jury. *State v. Boysen*, (1915) 76 Or 48, 147 P 927.

This section was not violated by allowing the district attorney to testify as to statements made by the defendant in the grand jury room. *State v. O'Donnell*, (1915) 77 Or 116, 149 P 536.

LAW REVIEW CITATIONS: 4 WLJ 176.

132.220

NOTES OF DECISIONS

A member of the grand jury may be allowed to testify as to what any witness testified to before that body. *State v. Moran*, (1887) 15 Or 262, 14 P 419; *State v. Brown*, (1895) 28 Or 147, 41 P 1042; *State v. Robinson*, (1897) 32 Or 43, 48 P 357; *State v. Mageske*, (1926) 119 Or 312, 227 P 1065, 249 P 364.

The court may in the interest of public justice require the proceedings before the grand jury to be disclosed. *State v. Putnam*, (1909) 53 Or 266, 100 P 2; *Gowin v. Heider*, (1963) 237 Or 266, 386 P2d 1; *State v. Guse*, (1964) 237 Or 479, 392 P2d 257.

LAW REVIEW CITATIONS: 39 OLR 301; 4 WLJ 174, 176.

132.290

CASE CITATIONS: *State v. Cortman*, (1968) 251 Or 566, 446 P2d 681.

132.310

ATTY. GEN. OPINIONS: Power to investigate crimes other than those presented by district attorney, 1930-32, p 655; propriety of the investigation of the Oregon Liquor Control Commission by a grand jury, 1950-52, p 150.

LAW REVIEW CITATIONS: 3 OLR 290; 1 EL 79.

132.320

NOTES OF DECISIONS

Where six defendants appeared before the grand jury as witnesses and were compelled to testify against each other, the indictment could not be set aside on the ground that subsection (1) was violated. *United States v. Brown*, (1871) 1 Sawy 531, Fed Cas No. 14,671.

FURTHER CITATIONS: *State v. McDonald*, (1961) 231 Or 24, 361 P2d 1001; *Haynes v. Gladden*, (1967) 245 Or 487, 422 P2d 678.

LAW REVIEW CITATIONS: 4 WLJ 172, 173, 175.

132.330

CASE CITATIONS: *Gumm v. Heider*, (1960) 220 Or 5, 348 P2d 455; *State v. Sieckman*, (1970) 3 Or App 454, 474 P2d 367.

ATTY. GEN. OPINIONS: When a defendant is held to answer on a charge of assault and battery, 1922-24, p 543; proceedings instituted against drunken drivers, 1940-42, p 28; right to a preliminary examination when charged with a misdemeanor in a minor court, (1971) Vol 35, p 764.

LAW REVIEW CITATIONS: 4 WLJ 172; 1 EL 78.

132.340

ATTY. GEN. OPINIONS: When the district attorney attends, 1930-32, p 655.

LAW REVIEW CITATIONS: 1 EL 78.

132.360

LAW REVIEW CITATIONS: 38 OLR 303.

132.380

NOTES OF DECISIONS

Under this section, a grand jury may indict an accused person although he has been previously discharged by a magistrate. *State v. Belding*, (1903) 43 Or 95, 71 P 330.

Failure to hold a preliminary hearing does not deprive the trial court of jurisdiction to try the case upon such indictment. *Anderson v. Gladden*, (1955) 205 Or 538, 288 P2d 823, cert. denied, 350 US 974, 76 S Ct 451, 100 L Ed 845.

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.

FURTHER CITATIONS: *Anderson v. Gladden*, (1963) 234

Or 614, 383 P2d 986; *State v. Silver*, (1965) 239 Or 459, 398 P2d 178.

LAW REVIEW CITATIONS: 4 WLJ 169, 171; 7 WLJ 341.

132.290

NOTES OF DECISIONS

The presumption is that the jurors believed the evidence was such that in their judgment it would, if unexplained or uncontroverted, warrant a conviction. *State v. Belding*, (1903) 43 Or 95, 71 P 330.

The fact the grand jury may have been prejudiced by hearsay evidence or prejudicial publicity which it ought not to consider is not grounds for dismissing or quashing an indictment. *State v. McDonald*, (1961) 231 Or 24, 361 P2d 1001, cert. denied, 370 US 903, 82 S Ct 1247, 8 L Ed2d 399.

An accused is not entitled to a preliminary hearing before he is indicted. *State v. Walley*, (1969) 1 Or App 189, 460 P2d 370.

FURTHER CITATIONS: *State ex rel. Connall v. Roth*, (1971) 258 Or 428, 482 P2d 740.

ATTY. GEN. OPINIONS: Proof of testing cutouts and open exhausts, 1960-62, p 273.

LAW REVIEW CITATIONS: 3 OLR 290; 4 WLJ 173.

132.400

NOTES OF DECISIONS

After judgment the defendant is precluded from making an objection that the indictment was not indorsed "a true bill." *State v. McElvain*, (1899) 35 Or 365, 58 P 525.

The presumption is that five jurors concurred in finding the indictment. *State v. Belding*, (1903) 43 Or 95, 71 P 330.

FURTHER CITATIONS: *State v. Whitney*, (1879) 7 Or 386; *State v. Justus*, (1883) 11 Or 178, 8 P 337; *State v. Pool*, (1890) 20 Or 150, 25 P 375; *State v. Reinhart*, (1895) 26 Or 466, 38 P 822; *State v. Kelliher*, (1907) 49 Or 77, 88 P 867; *State v. Smith*, (1948) 182 Or 497, 188 P2d 998.

132.410

NOTES OF DECISIONS

The presumption is that the indictment was regularly found and presented. *State v. Reinhart*, (1895) 26 Or 466, 38 P 822.

An objection that the indictment did not comply with this section must be taken by a motion to set aside. *Id.*

FURTHER CITATIONS: *Bend Pub. Co. v. Haner*, (1926) 118 Or 105, 244 P 868; *Miller v. Gladden*, (1950) 219 Or 538, 348 P2d 44.

132.420

NOTES OF DECISIONS

This section does not prohibit a grand juror from testifying that the defendant was examined before the grand jury. *State v. Boysen*, (1915) 76 Or 48, 147 P 927; *State v. O'Donnell*, (1915) 77 Or 116, 149 P 536.

LAW REVIEW CITATIONS: 41 OLR 335.

132.430

NOTES OF DECISIONS

After an indictment has been indorsed "not a true bill," any subsequent investigation of the charge is under the

control of the court. *State v. Turner*, (1922) 104 Or 334, 207 P 602.

The order of the court is a condition precedent to authority of the same or subsequent grand jury to investigate an indictment indorsed "not a true bill." *Id.*

132.440

ATTY. GEN. OPINIONS: Propriety of investigation of the Oregon Liquor Control Commission by a grand jury, 1950-52, p 150; authority of grand jury to inquire into conditions at Fairview Hospital and Training Center, 1966-68, p 366.

132.510 to 132.690

LAW REVIEW CITATIONS: 49 OLR 22; 2 EL 273.

132.510

NOTES OF DECISIONS

Pleadings in criminal actions are entirely statutory. *State v. Howe*, (1895) 27 Or 138, 44 P 672; *State v. Reyes*, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182.

This section does not abolish any essential requirements of an indictment. *State v. Dougherty*, (1871) 4 Or 200.

A proceeding by indictment is an action at law. *State v. Carr*, (1876) 6 Or 134.

The enactment of this section and the repeal of the appendix containing authorized forms does not carry the implication that such forms are insufficient. *State v. Holland*, (1954) 202 Or 656, 277 P2d 386.

This section abolished the ancient and highly technical forms of pleading in criminal actions. *Smallman v. Gladden*, (1956) 206 Or 262, 291 P2d 749.

There is no statute authorizing a bill of particulars in a criminal case. *State v. Reyes*, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182.

The repeal of statutory forms did not institute common-law criminal pleadings in this state. *State v. Foss*, (1962) 230 Or 579, 371 P2d 564.

Although the indictment for sodomy would have been insufficient at common law, it was sufficient under this section. *State v. McAllister*, (1913) 67 Or 480, 136 P 354.

FURTHER CITATIONS: *State v. Smith*, (1948) 182 Or 497, 188 P2d 998; *State v. McDonald*, (1961) 231 Or 24, 361 P2d 1001; *State v. Yarbrough*, (1970) 4 Or App 302, 477 P2d 232, Sup Ct review denied.

132.520

NOTES OF DECISIONS

1. Constitutionality
2. In general
3. Statement of facts
4. Particular offenses

1. Constitutionality

This section was not unconstitutional as denying the defendant a right to demand the nature and cause of the accusation against him under Ore. Const. Art. I, §11. *State v. Dormitzer*, (1927) 123 Or 165, 261 P 426.

2. In general

Where the statute describes an offense with sufficient particularity to inform the accused of the facts charged, the indictment may be in the language of the statute. *State v. Carr*, (1876) 6 Or 133; *State v. Ah Sam*, (1887) 14 Or 347, 13 P 303; *State v. Lee*, (1889) 17 Or 488, 21 P 455; *State v. Shaw*, (1892) 22 Or 287, 29 P 1028; *State v. Miller*, (1909) 54 Or 381, 103 P 519; *State v. Runyon*, (1912) 62 Or 246, 124 P 259; *State v. Morris*, (1917) 83 Or 429, 162 P 567; *Ah*

Poo v. Stevenson, (1917) 83 Or 340, 163 P 822; State v. German, (1939) 162 Or 166, 90 P 185; State v. Estabrook, (1939) 162 Or 476, 91 P 2d 838; State v. King, (1940) 165 Or 26, 103 P2d 751; State v. Smith, (1948) 182 Or 497, 188 P2d 998.

Unless exceptions or provisos are a material part of description of the offense, it is not necessary to negative them in the indictment. State v. Tramlar, (1890) 19 Or 528, 25 P 71, 9 LRA 853; State v. Carmody, (1907) 50 Or 1, 91 P 446, 1081, 12 LRA(NS) 828; State v. Eisen, (1909) 53 Or 297, 99 P 282, 100 P 257.

The purpose of the indictment is to apprise a person of the crime with which he is charged so that he may prepare his defense. State v. King, (1940) 165 Or 26, 103 P2d 751; State v. DuBois, (1944) 175 Or 341, 153 P2d 521.

Crimes which have no name may be indicated by a brief description in the indictment, but those that have names must be named therein. State v. Vowels, (1873) 4 Or 324.

The provision that the indictment is the first pleading on the part of the state is not inconsistent with the provision of the gambling Act that fines thereunder shall be recovered by an action at law. State v. Carr, (1876) 6 Or 133.

Since the charging part of indictment determines the character of the offense, the wrong name of the crime in the preliminary part is not fatal. State v. Jarvis, (1890) 18 Or 360, 23 P 251.

Where the defendant objects to an indictment and does not demur or move to set it aside, the objection will be overruled if the essential elements of the crime are contained therein. State v. Minnick, (1909) 54 Or 86, 102 P 605.

Under this section it is not necessary that the indictment follow any particular form or statute. State v. Linville, (1928) 127 Or 565, 273 P 338.

"Unlawfully" and "feloniously" are adequate terms to use in an indictment even though the statute intimates that the act must be wilful. State v. Doud, (1950) 190 Or 218, 225 P2d 400.

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

Indictment may be good despite error in designating the offense in caption if the charging part so clearly alleges facts constituting the crime that the accused would not reasonably be confused. State v. Elkins, (1959) 216 Or 509, 339 P2d 715.

Charging a crime in the language of the statute means the language of the statute under which the charge is drawn. State v. Davis, (1969) 1 Or App 285, 462 P2d 448.

An indictment may, at any stage of the proceedings, even for the first time on appeal, be challenged on the grounds that it does not state facts sufficient to constitute a crime; however, courts do not look with favor upon such delay in attack. State v. Schulman, (1971) 92 Or App Adv Sh 1505, 485 P2d 1252, Sup Ct review denied.

3. Statement of facts

Where the acts are stated disjunctively in the statute, they may be alleged in a single count in the indictment if the conjunctive is used. State v. Carr, (1876) 6 Or 133; State v. Dale, (1880) 8 Or 229; State v. Humphreys, (1903) 43 Or 44, 76 P 824.

An indictment which contains facts sufficient to constitute a crime is not defective because some allegations therein are indefinite and uncertain. State v. Dormitzer, (1927) 123 Or 165, 261 P 426; State v. DuBois, (1944) 175 Or 341, 153 P2d 521.

The indictment should contain on its face such a specification of facts as will identify the offense. State v. Dougherty, (1871) 4 Or 200.

An allegation which is not descriptive of the offense may be regarded as surplusage. State v. Humphreys, (1902) 43 Or 44, 70 P 824.

A demurrer to the indictment questions whether the facts are alleged as provided by this section and not whether they could be made more concise. State v. Keller, (1933) 143 Or 589, 21 P2d 807.

Where the statute characterizes the offense in general terms, the statute must be supplemented by other allegations which clearly and accurately set forth every ingredient of the offense. State v. Anderson, (1965) 242 Or 457, 410 P2d 230.

A fatally indefinite indictment may stand against demurrer if the grand jury cannot charge more specifically and recites its inability in the indictment. State v. Davis, (1969) 1 Or App 285, 462 P2d 448.

Where the facts were set forth with sufficient particularity and the indictment was tested by demurrer, the demurrer was overruled where the indictment stated a crime defined by statute. State v. Davis, (1956) 207 Or 525, 296 P2d 240.

Indictment in the exact language of the contributing to the delinquency of a minor statute was demurrable since it did not inform the accused in what respects their acts were illegal. State v. Elkins, (1959) 216 Or 509, 339 P2d 715.

4. Particular offenses

The indictments were held sufficient under this section. **Abortion**, State v. Schulman, (1971) 92 Or App Adv Sh 1505, 485 P2d 1252, Sup Ct review denied; **adultery**, State v. Eggleston, (1904) 45 Or 346, 77 P 738; **arson**, State v. Molitor, (1955) 205 Or 698, 289 P2d 1090; **assault with a dangerous weapon**, State v. Kelly, (1902) 41 Or 20, 68 P 1; **assault and robbery while armed**, State v. Howard, (1971) 92 Or App Adv Sh 1763, 486 P2d 1301; **assault with intent to kill**, State v. Lavery, (1899) 35 Or 402, 58 P 107; **burglary not in a dwelling**, State v. Marshall, (1963) 234 Or 540, 382 P2d 857; **burglary with explosives**, Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192; **embezzlement**, State v. Dormitzer, (1927) 123 Or 165, 261 P 426; **enhanced penalty**, State v. Waterhouse, (1957) 209 Or 424, 307 P2d 327; State v. Johnson, (1957) 209 Or 476, 307 P2d 351; **escape from lawful custody**, State v. Taylor, (1960) 224 Or 106, 355 P2d 603; **interference with a business relation**, State v. Smith, (1948) 182 Or 497, 188 P2d 998; **interfering with privacy of another**, State v. Waterhouse, (1957) 209 Or 424, 307 P2d 327; **larceny**, State v. Christy, (1929) 131 Or 314, 282 P 105; **manslaughter**, State v. Davis, (1956) 207 Or 525, 296 P2d 240; **murder**, State v. Steeves, (1896) 29 Or 85, 43 P 947; State v. Casey, (1923) 108 Or 386, 213 P 771; State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182; State v. Nunn, (1958) 212 Or 546, 321 P2d 356; **possessing a stolen vehicle**, State v. Gulbrandson, (1970) 2 Or App 511, 470 P2d-160; **statutory rape**, State v. Gauthier, (1925) 113 Or 297, 231 P 141; State v. Hilton, (1926) 119 Or 441, 249 P 1103; **traffic violations**, Yunker v. Quillin, (1954) 202 Or 362, 275 P2d 249; **unlawfully selling securities**, State v. Swain, (1934) 147 Or 207, 31 P2d 745, 32 P2d 773; **violation of license**, State v. Cook, (1936) 154 Or 67, 58 P2d 249. State v. Waterhouse, supra, distinguished in State v. Blacker, (1963) 234 Or 131, 380 P2d 789.

An indictment charging manslaughter by abortion need not allege defendant was not a licensed medical or osteopathic physician. State v. Elliott, (1963) 234 Or 522, 383 P2d 382.

An indictment charging receiving and concealing stolen property consisting of "certain hand tools" was not sufficiently definite. State v. Green, (1966) 245 Or 319, 422 P2d 272.

A murder indictment charging failure to provide "adequate sustenance, and medical and hygienic care" was insufficient for failure to state particular circumstances.

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

FURTHER CITATIONS: State v. Holland, (1954) 202 Or 656, 277 P2d 386; State v. Jackson, (1960) 224 Or 337, 356 P2d 495; State v. Waggoner, (1961) 228 Or 334, 365 P2d 291; State v. Hunt, (1970) 3 Or App 634, 475 P2d 596, Sup Ct review denied; State v. Zimmerlee, (1971) 5 Or App 253, 483 P2d 111.

LAW REVIEW CITATIONS: 12 OLR 254.

132.530

NOTES OF DECISIONS

1. The party charged
2. The crime charged

(1) Necessary particular circumstances

1. The party charged

The party charged in the indictment should be specifically stated. State v. Eddy, (1905) 46 Or 625, 81 P 941, 82 P 707.

The defendant's name need not be repeated in an indictment if once stated in full. Id.

Aliases may be used in an indictment if they are not arranged to imply defendant belongs to the so-called criminal class. State v. Kibler, (1969) 1 Or App 208, 461 P2d 72.

Although the general rule was that the indictment should contain both the given name and surname of the accused, use of the initials was not fatal to the indictment. State v. Weston, (1921) 102 Or 102, 201 P 1083.

2. The crime charged

The indictment should contain such a specification of acts and descriptive circumstances that will determine the identity of the offense. State v. Dougherty, (1871) 4 Or 200; State v. Burke, (1928) 126 Or 651, 269 P 869, 270 P 756.

Where defendant demurs to the indictment on the ground that it does not state facts sufficient to constitute a crime, he waives his right to demur to the indictment on the ground that it does not conform to the requirements of this section. State v. Miller, (1926) 119 Or 409, 243 P 72; State v. Smith, (1948) 182 Or 497, 188 P2d 998.

Indictment may be good despite error in designating the offense in caption if the charging part so clearly alleges facts constituting the crime that the accused would not reasonably be confused. State v. Elkins, (1959) 216 Or 509, 339 P2d 715.

It is unnecessary verbiage to include in the indictment the lesser included offenses; this does not prevent simplification of indictment by elimination of unnecessary verbiage. State v. Gibbons, (1961) 228 Or 238, 364 P2d 611.

An indictment is sufficient if it sets forth the elements of the crime so as to adequately inform the defendant of the charge he must answer. State v. Reynolds, (1961) 229 Or 167, 366 P2d 524.

Words in the statute may be omitted from the indictment if they are necessarily implied. Id.

Although the indictment for embezzlement contained many surplus words, it was sufficient under this section. State v. Dormitzer, (1927) 123 Or 165, 261 P 426.

An indictment charging a motorist with involuntary manslaughter was sufficient without setting out the facts with greater particularity. State v. Lockwood, (1928) 126 Or 118, 268 P 1016.

Indictment accusing defendant of negligent homicide was not demurrable for having used "wilful and wanton" as found in ORS 483.992. State v. Wilcox, (1959) 216 Or 110, 337 P2d 797.

Indictment of crime aiding inmate to escape was sufficient under this section. State v. Taylor, (1960) 224 Or 106, 355 P2d 603.

(1) **Necessary particular circumstances.** Although an indictment for a statutory offense is usually sufficient if in the words of the statute, it may be necessary to allege the particular circumstances to constitute a complete crime. State v. Packard, (1871) 4 Or 157; State v. Smith, (1948) 182 Or 497, 188 P2d 998.

Only when by the statute the doing of particular acts are made necessary to constitute the crime must particular acts be alleged. Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614, cert. denied, 379 US 947.

A challenge directed to the specificity of an indictment must be raised by demurrer at the time of arraignment or it is waived. State v. Pomroy, (1971) 4 Or App 564, 480 P2d 450.

An indictment for setting up and managing a lottery was insufficient as it failed to state the particular unlawful act. State v. Dougherty, (1871) 4 Or 200.

Indictment in the exact language of ORS 471.620 was demurrable since it did not inform the accused in what respects their acts were illegal. State v. Elkins, (1959) 216 Or 509, 339 P2d 715.

Murder indictment need not charge that killing was done in commission of another felony in order to authorize introduction of proof of such fact. State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182.

An indictment charging receiving and concealing stolen property consisting of "certain hand tools" was not sufficiently definite. State v. Green, (1966) 245 Or 319, 422 P2d 272.

A murder indictment charging failure to provide "adequate sustenance, and medical and hygienic care" was insufficient for failure to state particular circumstances. State v. House, (1971) 5 Or App 519, 485 P2d 33, Sup Ct review allowed.

FURTHER CITATIONS: Wong Sing v. Independence, (1905) 47 Or 231, 83 P 387; State v. Branton, (1907) 49 Or 86, 87 P 535; State v. Emmons, (1910) 55 Or 352, 104 P 882, 106 P 451; State v. Keller, (1933) 143 Or 589, 21 P2d 807; State v. Cahill (dissenting opinion), (1956) 208 Or 538, 293 P2d 169, 298 P2d 214; Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192; State v. Nunn, (1958) 212 Or 546, 321 P2d 356; Merrill v. Gladden, (1959) 216 Or 460, 337 P2d 774; Portland v. Welch, (1961) 229 Or 308, 364 P2d 1009, 367 P2d 403; State v. Anderson, (1965) 242 Or 457, 410 P2d 230; State v. Davis, (1969) 1 Or App 285, 462 P2d 448; State v. Hunt, (1970) 3 Or App 634, 475 P2d 596, Sup Ct review denied; State v. Freeman, (1971) 4 Or App 627, 481 P2d 638.

132.540

NOTES OF DECISIONS

1. Subsection (1)

- (1) In general
- (2) Time and place
- (3) Particular offenses

2. Subsection (2)

3. Decisions under former statute

1. Subsection (1)

(1) **In general.** An indictment is sufficient under this subsection, although it contains allegations not necessarily descriptive of the offense which may be regarded as surplusage. State v. Horne, (1891) 20 Or 485, 26 P 665; State v. Humphreys, (1903) 43 Or 44, 70 P 824; State v. Jewett, (1906) 48 Or 577, 85 P 994.

Although the indictment is not artfully drawn and could be improved, it is sufficient under this subsection. State v. Linville, (1928) 127 Or 565, 273 P 338; State v. Anthony, (1946) 179 Or 282, 169 P2d 587, cert. denied, 330 US 826, 67 S Ct 865, 91 L Ed 1276.

Although the indictment is not artfully drawn and could

be improved, it is sufficient under this subsection. *State v. Nunn*, (1958) 212 Or 546, 321 P2d 356; *State v. Palmer*, (1962) 232 Or 300, 375 P2d 243.

An indictment averring that the crime was committed in the county is sufficient, and the pleading need not negative the fact that the offense might have been committed in that part of the county over which the federal courts have exclusive jurisdiction. *State v. Carlson*, (1901) 39 Or 19, 62 P 1016, 1119.

If the indictment enables the court to determine without going outside the record that a crime has been committed, and the nature of the crime, it is sufficient under this subsection. *State v. Burke*, (1928) 126 Or 651, 269 P 869, 270 P 756.

Where the indictment complies with the provisions of this subsection, the constitutional right of a defendant "to demand the nature and cause against him" is not violated. *State v. Nesmith*, (1931) 136 Or 593, 300 P 356.

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 and Walker*, (1955) 204 Or 69, 267 P2d 993, 995, 282 P2d 344, 347.

Facts constituting aggravation of an alleged offense must be set forth in the original indictment. *State v. Blacker*, (1963) 234 Or 131, 380 P2d 789.

An indictment need only inform the defendant with certainty as to the crime charged and as to what he must defend against. *State v. Wilkinson*, (1966) 245 Or 274, 420 P2d 629.

An indictment was sufficient even though it did not name the person who participated in the criminal act such as the purchaser of lottery tickets. *State v. Rood*, (1963) 234 Or 196, 380 P2d 806.

(2) **Time and place.** An allegation that the act was committed "then and there" refers to the time and place of the offense and is sufficient. *State v. Kelly*, (1902) 41 Or 20, 68 P 1.

An indictment charging that the crime was committed in a particular month of a particular year within the statute of limitations is sufficient under this subsection. *State v. Christy*, (1929) 131 Or 314, 282 P 105.

(3) **Particular offenses.** If the cause of death is unknown to the grand jury and it is so stated in the indictment, the indictment complies with the Oregon Constitution and statutes in stating a crime. *State v. Schwensen*, (1964) 237 Or 506, 392 P2d 328.

The indictment for adultery charging that the defendant "then and there" was a married man was sufficient under this subsection. *State v. Eggleston*, (1904) 45 Or 346, 77 P 738.

An indictment for robbery was insufficient when not specific in respect to the party charged. *State v. Eddy*, (1905) 46 Or 625, 81 P 941, 82 P 707.

Although the complaint in the justice's court for assault and battery was not denominated as an accusation, it was sufficient under this subsection. *Straub v. State*, (1927) 121 Or 451, 255 P 897.

Under this subsection, the indictment in a homicide case was sufficient although it did not allege that the deceased was an officer or that the defendant was resisting arrest. *State v. Kingsley*, (1931) 137 Or 305, 2 P2d 3, 3 P2d 113.

Indictment charging crime of first degree arson against defendants in the language of the statute was sufficient. *State v. Molitor*, (1955) 205 Or 698, 289 P2d 1090.

Indictment accusing defendant of negligent homicide was not demurrable for having used "wilful and wanton" as found in ORS 483.992. *State v. Wilcox*, (1959) 216 Or 110, 337 P2d 797.

An indictment charging defendant with violation of ORS 166.270, including previous conviction, was not demurrable under subsection (1)(f). *State v. Hoover*, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695.

Indictment of crime of aiding an inmate to escape was sufficient under this section. *State v. Taylor*, (1960) 224 Or 106, 355 P2d 603.

The indictment was insufficient to charge obtaining money by false pretenses. *State v. Mims*, (1963) 235 Or 540, 385 P2d 1002.

The complaint was insufficient to charge a violation of the nuisance statute. *State v. Anderson*, (1965) 242 Or 457, 410 P2d 230.

An indictment charging receiving and concealing stolen property consisting of "certain hand tools" was not sufficiently definite. *State v. Green*, (1966) 245 Or 319, 422 P2d 272.

2. Subsection (2)

In an indictment for assault with intent to commit rape, the use of the word "violently" is sufficient to charge the act was done "forcibly." *State v. Daly*, (1888) 16 Or 240, 18 P 357.

An indictment for assault with a dangerous weapon need not follow the words of the statute. *State v. Linville*, (1928) 127 Or 565, 273 P 338.

In an indictment for larceny, it is sufficient to allege that the defendant "feloniously took and carried away" the personal property therein described without employing the word "steal" in any form. *State v. Lee Yan Yan*, (1882) 10 Or 365.

An indictment under ORS 166.270 charging a prior-convicted felon of carrying a "firearm capable of being concealed upon the person," but omitting the statutory definition, was sufficient under this subsection. *State v. Wood*, (1948) 183 Or 650, 195 P2d 703.

3. Decisions under former statute

An indictment which followed, where applicable, the forms prescribed in the appendix to chapter 7, title 26, OCLA, was sufficient. **Assault and battery**, *State v. Greeley*, (1939) 160 Or 435, 86 P2d 437; **assault and robbery, being armed with a dangerous weapon**, *State v. Dillely*, (1887) 15 Or 70, 13 P 648; *State v. Broom*, (1931) 135 Or 641, 297 P 340; **burglary**, *State v. Briggen*, (1924) 112 Or 681, 231 P 125; *State v. Tovrea*, (1927) 123 Or 231, 261 P 431; **forgery**, *State v. Childers*, (1897) 32 Or 119, 49 P 801; *State v. Swank*, (1921) 99 Or 571, 195 P 168; **larceny**, *State v. Lee Yan Yan*, (1882) 10 Or 365; **libel**, *State v. Hosmer*, (1914) 72 Or 57, 142 P 581; **murder**, *State v. Dodson*, (1870) 4 Or 64; *State v. Brown*, (1879) 7 Or 186; *State v. Martin*, (1909) 54 Or 403, 100 P 1106, 103 P 512; *State v. Morris*, (1917) 83 Or 429, 163 P 567; *State v. Weston*, (1921) 102 Or 102, 201 P 1083; *State v. Casey*, (1923) 108 Or 386, 213 P 771, 217 P 632; *State v. Kelley*, (1926) 118 Or 397, 247 P 146; *State v. Merten*, (1944) 175 Or 257, 152 P2d 942; **perjury**, *State v. Spencer*, (1876) 6 Or 152; *State v. Ah Lee*, (1890) 18 Or 540, 23 P 424; **robbery**, *State v. Eddy*, (1905) 46 Or 625, 81 P 941, 82 P 707.

When the forms given were inapplicable, other forms as nearly similar as the case permitted could be used. *State v. Wright*, (1890) 19 Or 258, 24 P 229; *State v. McAllister*, (1913) 67 Or 480, 136 P 354; *State v. Briggen*, (1924) 112 Or 681, 231 P 125; *State v. Christiansen*, (1935) 150 Or 11, 41 P2d 442; *State v. Poyntz*, (1942) 168 Or 69, 120 P2d 966.

In using the forms prescribed in the appendix to chapter 7, title 26, OCLA, it was not necessary to state in the indictment the name of the owner of the property. **Burglary**, *State v. Briggen*, (1924) 112 Or 681, 23 P 125; **murder while committing robbery**, *State v. McCarthy*, (1938) 160 Or 196, 83 P2d 801; **robbery**, *State v. Eddy*, (1905) 46 Or 625, 81 P 941, 82 P 707.

An indictment for assault with intent to commit rape was sufficient although it did not allege the age of the defendant or that the victim was not the wife of the defendant. *State*

v. Edy, (1926) 117 Or 430, 244 P 538; State v. Nesmith, (1931) 136 Or 593, 300 P 356.

The appendix was considered a part of the statutes. State v. Dodson, (1890) 4 Or 64.

An indictment which contained all the essential statutory elements of the offense was sufficient although it did not follow the form prescribed. State v. Parr, (1909) 54 Or 316, 103 P 434.

The form prescribed in the statute was not intended to indicate a rule as to the requisites of indictments, it was a guide for the convenience of the pleader. United States v. McKinley, (1903) 127 Fed 168.

FURTHER CITATIONS: Fitzpatrick v. United States, (1900) 178 US 304, 20 S Ct 944, 44 L Ed 1078; State v. Scott, (1912) 63 Or 444, 128 P 441; State v. Mishler, (1916) 81 Or 548, 160 P 382; State v. Lockwood, (1928) 126 Or 118, 268 P 1016; State v. Coffman, (1943) 171 Or 166, 136 P2d 687; State v. Peppie, (1946) 179 Or 532, 173 P2d 468; State v. Smith, (1948) 182 Or 497, 188 P2d 998; Nelson v. United States, (1887) 30 Fed 112; Jackson v. United States, (1900) 42 CCA 452, 102 Fed 473; Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192; State v. Palmer, (1962) 232 Or 300, 375 P2d 243; State v. Hoffman, (1963) 236 Or 98, 385 P2d 741; State v. Yielding, (1964) 238 Or 419, 395 P2d 172; State v. Collis, (1966) 243 Or 222, 413 P2d 53; State v. March, (1967) 247 Or 271, 428 P2d 896; State v. Davis, (1969) 1 Or App 285, 462 P2d 448; State v. Hunt, (1970) 3 Or App 634, 475 P2d 596, Sup Ct review denied; State v. Zimmerlee, (1971) 5 Or App 253, 483 P2d 111; State v. House, (1971) 5 Or App 519, 485 P2d 33, Sup Ct review allowed.

LAW REVIEW CITATIONS: 37 OLR 84.

132.550

NOTES OF DECISIONS

An indictment is sufficient if it substantially conforms to the form herein prescribed. State v. Wintzingerode, (1881) 9 Or 153; State v. Guglielmo, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann Cas 976, 69 LRA 466; State v. Gauthier, (1925) 113 Or 297, 231 P 141.

The form prescribed in the statute is not intended to indicate a rule as to the requisites of indictments, but is a guide for the convenience of the pleader. United States v. McKinley, (1903) 127 Fed 168; Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192.

The form in this section may be varied to apply to any crime. State v. Wright, (1890) 19 Or 258, 24 P 229.

An indictment complying with this section and a form in the former appendix to chapter 7, title 26, OCLA, was sufficient. State v. Martin, (1909) 54 Or 403, 100 P 1106, 103 P 512.

An indictment entitled "State of Oregon v. J.S." was not insufficient notwithstanding this section provides that it be entitled "The State," etc. State v. Swank, (1921) 99 Or 571, 195 P 168.

ATTY. GEN. OPINIONS: Commencement of an action in the county court, 1944-46, p 300.

LAW REVIEW CITATIONS: 12 OLR 254.

132.560

NOTES OF DECISIONS

Where a statute makes it a crime to do one of several acts stated disjunctively, the indictment is sufficient if the acts charged are stated in the indictment using the word "and" even though the statute uses the word "or." State v. Carr, (1876) 6 Or 133; State v. Berry, (1877) 6 Or 341; State v. Dale, (1880) 8 Or 229; State v. Humphreys, (1902)

43 Or 44, 70 P 824; State v. White, (1906) 48 Or 416, 87 P 137.

Objection to an indictment on the grounds that it does not conform to this section must be taken by demurrer or it is waived. State v. Jarvis, (1890) 18 Or 360, 23 P 251; State v. Lee, (1899) 33 Or 506, 56 P 415; State v. Reyner, (1907) 50 Or 224, 91 P 301; State v. Taylor, (1913) 65 Or 266, 132 P 713.

If the indictment charges two or more offenses, it is defective under this section. **Accessory before the fact and accessory after the fact**, State v. Hinkle, (1898) 33 Or 93, 54 P 155; **burglary and larceny**, State v. Briggen, (1924) 112 Or 681, 231 P 125; **rape and incest**, State v. Jarvis, (1890) 18 Or 360, 23 P 251.

Where a greater offense includes a lesser one, the indictment charging both is not defective. State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128; State v. Branton, (1907) 49 Or 86, 87 P 535.

Charges may be joined when conduct or acts are concatenated in time, place and circumstances and the evidence of one charge would be relevant and admissible with the evidence of the other charges. State v. Huennekens, (1966) 245 Or 150, 420 P2d 384; State v. Tracy, (1967) 246 Or 349, 425 P2d 171; State v. Clipston, (1970) 3 Or App 313, 473 P2d 682; State v. Birt, (1970) 3 Or App 265, 473 P2d 669; State v. Fitzmaurice, (1970) 3 Or App 601, 475 P2d 426, Sup Ct review denied.

Where the indictment charges a single continuous transaction, it is sufficient under this section. State v. Laundry, (1922) 103 Or 443, 204 P 958, 206 P 290.

Where a single offense may be committed by several means, the indictment may allege in a single count the means in the alternative. *Id.*

The defendant may be charged by one indictment with the stealing at the same time and place of several persons' goods. State v. Clark, (1905) 46 Or 140, 80 P 101. **Distinguished in** State v. Gratz, (1969) 254 Or 474, 461 P2d 829.

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.

Where the means by which death was caused was alleged conjunctively, the indictment for murder was sufficient. State v. Fiester, (1897) 32 Or 254, 50 P 561.

An indictment for manslaughter including allegations of both reckless and drunken driving was sufficient under this section. State v. Cram, (1945) 176 Or 577, 160 P2d 283.

It was error to require the state to elect whether defendant was to be tried as a principal or aider and abettor. State v. Cook, (1966) 242 Or 509, 411 P2d 78.

The indictment was good against demurrer. State v. Stuart, (1968) 250 Or 303, 442 P2d 231.

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. Gilbert, (1883) 55 Or 596, 112 P 436; State v. Runyon, (1912) 62 Or 246, 124 P 259; State v. Keller, (1933) 143 Or 589, 21 P2d 807; State v. Cahill (dissenting opinions), (1956) 208 Or 538, 293 P2d 169, 298 P2d 214; State v. Montieth, (1966) 247 Or 43, 417 P2d 1012; State v. Gratz, (1969) 254 Or 474, 461 P2d 829.

LAW REVIEW CITATIONS: 2 OLR 170, 13 OLR 188; 41 OLR 128-132; 48 OLR 293.

132.570

NOTES OF DECISIONS

Although an indictment need not state presumptions of law, inferences are not allowed to interpret the language of a formal charge where certainty is demanded by statute. *State v. Eddy*, (1905) 46 Or 625, 81 P 941, 82 P 707.

In an indictment charging the defendant with the statutory offense of preventing one employed by another from continuing his work, that the business and employment were lawful is presumed. *State v. Smith*, (1948) 182 Or 497, 188 P2d 998.

FURTHER CITATIONS: *State v. Hoover*, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695.

132.580

NOTES OF DECISIONS

Where a defendant files a demurrer to the indictment, he is thereafter precluded from filing a motion to set aside. *State v. Smith*, (1899) 33 Or 483, 55 P 534; *Gue v. Eugene*, (1909) 53 Or 289, 100 P 306.

Although a witness's name is not indorsed upon the indictment he may testify on trial. *State v. Anderson*, (1882) 10 Or 448.

It is reversible error for the court to refuse to set aside an indictment which did not contain the names of all the witnesses indorsed thereon. *State v. Pool*, (1890) 20 Or 150, 25 P 375.

Where the case has been resubmitted, the subsequent indictment must contain the names of the witnesses who were examined when the first indictment was found as well as those examined when the second indictment was found. *State v. Andrews*, (1899) 35 Or 388, 58 P 765.

Since the object of placing the name of a witness upon the indictment is only to identify a particular person, an assumed name is sufficient. *State v. LaRose*, (1909) 54 Or 555, 104 P 299.

Although indorsement of the defendant's name as witness is not necessary, its appearance on the indictment is not a ground to quash the indictment. *State v. Rader*, (1912) 62 Or 37, 124 P 195.

This section does not apply to an information to be filed by the district attorney under the Habitual Criminal Act. *State v. Smith*, (1929) 128 Or 515, 273 P 323.

The names of only those witnesses whom the grand jury believes can give competent evidence which will support a verdict of guilty and whose evidence it is expected will be used to confront the accused on trial are required to be indorsed on the indictment. *State v. McDonald*, (1961) 231 Or 24, 361 P2d 1001, cert denied, 370 US 903, 82 S Ct 1247, 8 L Ed 2d 399.

When a case has been resubmitted the subsequent indictment need not contain the names of those witnesses examined at the first inquiry. *State v. McDonald*, (1961) 231 Or 24, 361 P2d 1001, 365 P2d 494. Overruling *State v. Andrews*, (1899) 35 Or 388, 58 P 765.

A motion to quash on the ground that the names of the witnesses were not indorsed upon the indictment was properly denied. *State v. Kelliher*, (1907) 49 Or 77, 88 P 867.

FURTHER CITATIONS: *Shelp v. United States*, (1897) 26 CCA 570, 81 Fed 694; *State v. Guse*, (1964) 237 Or 49, 392 P2d 257.

132.590

NOTES OF DECISIONS

Under this section an indictment is not insufficient if it alleges the acts charged with such a degree of certainty as to inform the defendant of the nature of the offense with

which he is charged. *State v. Frasier*, (1919) 94 Or 90, 180 P 520, 184 P 848; *State v. Cook*, (1936) 154 Or 62, 58 P2d 249.

This provision applies only to the insufficiency of the indictment and to a "trial, judgment, or other proceeding" under an insufficient indictment. *Howell v. State*, (1889) 1 Or 241.

When no special relationship exists between defendant and deceased, it is necessary to allege only the facts of the occurrence and the law will imply the duty, if any exists. *State v. Standard*, (1962) 232 Or 333, 375 P2d 551.

If the state is permitted to express its view of the law in the indictment, the rights of the defendant to a fair and impartial trial may be infringed upon. *Id.*

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, cert. denied, 84 S Ct 176, 11 L Ed 2d 126.

This section does not apply where the indictment fails to charge an offense. *State v. Mims*, (1963) 235 Or-540, 385 P2d 1002.

The defect in the indictment for sodomy was not prejudicial. *State v. Edwards*, (1966) 243 Or 440, 412 P2d 526.

FURTHER CITATIONS: *Straub v. State*, (1927) 121 Or 451, 454, 255 P 897; *State v. Sieckman*, (1968) 251 Or 259, 445 P2d 599; *State v. Clipston*, (1970) 3 Or App 313, 473 P2d 682; *State v. Fitzmaurice*, (1970) 3 Or App 601, 475 P2d 426, Sup Ct review denied; *State v. Zimmerlee*, (1971) 5 Or App 253, 483 P2d 111.

132.610 to 132.720

LAW REVIEW CITATIONS: 2 EL 273.

132.610

NOTES OF DECISIONS

An instruction by the court in the substance of this section is not erroneous. *State v. Eggleston*, (1904) 45 Or 346, 77 P 738; *State v. Goddard*, (1914) 69 Or 73, 133 P 90, 138 P 243, Ann Cas 1916A, 146; *State v. Delaplain*, (1930) 132 Or 627, 287 P 681; *State v. Poole*, (1939) 161 Or 481, 90 P2d 472.

Where the offense is in its nature continuing or constituted out of a series of minor acts, it is sufficient to charge the act as having been committed upon a particular day. *State v. Ah Sam*, (1887) 14 Or 347, 13 P 303.

ORS 132.550 which indicates a precise averment as to time is a guide to the pleader only and does not affect this section. *United States v. McKinley*, (1903) 127 Fed 168.

An allegation that defendant "on or about" a certain date committed the offense is sufficient. *United States v. McKinley*, (1903) 127 Fed 168. *Contra*, *United States v. Winslow*, (1875) 3 Sawy 337, Fed Cas No. 16,742.

This section refers to charging the crime not to the proof of the crime, and where a specific relationship between the parties defines the crime and the acts tend to prove such relationship, evidence of acts which occur after the date of the crime or continue after the date of the indictment is admissible. *State v. Young*, (1970) 1 Or App 562, 463 P2d 374, Sup Ct review denied.

Time is not a material ingredient of the crime of assault and battery by means of force likely to produce great bodily harm. *State v. Newton*, (1970) 1 Or App 419, 463 P2d 372.

The precise time is not a material ingredient in the crime of failure to support. *State v. Combs*, (1970) 3 Or App 260, 473 P2d 672.

Since time is not an essential ingredient of the crime of sodomy, the state was not required to prove the act relied on was committed on the date stated in the indictment,

but could prove that the act was committed on another date. *State v. Howard*, (1958) 214 Or 611, 331 P2d 1116.

The exact time of the commission of the rape was not a vital element of the crime. *State v. Yielding*, (1964) 238 Or 419, 395 P2d 172.

The court did not abuse its discretion in permitting the state, after presentation of its case in chief, to elect the date on which crime was committed. *State v. Kibler*, (1969) 1 Or App 208, 461 P2d 72.

FURTHER CITATIONS: *State v. Cutting*, (1870) 3 Or 260; *State v. Coss*, (1909) 53 Or 462, 101 P 193; *State v. Wilson*, (1928) 127 Or 294, 271 P 742; *Ex parte Montoya*, (1943) 170 Or 499, 135 P2d 281; *State v. Cahill*, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214; *State v. Jackson*, (1960) 221 Or 315, 351 P2d 439, *State v. West*, (1970) 1 Or App 422, 463 P2d 383.

132.630

NOTES OF DECISIONS

In an indictment for forgery, it is not necessary to name any particular person as having been defrauded. *State v. Lurch*, (1885) 12 Or 104, 6 P 408.

An indictment for larceny containing an erroneous allegation as to the ownership of the property was sufficient under this section. *State v. Chaplin*, (1915) 74 Or 346, 144 P 1187.

Although there was a discrepancy between the allegation and the proof of the initials of the owner of the dwelling house, the indictment for arson was sufficient under this section. *State v. Director*, (1924) 113 Or 74, 227 P 298, 231 P 191.

Where the indictment for receiving stolen goods alleged the property to belong to a partnership, failure to prove that the owners were copartners was not a fatal variance. *State v. Savan*, (1934) 148 Or 423, 36 P2d 594, 96 ALR 497.

It was proper to apply this section in a prosecution for larceny of a calf. *State v. Smith*, (1969) 253 Or 280, 453 P2d 942.

FURTHER CITATIONS: *State v. Adler*, (1914) 71 Or 70, 142 P 344.

132.640

NOTES OF DECISIONS

An indictment charging larceny of a "calf" is sufficient under this section. *State v. Brinkley*, (1909) 55 Or 134, 104 P 893, 105 P 708.

FURTHER CITATIONS: *State v. Eppers*, (1932) 138 Or 340, 3 P2d 989, 6 P2d 1086; *State v. Russell*, (1962) 231 Or 317, 372 P2d 770; *State v. Green*, (1966) 245 Or 319, 422 P2d 272.

ATTY. GEN. OPINIONS: Necessity of allegation of the value of the animals, 1920-22, p 403; use of the common name "livestock," 1926-28, p 557.

132.670

NOTES OF DECISIONS

A prosecution for libel must be by indictment. *Wallowa County v. Oakes*, (1904) 46 Or 33, 78 P 892.

FURTHER CITATIONS: *State v. Hosmer*, (1914) 72 Or 57, 142 P 814.

132.690

NOTES OF DECISIONS

An indictment for perjury which contains every allegation mentioned in the form given in the appendix is sufficient. *State v. Ah Lee*, (1890) 18 Or 540, 23 P 424; *State v. Woolridge*, (1904) 45 Or 389, 78 P 333.

It is sufficient to allege, in an indictment for perjury committed by a witness in the trial of a civil action in the circuit court, that the oath was taken in that court, without designating the officer by whom it was administered. *State v. Spencer*, (1876) 6 Or 152.

Under this section, the indictment must set forth the substance of the controversy in respect of which the perjury was committed. *State v. Witham*, (1877) 6 Or 366.

An indictment is sufficient if it charges that the person was duly sworn without setting forth the manner in which it was done. *State v. Jewett*, (1906) 48 Or 577, 85 P 994.

The proceedings in which the perjury was committed must be described correctly in the indictment, but it need not set forth the pleadings, record or proceedings with which the oath is connected. *State v. Stilwell*, (1924) 109 Or 643, 221 P 174.

This section applies to indictments for false swearing. *State v. King*, (1940) 165 Or 26, 103 P2d 751.

An information for perjury charging the defendant with making false statements in a deposition, sufficiently stated that the clerk had authority to administer oaths and that an oath was administered to the defendant. *State v. Woolridge*, (1904) 45 Or 389, 78 P 333.

An indictment charging subordination of perjury by procuring a false oath to be made and setting out the entire paper did not need to specifically charge that the oath was presented to anyone, since it was apparent from the paper itself. *State v. Jewett*, (1906) 48 Or 577, 85 P 994.

Under this section, an information charging that the accused swore before a notary that all the facts in the complaint were true was not insufficient for failing to set out the verification to the complaint. *State v. Luper*, (1907) 49 Or 605, 91 P 444; *State v. Luper*, (1908) 95 P 811.

Under this section, an indictment charging that defendant "unlawfully, wilfully and corruptly swore falsely" sufficiently alleged the falsity of the statements. *State v. King*, (1940) 165 Or 26, 103 P2d 751.

132.710

NOTES OF DECISIONS

Under this section, where the indictment charged larceny "in a dwelling, the Riverside Hotel," it sufficiently alleged the crime to have been committed in a house. *State v. O'Neil*, (1891) 21 Or 170, 27 P 1038.

FURTHER CITATIONS: *State v. Wood*, (1948) 183 Or 650, 185 P2d 703.

LAW REVIEW CITATIONS: 39 OLR 164; 4 WLJ 286.

132.720

CASE CITATIONS: *State v. Fetsch*, (1917) 85 Or 45, 165 P 1179.

ATTY. GEN. OPINIONS: Correction of name of defendant, indicted by fictitious name, 1926-28, p 421.