

## Chapter 133

### Complaint; Arrest; Examination; Discharge or Commitment

#### Chapter 133

ATTY. GEN. OPINIONS: Right to a preliminary examination when charged with a misdemeanor in a minor court, (1971) Vol 35, p 764.

#### 133.010

##### NOTES OF DECISIONS

Oregon law does not require the names of complaining witnesses be indorsed on an information. *Eubanks v. Gladden*, (1964) 236 F Supp 129.

FURTHER CITATIONS: *State v. Guglielmo*, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann Cas 976, 69 LRA 466; *White v. Pac. Tel. & Tel. Co.*, (1939) 162 Or 270, 282, 148 P2d 239, 149 P2d 168.

ATTY. GEN. OPINIONS: Invoking the powers of a committing magistrate, 1922-24, p 543; proceedings against drunken drivers, 1940-42, p 28; commencement of actions in the county court, 1944-46, p 300; peace officer signing complaint for misdemeanor not committed in his presence, 1956-58, p 62; authority of city police to cite persons under state law, 1966-68, p 336; right to a preliminary examination when charged with a misdemeanor in a minor court, (1971) Vol 35, p 764.

#### 133.020

CASE CITATIONS: *Wallowa County v. Oakes*, (1904) 46 Or 33, 78 P 892.

ATTY. GEN. OPINIONS: Invoking the powers of a committing magistrate, 1922-24, p 543.

#### 133.030

##### NOTES OF DECISIONS

A circuit judge is a magistrate. *Ex parte Wessens*, (1918) 89 Or 587, 175 P 73.

FURTHER CITATIONS: *Wallowa County v. Oakes*, (1904) 46 Or 33, 78 P 892.

ATTY. GEN. OPINIONS: A county judge as magistrate, 1944-46, p 300; authority of city police to cite persons under state law, 1966-68, p 336.

LAW REVIEW CITATIONS: 4 WLJ 170.

#### 133.037

##### NOTES OF DECISIONS

###### 1. Under former similar statute

The presence or absence of reasonable cause for the restraint was to be determined by the court as a matter of law and not by the jury as a question of fact. *Lukas v. J.C. Penney Co.*, (1963) 233 Or 345, 378 P2d 717; *Delp*

*v. Zapp's Drug & Variety Stores*, (1964) 238 Or 538, 395 P2d 137.

When there was a conflict in the evidence with respect to probable cause, only the question of the existence of facts which, if established, would constitute probable cause, were to be submitted to the jury. *Id.*

The restraint did not need to be for more than a brief time. *Lukas v. J. C. Penney Co.*, (1963) 233 Or 345, 378 P2d 717.

Detention of a person who, with reasonable cause, was suspected, for the purpose of learning the suspect's name, was reasonable. *Delp v. Zapp's Drug & Variety Stores*, (1964) 238 Or 538, 395 P2d 137.

LAW REVIEW CITATIONS: 39 OLR 131; 44 OLR 210; 4 WLJ 262-268.

#### 133.110

##### NOTES OF DECISIONS

Information gained without committing a trespass and without the aid of any electronic device, could properly be made the basis for the issuance of a search warrant. *State v. Cartwright*, (1966) 246 Or 120, 418 P2d 822, cert denied, 386 US 937.

The mere filing of a criminal complaint does not ipso facto solo constitute the probable cause for the issuance of a warrant of arrest required by Ore. Const. Art. I, §9. *State v. Redeman*, (1971) 92 Or App Adv Sh 1197, 485 P2d 655.

FURTHER CITATIONS: *Hannah v. Wells*, (1872) 4 Or 249; *State v. Guglielmo*, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann Cas 976, 69 LRA 466; *Aiken v. Shell Oil Co.*, (1959) 219 Or 523, 348 P2d 51.

ATTY. GEN. OPINIONS: Issuance of warrant of arrest on Sunday, 1920-22, p 121; peace officer signing complaint for misdemeanor not committed in his presence, 1956-58, p 62; proof of testing cutouts and open exhausts, 1960-62, p 273; compelling defendant to appear on a traffic offense, (1968) Vol 34, p 290.

LAW REVIEW CITATIONS: 6 WLJ 431-448.

#### 133.120

##### NOTES OF DECISIONS

A warrant of arrest for crime must be issued by a magistrate of the county in which the same is committed or triable. *In re Kelly*, (1890) 46 Fed 653.

ATTY. GEN. OPINIONS: Enforcing fine imposed upon delinquent defendant who is resident of another county, 1954-56, p 90.

## 133.130

## NOTES OF DECISIONS

The issuance of a "John Doe" warrant upon an information charging the commission of a crime by unknown parties was not void ab initio. *White v. Pac. Tel. & Tel. Co.*, (1939) 162 Or 270, 90 P2d 193.

## 133.170

## NOTES OF DECISIONS

A policeman who has been legally appointed is a peace officer. *Reising v. Portland*, (1910) 57 Or 295, 111 P 377, Ann Cas 1912D, 895; *Albee v. Weinberger*, (1914) 69 Or 331, 138 P 859; *Branch v. Albee*, (1914) 71 Or 188, 200, 142 P 598.

FURTHER CITATIONS: *State v. Laundry*, (1922) 103 Or 443, 495, 204 P 958, 206 P 290.

ATTY. GEN. OPINIONS: Special agents as peace officers, 1926-28, p 398; whether a deputy sheriff is a peace officer, 1926-28, pp 459, 462; definition of peace officer, 1928-30, p 133; employees of State Department of Agriculture as peace officers, 1932-34, p 197; members of state police as peace officers, 1942-44, p 148; constables as peace officers, 1946-48, p 271; validity of service of municipal court warrant by a member of the Oregon State Police, 1948-50, p 291; brand inspector as a peace officer, 1966-68, p 65; authority of city police to cite persons under state law, 1966-68, p 336.

## 133.210

## NOTES OF DECISIONS

It is proper to instruct that there must be some actual restraint of the person to constitute an arrest and that mere utterance of words indicative of an arrest is not sufficient. *Shain v. Meier & Frank Co.*, (1932) 140 Or 518, 13 P2d 360.

Where the defendant was charged after arrest with an offense of which the search showed him guilty rather than the offense for which he was arrested, the arrest was not unlawful. *State v. McDaniel*, (1925) 115 Or 187, 234, 231 P 965, 237 P 373.

Where an attempted arrest was not completed by taking the defendants into custody of the officer, the defendants were not authorized to participate in an unlawful assault on the officer. *State v. Allen*, (1936) 152 Or 422, 53 P2d 1054.

Defendant was not under arrest or in custody during the interrogation. *State v. Cook*, (1966) 242 Or 509, 411 P2d 78.

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

ATTY. GEN. OPINIONS: Authority of agents of the Oregon State Hospital to make an arrest, 1932-34, p 28; power of National Guard to arrest, 1966-68, p 556.

LAW REVIEW CITATIONS: 4 OLR 160.

## 133.220

## NOTES OF DECISIONS

An instruction is proper which states that a private person may arrest another without a warrant when a felony has been committed and such private person has reasonable cause for believing the person arrested to have committed it. *Shain v. Meier & Frank Co.*, (1932) 140 Or 518, 13 P2d 360.

FURTHER CITATIONS: *State v. Laundry*, (1922) 103 Or 443, 495, 204 P 958, 206 P 290.

ATTY. GEN. OPINIONS: Authority of a constable to make an arrest without a warrant, 1928-30, p 279; power of a peace officer to arrest a person on Sunday without a warrant, 1930-32, p 203; whether authorized employees of the State Department of Agriculture may serve warrants, 1940-42, p 123; authority of city police to cite persons under state law, 1966-68, p 336; power of National Guard to arrest, 1966-68, p 556.

LAW REVIEW CITATIONS: 44 OLR 208.

## 133.240

CASE CITATIONS: *State v. Williams*, (1967) 248 Or 85, 432 P2d 679.

ATTY. GEN. OPINIONS: Issuing and serving a warrant of arrest for a misdemeanor on Sunday, 1920-22, p 121; arrest without a warrant on Sunday for a misdemeanor, 1930-32, p 203.

## 133.250

## NOTES OF DECISIONS

Person submitting to arrest cannot complain that person arresting him had no warrant. *State v. Cody*, (1925) 116 Or 509, 241 P 983.

It is proper to instruct that there must be some actual restraint of the person to constitute an arrest and that mere utterance of words indicative of an arrest is not sufficient. *Shain v. Meier & Frank Co.*, (1932) 140 Or 518, 13 P2d 360.

Where a person driving a motor vehicle stops upon hearing a peace officer's siren, he submits himself to the custody of the officer and is under arrest. *State v. Christensen*, (1935) 151 Or 529, 51 P2d 835.

Where an attempted arrest was not completed by the defendants' submission to the custody of the officer, the defendants were not authorized to participate in an unlawful assault on the officer. *State v. Allen*, (1936) 152 Or 422, 53 P2d 1054.

FURTHER CITATIONS: *State v. McDaniel*, (1925) 115 Or 187, 234, 231 P 965, 237 P 373; *State v. Hoover*, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695; *State v. Olson*, (1969) 1 Or App 380, 462 P2d 681.

ATTY. GEN. OPINIONS: Issuance of citation, 1956-58, p 62; power of National Guard to arrest, 1966-68, p 556.

LAW REVIEW CITATIONS: 4 OLR 163.

## 133.270

## NOTES OF DECISIONS

See also cases under ORS 141.110.

FURTHER CITATIONS: *State v. McDaniel*, (1925) 115 Or 187, 213, 231 P 965, 237 P 373.

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.

## 133.290

## NOTES OF DECISIONS

There was substantial evidence from which the trial court could find the police complied with this section. *State v. Spicer*, (1970) 3 Or App 120, 473 P2d 147.

FURTHER CITATIONS: *Miller v. United States*, (1957) 357 US 301; *State v. Cortman*, (1968) 251 Or 566, 446 P2d 681,

cert. denied, 394 US 951; *State v. Gulbrandson*, (1970) 2 Or App 511, 470 P2d 160; *State v. Westbrook*, (1971) 5 Or App 33, 482 P2d 547.

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.

### 133.300

ATTY. GEN. OPINIONS: Extent to which special agent can enter upon privately owned property to apprehend criminals, 1936-38, p 424.

### 133.310

#### NOTES OF DECISIONS

1. In general
2. Cause to believe commission of felony
3. Search and seizure

##### 1. In general

In order that a crime be committed in the presence of an officer within the meaning of this section, it is not necessary that he see it committed but it is sufficient if he observes it through his sense of hearing or smell. *State v. Quartier*, (1925) 114 Or 657, 236 P 746; *State v. Duffy*, (1931) 135 Or 290, 295 P 953; *State v. Elk*, (1968) 249 Or 614, 439 P2d 1011.

An attempt to make an arrest without a warrant in other circumstances than those specified in this section is unlawful and may be resisted. *State v. Seeley*, (1908) 51 Or 131, 134, 94 P 37.

A peace officer may arrest a person without a warrant for violation of the motor vehicle law. *State v. Christensen*, (1935) 151 Or 529, 51 P2d 835.

This section gives a peace officer authority to arrest without a warrant one who is committing or attempting to commit a crime in the officer's presence. *Bowles v. Creason*, (1937) 156 Or 278, 66 P2d 1183.

Anyone who possesses a concealed weapon for which he has no license may be lawfully arrested without warrant by police officer for a "crime committed in his presence." *State v. Hoover*, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695.

The state bears the burden of proving the lawfulness of the arrest. *State v. Jones*, (1967) 248 Or 428, 435 P2d 317.

Where circumstances exist from which officer may formulate the reasonable belief that there was a duly issued warrant for the arrest of person charged with a crime in another jurisdiction, an arrest is justified under subsection (4). *State v. Newcomer*, (1970) 2 Or App 181, 465 P2d 916, Sup Ct review denied.

##### 2. Cause to believe commission of felony

A belief unsupported by facts or circumstances will not justify an officer in making an arrest without a warrant. *State v. Duffy*, (1931) 135 Or 290, 295 P 953; *State v. Jones*, (1967) 248 Or 428, 435 P2d 317; *State v. Parks*, (1970) 5 Or App 601, 485 P2d 1246. Probable cause is the existence of circumstances calculated to lead a reasonably prudent person to believe in the guilt of the accused party. *State v. Duffy*, (1931) 135 Or 290, 295 P 953.

Under subsection (3), the felony which must be shown to have been committed need not have been committed by the person arrested. *State v. Knighten*, (1964) 236 Or 634, 390 P2d 166.

Whether or not there exists "probable cause" or "reasonable grounds" to believe that a crime is being committed in the officer's presence is the probability as it would appear to reasonably cautious, prudent men, not legal technicians. *State v. Penney*, (1965) 242 Or 470, 410 P2d 226.

An arrest under subsection (2) does not support a search unless there was probable cause even if a felony has in fact been committed. *State v. Roderick*, (1966) 243 Or 105, 412 P2d 17.

Evidence of information from a reliable informer is sufficient to sustain a finding of reasonable cause. *Id.*

The police need not be certain that a crime has been committed so long as they have a reasonable suspicion that a crime has occurred and that defendant committed it. *State v. Frailey*, (1971) 92 Or App Adv Sh 1392, 485 P2d 1126, Sup Ct review denied.

The search was illegal because there was insufficient evidence on which to base the arrest. *State v. Roderick*, (1966) 243 Or 105, 412 P2d 17; *State v. Rater*, (1969) 253 Or 109, 453 P2d 680; *State v. Parks*, (1971) 5 Or App 601, 485 P2d 1246.

City detectives were justified in arresting without a warrant a person suspected of robbery who had a stolen watch in his possession. *Askay v. Maloney*, (1919) 92 Or 566, 179 P 899.

Where a sheriff was in a county of which he was not sheriff and had reason to believe that the defendant had committed a crime, he was authorized to arrest the defendant without a warrant. *State v. Cody*, (1925) 116 Or 509, 241 P 983.

A warrant for arrest was unnecessary where a felony had actually been committed and the arresting officer had reasonable grounds for believing that the defendant had committed it. *White v. Pac. Tel. & Tel. Co.*, (1939) 162 Or 270, 90 P2d 193.

##### 3. Search and seizure

Where a defendant is arrested without a warrant, a subsequent search of his person and property is not illegal. *State v. Quartier*, (1925) 114 Or 657, 236 P 746; *State v. Hayes*, (1926) 119 Or 554, 249 P 637; *State v. Walker*, (1931) 135 Or 680, 296 P 850.

Arrest and search without a warrant is legal where "probable cause" or "reasonable grounds" is established by evidence apart from an informer's communication. *State v. Penney*, (1965) 242 Or 470, 410 P2d 226; *State v. George*, (1969) 253 Or 613, 456 P2d 497; *State v. Hasting*, (1970) 2 Or App 103, 467 P2d 124.

Although an officer may arrest for a crime committed in his presence without a warrant, he may not search the person without a warrant prior to the person's arrest. *State v. McDaniel*, (1925) 115 Or 187, 231 P 965, 237 P 373.

An arrest without a warrant for vagrancy was lawful, although the defendant was subsequently found guilty of unlawfully carrying a concealed weapon. *State v. Wood*, (1948) 183 Or 650, 195 P2d 703.

FURTHER CITATIONS: *State v. Williams*, (1904) 45 Or 314, 77 P 965, 67 LRA 167; *State v. Laundry*, (1922) 103 Or 443, 204 P 958, 206 P 290; *Shain v. Meier & Frank Co.*, (1932) 140 Or 518, 13 P2d 360; *Kraft v. Montgomery Ward & Co.*, (1959) 220 Or 230, 315 P2d 558, 348 P2d 239; *Delp v. Zapp's Drug & Variety Stores*, (1964) 238 Or 538, 395 P2d 137; *State v. Allen*, (1967) 248 Or 376, 434 P2d 740; *State v. Kipp*, (1968) 249 Or 681, 440 P2d 369; *State v. Roderick*, (1968) 250 Or 452, 443 P2d 167; *State v. Planck*, (1970) 3 Or App 331, 473 P2d 694, Sup Ct review denied; *State v. Brown*, (1971) 5 Or App 412, 485 P2d 444; *State v. Patterson*, (1971) 5 Or App 438, 485 P2d 429; *State v. Riner*, (1971) 92 Or App Adv Sh 1493, 485 P2d 1234, Sup Ct review denied.

ATTY. GEN. OPINIONS: Power of a peace officer without a warrant to make an arrest on Sunday for a misdemeanor, 1920-22, p 121, 1930-32, p 203; whether an officer may search the accused after an arrest without a warrant for violation of the prohibition laws, 1920-22, p 186, 1922-24, p 719; authority of special agents to arrest without a warrant, 1924-

26, p 398, 1936-38, p 424; power of Oregon Game Commission [State Game Commission] to arrest without a warrant and search the defendant's property without a search warrant, 1928-30, p 77; authority of a constable to make an arrest without a warrant outside his own district, 1928-30, p 279; power of a peace officer to make an arrest without a warrant for a misdemeanor not committed in his presence, 1930-32, p 211, 1938-40, p 131; authority of employes of State Department of Agriculture to arrest without a warrant, 1932-34, p 197; detaining or arresting, without a warrant, a person allegedly suffering from mental illness, 1954-56, p 129; proof of testing cutouts and open exhausts, 1960-62, p 273; authority of city police to cite persons under state law, 1966-68, p 336; power of National Guard to arrest, 1966-68, p 556.

LAW REVIEW CITATIONS: 3 OLR 179; 4 OLR 160; 6 OLR 177; 19 OLR 374; 39 OLR 131, 373; 44 OLR 208.

## 133.320

## NOTES OF DECISIONS

Where an officer has reasonable cause to believe that a felony was then being committed within the house, he may enter it to make an arrest without a warrant. *State v. Quartier*, (1925) 114 Or 657, 236 P 746; *State v. Duffy*, (1930) 135 Or 290, 295 P 953.

Officers are entitled to enter where necessary to make a lawful arrest for a known felony. *State v. Chinn*, (1962) 231 Or 259, 373 P2d 392.

The entry must conform to this section and federal constitutional standards of reasonableness. *State v. Jones*, (1967) 248 Or 428, 435 P2d 317.

There were exigent circumstances which justified the officers in entering without first announcing their purpose. *State v. Steffes*, (1970) 2 Or App 163, 465 P2d 905, Sup Ct review denied.

FURTHER CITATIONS: *Ker v. California*, (1963) 374 US 23, 50, 83 S Ct 1623, 1638; *State v. Hollman*, (1968) 251 Or 416, 446 P2d 117; *State v. Johnson*, (1969) 253 Or 416, 454 P2d 852; *State v. Casey*, (1970) 4 Or App 243, 478 P2d 414.

ATTY. GEN. OPINIONS: Extent to which a special agent can enter private property to apprehend criminals, 1936-38, p 424.

## 133.330

## NOTES OF DECISIONS

Where the police officer arrested the defendant following an assault in the officer's presence, the defendant need not be informed of the cause of the arrest. *State v. Swanson*, (1926) 119 Or 522, 250 P 216.

The officers' uniforms sufficiently informed the defendant of their authority to make the arrest. *State v. Wood* (concurring opinion), (1948) 183 Or 650, 657, 195 P2d 703.

FURTHER CITATIONS: *State v. McDaniel*, (1925) 115 Or 187, 213, 231 P 965, 237 P 373; *State v. Hoover*, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695; *State v. Knighten*, (1964) 236 Or 634, 390 P2d 166.

## 133.340

CASE CITATIONS: *State v. Williams*, (1904) 45 Or 314, 77 P 965, 67 LRA 166; *Utley v. City of Independence*, (1965) 240 Or 384, 402 P2d 91.

## 133.350

## NOTES OF DECISIONS

Where a person has committed an assault with a dangerous weapon he may be arrested by a private person although the latter did not see the offense committed. *Lander v. Miles*, (1868) 3 Or 35.

Where a sheriff was in a county of which he was not a sheriff and had reason to believe that the defendant had committed a crime, his arrest of the defendant was lawful under this section. *State v. Cody*, (1925) 116 Or 509, 241 P 983.

An instruction is proper which states that a private person may effect an arrest without a warrant when a felony has been committed, and such private person has reasonable cause for believing the person arrested to have committed it. *Shain v. Meier & Frank Co.*, (1932) 140 Or 518, 13 P2d 360.

ATTY. GEN. OPINIONS: Authority of a private person to make an arrest for violation of the prohibition laws in his presence, 1920-22, p 186; whether a constable acting as a private person may arrest for a violation of the motor vehicle law, 1928-30, p 279; authority of city police to cite persons under state law, 1966-68, p 336.

LAW REVIEW CITATIONS: 44 OLR 208.

## 133.430

CASE CITATIONS: *Trevathan v. Mut. Life Ins. Co.*, (1941) 166 Or 515, 113 P2d 621.

LAW REVIEW CITATIONS: 17 OLR 356.

## 133.520

ATTY. GEN. OPINIONS: Admission to bail when accused arrested in county other than one from which warrant issued, 1958-60, p 378.

LAW REVIEW CITATIONS: 5 WLJ 21.

## 133.550

## NOTES OF DECISIONS

This section is directory only. *State v. Belding*, (1903) 43 Or 95, 71 P 330.

After an arrest it is the duty of an officer to take his prisoner before a magistrate without delay unless the prisoner waives his right to have him do so. *Bowles v. Creason*, (1937) 156 Or 278, 66 P2d 1183; *Brown v. Meier & Frank Co.*, (1939) 160 Or 608, 86 P2d 79.

Where the delay in bringing an accused before the magistrate is occasioned by the conduct of the person arrested or of his attorney, the officer is not liable for breach of duty in that respect. *Bowles v. Creason*, (1938) 159 Or 129, 78 P2d 324; *Brown v. Meier & Frank Co.*, (1939) 160 Or 608, 86 P2d 79.

It is a question for the jury whether the detention was for an unreasonable time. *Id.*

When the defendant is arrested and brought before a magistrate pursuant to this section, the magistrate must inform him of the charge against him and of his right to counsel. *State v. Butchek*, (1927) 121 Or 141, 253 P 397, 254 P 805.

A general practice under which the arresting officer lodges the accused in jail while he proceeds to the prosecuting attorney's office and secures a complaint is not out of harmony with the requirements of this section. *Bowles v. Creason*, (1938) 159 Or 129, 78 P2d 324.

An officer cannot justify the detention of a prisoner for

an unreasonable length of time without a warrant on the ground that time is necessary to investigate the case and procure evidence against the person under arrest. *Brown v. Meier & Frank Co.*, (1939) 160 Or 608, 86 P2d 79.

This section is not complied with where a defendant after arrest is taken before a self-constituted inquisitorial body for the examination instead of magistrate. *Allen v. Burns Intl. Detective Agency*, (1947) 121 Or 492, 256 P 197.

A denial of the prisoner's rights under this section was necessarily a denial of his rights under ORS 133.610. *State v. Allen*, (1965) 239 Or 524, 398 P2d 477.

In the event that conditions make it impossible to take defendant before a magistrate prior to taking statements the defendant may want to give, then the police must explain his rights in a manner consistent with the Neely case. *State v. Sunderland*, (1970) 4 Or App 1, 468 P2d 900, 476 P2d 563, Sup Ct review denied.

The defendant could and should have been taken before a magistrate sooner than he was. *State v. Shipley*, (1962) 232 Or 354, 375 P2d 237, cert. denied, 374 US 811, 83 S Ct 1701, 10 L Ed 2d 1034.

The defendant was taken before the magistrate without delay. *State v. Sunderland*, (1970) 4 Or App 1, 468 P2d 900, 476 P2d 563, Sup Ct review denied; *State v. Riner*, (1971) 92 Or App Adv Sh 1493, 485 P2d 1234, Sup Ct review denied.

Failure to take a defendant before a magistrate on New Year's Eve or New Year's Day was not a "delay" under this section. *State v. Sunderland*, (1970) 4 Or App 1, 468 P2d 900, 476 P2d 563, Sup Ct review denied.

**FURTHER CITATIONS:** *State v. Morris*, (1917) 83 Or 429, 459, 163 P 567; *State v. Green*, (1929) 128 Or 49, 273 P 381; *State v. Lillie*, (1943) 172 Or 194, 139 P2d 576; *State v. Freeman*, (1962) 232 Or 267, 374 P2d 453; *State v. Sallee*, (1965) 241 Or 244, 405 P2d 501; *State v. Jones*, (1965) 242 Or 427, 410 P2d 219; *Dorsciak v. Gladden*, (1967) 246 Or 233, 425 P2d 177; *State v. Williams*, (1967) 248 Or 85, 432 P2d 679; *Ball v. Gladden*, (1968) 250 Or 485, 443 P2d 621; *State v. Travis*, (1968) 250 Or 213, 441 P2d 597; *State v. Seigler*, (1970) 4 Or App 405, 478 P2d 436, Sup Ct review denied.

**ATTY. GEN. OPINIONS:** Procedure where a traffic officer finds an overloaded truck on the highway, 1920-22, p 534; power of officer to release arrested person on his own recognizance without taking him before magistrate, 1930-32, p 441; effect of waiver of preliminary examination before magistrate, 1946-48, p 90; admission to bail when accused arrested in county other than one from which warrant issued, 1958-60, p 378; authority of city police to cite persons under state law, 1966-68, p 336; dismissal of information on motion of district attorney, (1970) Vol 35, p 354.

#### 133.560

**ATTY. GEN. OPINIONS:** Authority of city police to cite persons under state law, 1966-68, p 336.

**LAW REVIEW CITATIONS:** 39 OLR 131; 5 WLJ 21.

#### 133.610

##### NOTES OF DECISIONS

Where a defendant is arrested without a warrant for a felony and brought before the magistrate, it is not necessary that the charge be in writing. *Hannah v. Wells*, (1872) 4 Or 249.

A waiver of a preliminary examination before the magistrate is an admission only that there is sufficient cause for holding the accused. *Hess v. Ore. Baking Co.*, (1897) 31 Or 503, 49 P 803.

Since neither a district attorney nor a police officer to

whom the defendant made a confession is a magistrate, they were not required to inform him of the charge against him and of his right to counsel. *State v. Butchek*, (1927) 121 Or 141, 253 P 367, 254 P 805.

No preliminary hearing is necessary when the grand jury indicts a person. *State v. Sanford*, (1966) 245 Or 397, 421 P2d 988.

A denial of the prisoner's rights under ORS 133.550 was necessarily a denial of his rights under this section. *State v. Allen*, (1965) 239 Or 524, 398 P2d 477.

**FURTHER CITATIONS:** *Wallowa County v. Oakes*, (1905) 46 Or 33, 78 P 892; *State v. Morris*, (1917) 83 Or 429, 163 P 567; *State v. Lillie*, (1943) 172 Or 194, 139 P2d 576; *State v. Leland*, (1951) 190 Or 598, 227 P2d 785; *State v. Freeman*, (1962) 232 Or 267, 374 P2d 453, cert. denied, 373 US 919, 83 S Ct 1310, 10 L Ed 2d 418; *State v. Adams*, (1965) 240 Or 179, 400 P2d 556; *State v. Allen*, (1965) 241 Or 95, 404 P2d 207; *Silva v. State*, (1966) 243 Or 187, 412 P2d 375; *State v. Casey*, (1966) 244 Or 168, 416 P2d 665; *State v. Sunderland*, (1970) 4 Or App 1, 468 P2d 900, 476 P2d 563, Sup Ct review denied.

**ATTY. GEN. OPINIONS:** Effect of waiver of preliminary examination before the magistrate, 1946-48, p 90; right to a preliminary examination when charged with a misdemeanor in a minor court, (1971) Vol 35, p 764.

**LAW REVIEW CITATIONS:** 4 WLJ 170; 5 WLJ 21.

#### 133.620

**CASE CITATIONS:** *State v. Lillie*, (1943) 172 Or 194, 139 P2d 576.

**ATTY. GEN. OPINIONS:** Dismissal of information on motion of district attorney, (1970) Vol 35, p 354.

#### 133.625

##### NOTES OF DECISIONS

The question of indigency is one for the trial court to decide from the evidence. *State v. Sands*, (1970) 2 Or App 575, 469 P2d 795, Sup Ct review denied.

The court properly exercised its discretion in denying change-of-counsel requests. *State v. Miller*, (1969) 1 Or App 460, 460 P2d 874, Sup Ct review denied.

**FURTHER CITATIONS:** *State v. Freeman*, (1962) 232 Or 267, 374 P2d 453; *Gebhart v. Gladden*, (1966) 243 Or 145, 412 P2d 29; *State v. Rutherford*, (1970) 1 Or App 599, 465 P2d 243, Sup Ct review denied.

**ATTY. GEN. OPINIONS:** Fees of court appointed counsel, 1960-62, p 301; counsel appointments in inferior courts, 1960-62, p 375; county public defender office, (1970) Vol 34, p 1157.

**LAW REVIEW CITATIONS:** 44 OLR 258, 259; 5 WLJ 663-670; 6 WLJ 394, 491.

#### 133.635

**ATTY. GEN. OPINIONS:** Fees of court appointed counsel, 1960-62, p 301; counsel appointments in inferior courts, 1960-62, p 375; county public defender office, (1970) Vol 34, p 1157.

**LAW REVIEW CITATIONS:** 47 OLR 181; 4 WLJ 168.

**133.650****NOTES OF DECISIONS**

If a continuance is necessary, a magistrate has power under this section to commit the defendant or to release him on bail. *Hannah v. Wells*, (1872) 4 Or 249.

An undertaking is not of a character contemplated by this section where it in effect states that the examination of defendant has been completed and that he is held to answer. *State v. Gardner*, (1896) 29 Or 254, 45 P 753.

Failure of a defendant to appear at the examination before the magistrate is not a breach of a bail undertaking which contains no agreement that he will so appear. *Id.*

**FURTHER CITATIONS:** *Capos v. Clatsop County*, (1933) 144 Or 510, 25 P2d 903, 90 ALR 289.

**133.660**

**LAW REVIEW CITATIONS:** 4 WLJ 169, 170.

**133.670**

**CASE CITATIONS:** *State v. Lillie*, (1943) 172 Or 194, 134 P2d 576.

**133.680****NOTES OF DECISIONS**

Before the statement made by a defendant can be admitted in evidence against him at his trial, it must affirmatively appear that notice of his right to waive a statement was given. *State v. Hatcher*, (1896) 29 Or 309, 44 P 584; *State v. Andrews*, (1899) 35 Or 388, 391, 58 P 765.

Statements which are made to the district attorney at his office are not part of the defendant's preliminary examination, and are admissible, if at all, as extrajudicial confessions and not under this section. *State v. Scott*, (1912) 63 Or 444, 128 P 441; *State v. Stevenson*, (1920) 98 Or 285, 193 P 1030; *State v. Kelley*, (1926) 118 Or 397, 247 P 146.

A voluntary confession is admissible even though made before the defendant was taken to the magistrate. *State v. Leland*, (1951) 190 Or 598, 227 P2d 785, *aff'd* on other grounds 343 US 790, 72 S Ct 1002, 96 L Ed 1302.

**FURTHER CITATIONS:** *State v. Lillie*, (1943) 172 Or 194, 139 P2d 576.

**133.690****NOTES OF DECISIONS**

Where a statement made on preliminary examination by one accused of crime is not signed and certified by the magistrate as provided in subsection (3), it is not admissible on trial. *State v. Hatcher*, (1896) 29 Or 309, 44 P 584.

**LAW REVIEW CITATIONS:** 4 WLJ 169.

**133.700****NOTES OF DECISIONS**

Error in admitting a preliminary statement made by the accused on a criminal prosecution is cured where he subsequently testifies to the same state of facts set forth therein. *State v. Hatcher*, (1896) 29 Or 309, 44 P 584.

**133.755****NOTES OF DECISIONS**

Discovery in criminal cases is covered by this section exclusively. *State v. Little*, (1967) 249 Or 297, 431 P2d 810, *cert. denied*, 390 US 955.

Exculpatory evidence, at the request of the defense, must be disclosed by the prosecution at such time as will allow the defendant to use it effectively in his own defense. *State ex rel. Dooley v. Connall*, (1970) 257 Or 94, 475 P2d 582.

In the event the prosecution and defense cannot agree as to the time for and the disclosure of evidence, the trial court has the inherent power and the duty to decide the time of disclosure. *Id.*

Motion for mistrial should have been granted for prosecution's failure to comply with an order to disclose damaging admissions of defendant. *State v. Hiteshow*, (1970) 4 Or App 58, 476 P2d 935.

**LAW REVIEW CITATIONS:** 4 WLJ 170, 177, 179; 7 WLJ 338-346.

**133.810 to 133.820**

**LAW REVIEW CITATIONS:** 4 WLJ 169.

**133.810****NOTES OF DECISIONS**

The discharge of an accused on preliminary examination by a magistrate is prima facie evidence of want of probable cause for the arrest. *Stamper v. Raymond*, (1900) 38 Or 16, 35, 62 P 20.

A complaint for malicious prosecution is sufficient although it does not allege that the magistrate complied with subsection (1). *Kuhnhausen v. Stadelman*, (1944) 174 Or 290, 148 P2d 239, 149 P2d 168.

**ATTY. GEN. OPINIONS:** Dismissal of information on motion of district attorney, (1970) Vol 35, p 354; right to a preliminary examination when charged with a misdemeanor in a minor court, (1971) Vol 35, p 764.

**133.820****NOTES OF DECISIONS**

If the acts proved against the defendant constitute a crime different from the one designated, the magistrate should hold the defendant to answer for the crime disclosed on the examination. *Hannah v. Wells*, (1872) 4 Or 249.

If the magistrate is satisfied that the crime was committed, it is his duty to commit the accused notwithstanding irregularity in the proceedings before him. *Merriman v. Morgan*, (1879) 7 Or 68.

Where the crime is not within the jurisdiction of the justice's court, the magistrate is powerless to do more than to order him to be held to answer the charge as provided by this section. *State v. Andrews*, (1899) 35 Or 388, 58 P 765.

Under this section, the state must prove to the magistrate that the crime has been committed and make a prima facie showing that the accused is apparently guilty. *State v. Belding*, (1903) 43 Or 95, 71 P 330.

The right to take bail from one accused of crime depends upon a valid order having been previously entered by a magistrate in the form prescribed in this section. *Malheur County v. Carter*, (1908) 52 Or 616, 98 P 489.

**FURTHER CITATIONS:** *State v. Lillie*, (1943) 172 Or 194, 139 P2d 576.

**ATTY. GEN. OPINIONS:** Proceedings to hold an accused to answer a charge of assault and battery, 1922-24, p 543; effect of waiver of preliminary examination, 1946-48, p 90; jurisdiction to reduce bail or dismiss proceedings after defendant is held to answer, 1964-66, p 403; right to a preliminary examination when charged with a misdemeanor in a minor court, (1971) Vol 35, p 764.

## 133.830

## NOTES OF DECISIONS

A commitment designating the crime as "carrying on a lottery" was sufficient. *Fleming v. Bills*, (1871) 3 Or 286.

A commitment designating the crime against each prisoner as "murder" was sufficient. *United States v. Martin*, (1883) 9 Sawy 90, 17 Fed 150.

If the offense charged has a specific name by which it is known at law, a designation of it by that name in the commitment is sufficient and the particulars constituting the crime need not be stated. *Id.*

A commitment holding accused to answer "for the crime of enticing and inveigling" certain named persons "to leave the State of Oregon against their will" was sufficient. *In re Kelly*, (1890) 46 Fed 653.

A crime that has no generic name must be designated with particularity. *Id.*

Rules of construction are not to be applied as strictly to a commitment of a justice of the peace as to an indictment. *Id.*

A commitment substantially complying with this section is not objectionable because it was erroneously entitled "In the Circuit Court." *Ex parte Wessens*, (1918) 89 Or 587, 175 P 73.

FURTHER CITATIONS: *State v. Lillie*, (1943) 172 Or 194, 139 P2d 576.

ATTY. GEN. OPINIONS: Jurisdiction to reduce bail or dismiss proceedings after defendant is held to answer, 1964-66, p 403.

## 133.860

## NOTES OF DECISIONS

Where a magistrate failed to certify in writing that the undertaking was taken and made no written order directing the discharge, discharge was proved by parol in an action on the bail. *State v. Hayes*, (1868) 2 Or 314.

The magistrate was bound to return the proceedings before him to the circuit court notwithstanding the fact that the prisoner was discharged on habeas corpus before the term of the circuit court at which he was held to answer. *Merriman v. Morgan*, (1879) 7 Or 68.

ATTY. GEN. OPINIONS: Proceedings to hold an accused to answer a charge of assault and battery, 1922-24, p 543; jurisdiction to reduce bail or dismiss proceedings after defendant is held to answer, 1964-66, p 403.