Chapter 163

Offenses Against Persons

163.010 to 163.660

LAW REVIEW CITATIONS: 47 OLR 184.

163.115

NOTES OF DECISIONS

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

(1) First degree murder (ORS 163.010)

(a) In general. To constitute murder in the first degree the killing had to be done purposely and of deliberate and premeditated malice or in the commission or attempt to commit rape, arson, robbery or burglary. State v. Garrand, (1874) 5 Or 216; State v. Dorland, (1939) 161 Or 403, 89 P2d 595.

There had to be some evidence other than the mere proof of killing to constitute murder in the first degree. State v. Conally, (1869) 3 Or 69; State v. Olds, (1890) 19 Or 397, 24 P 394.

It was not error to give a "felony-murder" instruction. State v. Morris, (1965) 241 Or 253, 405 P2d 369; State v. Tremblay, (1971) 4 Or App 512, 479 P2d 507, Sup Ct review denied.

Voluntary intoxication of the defendant could be considered in determining the issue as to whether the killing was done with deliberation or premeditation. State v. Weaver, (1899) 35 Or 415, 58 P 109.

Where murder was charged as deliberate and with malice, evidence that it occurred during attempted robbery was admissible. State v. Anderson, (1909) 53 Or 479, 101 P 198.

A person shooting deceased who had been mortally wounded by another was guilty of murder if the effects of his shot hastened death. State v. Weston, (1937) 155 Or 556, 64 P2d 536, 108 ALR 1402.

Where evidence proved a homicide was committed in the perpetration of one of the felonies enumerated in the statute defining first degree murder and no doubt was created as to some other degree, instruction as to different degrees of homicide was improper. State v. Wilson, (1948) 182 Or 681, 189 P2d 403.

In an indictment under the statute where the evidence created a slight doubt as to what degree of homicide was involved, the court should have charged on all degrees, and the jury could have found the accused guilty of some lesser degree. Id.

It was not prejudicial error for the court to inform the jury that a person imprisoned for life is subject to parole. State v. Leland, (1951) 190 Or 598, 227 P2d 785, aff'd on other grounds 343 U.S. 790, 72 S Ct 1002, 96 L Ed 1302.

The jury was not bound by the opinions of psychiatrists on the question of defendants' mental condition. State v. McGahuey, (1962) 230 Or 643, 371 P2d 669.

Whether "deliberate and premeditated malice" had been proved beyond a reasonable doubt was a question for the jury. Id.

Where the only felony committed (apart from the murder) was the assault upon the victim which resulted in the killing, the assault merged with the killing and could not be an ingredient of a "felony-murder." State v. Branch, (1966) 244 Or 97, 415 P2d 766.

Evidence which demonstrated that the defendant committed other crimes was admissible if it established motive for the crime charged. State v. Tucker, (1971) 5 Or App 283, 483 P2d 825.

The instruction adequately covered the effects of intoxication on the requisite intent. State v. Obremski, (1971) 5 Or App 302, 483 P2d 467.

(b) Constitutionality of penalty provisions. The penalty provisions were not unconstitutional as being vindictive justice under Ore. Const. Art. I, §15. State v. Finch, (1909) 54 Or 482, 103 P 505.

(c) Killing in commission of felony. Where one intending to kill another shot at him and killed a third person, he was equally guilty as though he had killed the person at whom the shot was fired. State v. Johnson, (1879) 7 Or 210.

The killing was done during the robbery where the removal of goods was continuous and uninterrupted from the time of the robbery until the killing which was committed during an effort to escape from pursuit. State v. Brown, (1879) 7 Or 186.

Evidence of the admission by accused that he killed deceased while he was attempting to "hold up" deceased and that he did so to escape being "taken in," was not sufficient to support a conviction. State v. Anderson, (1909) 53 Or 479, 101 P 198.

The attempt to commit one of the four crimes mentioned in the statute was an alternative to the element of malice in the crime of murder and as such had to be alleged. State v. Merten, (1944) 175 Or 254, 152 P2d 942.

The casual connection between the commission of the felony and the death had to be clearly established. State v. Schwensen, (1964) 237 Or 506, 392 P2d 328.

The failure of the indictment to distinguish between armed and unarmed robbery was immaterial in a murder case. State v. Thomas, (1965) 240 Or 181, 400 P2d 549.

Evidence permitted the inference defendant obtained the victim's property by force. State v. Bowling, (1966) 243 Or 344, 413 P2d 421.

There was evidence of the commission of the collateral felony. State v. Little, (1967) 249 Or 297, 431 P2d 810, cert. denied, 390 US 955.

The crime of attempted rape was composed of two elements: a specific intent to commit forcible sexual intercourse and an overt act tending and fairly designed to

effectuate the commission of the crime. State v. Zauner, (1968) 250 Or 105, 441 P2d 81.

Attempted rape could be proved by circumstantial evidence. Id.

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

(d) Indictment. An indictment which charged only premeditated murder was sufficient to sustain a conviction of murder in the first degree where the proof disclosed that the killing was done in the course of committing or attempting to commit a felony. State v. Earp, (1968) 250 Or 19, 440 P2d 214, cert. denied, 393 US 891; State v. Tremblay, (1971) 4 Or App 512, 479 P2d 507, Sup Ct **review denied.**

Describing the shooting as unlawful and felonious did not make indictment defective. State v. Abrams, (1883) 11 Or 169, 8 P 327.

Indictment was not bad as charging the two crimes of murder and assault where facts were set up to establish murder in commission of robbery. State v. Evans, (1924) 109 Or 503, 221 P 822.

Charging a crime in the language of the statute was insufficient. State v. Davis, (1969) 1 Or App 285, 462 P2d 448.

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

(2) Second degree murder (ORS 163.020). Malice was an essential element of second degree murder. State v. Moore, (1971) 4 Or App 548, 480 P2d 458; State v. Gill, (1970) 3 Or App 488, 474 P2d 23, Sup Ct **review denied.**

Intoxication did not preclude conviction of second degree murder. State v. Trapp, (1910) 56 Or 588, 109 P 1094.

Where defendant shot at one person who during struggle seized him but killed another unintentionally, it was second degree murder. State v. Davis, (1914) 70 Or 93, 140 P 448.

Killing in the commission of a felony constituted murder in the second degree, though there was no specific intent to kill and the only intent was to commit the felony. State v. Morris, (1917) 83 Or 429, 163 P 567.

The essential elements of the crime of second degree murder were not changed in the 1953 revision. State v. Holland, (1954) 202 Or 656, 277 P2d 386.

The question of malice was properly submitted to the jury. State v. Jones, (1965) 241 Or 142, 405 P2d 514.

Purposely meant intentionally. State v. Davis, (1969) 1 Or App 285, 462 P2d 448.

There did not need to be a specific intent to kill. Id.

The evidence was sufficient to support a conviction. State v. Nipper, (1970) 1 Or App 540, 464 P2d 835.

Firing a rifle into a house was an inherently dangerous act. State v. Gill, (1970) 3 Or App 488, 474 P2d 23, Sup Ct **review denied.**

The evidence was insufficient to support a conviction. State v. Crenshaw, (1971) 92 Or App Adv Sh 1668, 486 P2d 581.

(3) Evidence of malice, premeditation, deliberation (ORS 163.120)

(a) Malice. The prosecution had to establish malice. Goodall v. State, (1861) 1 Or 333, 80 Am. Dec. 396; State v. Whitney, (1879) 7 Or 386, 392.

The use of a weapon which was intended for taking life raised a presumption that the killing was done maliciously. State v. Bertrand, (1868) 3 Or 61; State v. Abrams, (1883) 11 Or 169, 8 P 327.

A motive for the homicide was relevant as to malice and could properly be shown. State v. Ingram, (1893) 23 Or 434, 31 P 1049; State v. Sing, (1925) 114 Or 267, 229 P 921.

The intent presumed from use of deadly weapon was not sufficient to establish deliberation and premeditation. State v. Carver, (1892) 22 Or 602, 30 P 315.

It was not error to instruct that the law conclusively presumed malice from the deliberate and unlawful use of a deadly weapon but that the presumption alone was insufficient to sustain verdict of murder in first degree. State v. Jancigaj, (1909) 54 Or 361, 103 P 54.

Malice was presumed where homicide was deliberate and unlawful. State v. Corell, (1925) 113 Or 254, 232 P 628.

(b) Premeditation or deliberation. Direct proof of deliberation or premeditation was not essential but could be inferred from circumstances. State v. Ah Lee, (1880) 8 Or 214; State v. Anderson, (1882) 10 Or 448.

Proof of a simultaneous attack by two or more persons in a house of worship warranted a conclusion that the homicide was preconcerted and formed in cold blood. State v. Ah Lee, (1880) 8 Or 214.

Proof of acquisition of a weapon was admissible. State v. Wintzingerode, (1881) 9 Or 153.

Every death caused by poisoning was not murder in the first degree; the state had to prove by some appropriate evidence that deliberation and premeditation existed in the mind of the defendant. State v. Ellsworth, (1896) 30 Or 145, 47 P 199.

Evidence of a previous quarrel was relevant as to premeditation and was admissible. State v. Bartmess, (1898) 33 Or 110, 54 P 167.

Evidence that accused at the time of the homicide was endeavoring to rob deceased, was knocked down and that he shot deceased to prevent being captured was admissible to show deliberation and premeditated malice. State v. Anderson, (1909) 53 Or 479, 101 P 198.

(c) Self control. The defendant had to have been master of his own understanding at the time when he formed and matured the design to kill the deceased. State v. Henderson, (1893) 24 Or 100, 32 P 1030; State v. Morey, (1894) 25 Or 241, 35 P 655, 36 P 573.

It was not error for court to instruct that where a deliberate design to take life was made in cold blood, it was first degree murder whether or not the shooting was done in passion. State v. Garrand, (1874) 5 Or 216.

It was error to instruct that it was first degree murder if the defendant had enough reason left to enable him to intend to take and to know he was about to take the life of deceased. State v. Henderson, (1893) 24 Or 100, 32 P 1030.

A design to kill, formed when reason was obscured by passion, did not make a homocide murder in the first degree. Id.

(d) Time for deliberation. It was not necessary that the intent to kill be formed any specific length of time prior to the commission of the act of killing. State v. Garrand, (1874) 5 Or 216; State v. Morey, (1894) 25 Or 241, 35 P 655, 36 P 573; State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130.

Proof that the defendant waited for his wife to come home with another man was sufficient proof of premeditation and deliberation. State v. Murray, (1884) 11 Or 413, 5 P 55.

Time and opportunity for deliberate thought must have been afforded to the defendant when he formed the design to take the life of the deceased. State v. Henderson, (1893) 24 Or 100, 32 P 1030.

When the jury asked the court if time which elapsed while defendant did certain acts was sufficient to give opportunity for deliberation and premeditation, the court properly answered in affirmative. State v. Morey, (1894) 25 Or 241, 35 P 655, 36 P 573.

Where there was evidence that defendant was in passion before crime, the question of whether there was an interval of time for premeditation or deliberation was for the jury. State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130.

FURTHER CITATIONS: State v. Whitney, (1879) 7 Or 386;

State v. Olds, (1890) 19 Or 397, 24 P 394; State v. Brown, (1895) 28 Or 147, 41 P 1042; State v. Caseday, (1911) 58 Or 429, 115 P 287; State v. Humphrey, (1912) 63 Or 540, 128 P 824; Ex parte Jung Shing, (1915) 74 Or 372, 145 P 637; State v. Rathie, (1921) 101 Or 339, 199 P 169, 200 P 790; Ex parte Kerby, (1922) 103 Or 612, 205 P 279; State v. Hecker, (1924) 109 Or 520, 221 P 808; State v. Kingsley, (1931) 137 Or 305, 2 P2d 3, 3 P2d 113; State v. Wilson, (1943) 172 Or 373, 142 P2d 680; State v. Cunningham, (1943) 173 Or 25, 144 P2d 303; State v. Folkes, (1944) 174 Or 568, 150 P2d 17; State v. Bailey, (1946) 179 Or 163, 170 P2d 355; State v. Ogilvie, (1946) 180 Or 365, 175 P2d 454; State v. Henderson, (1947) 182 Or 147, 184 P2d 392; 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; State v. Hansen, (1952) 195 Or 169, 244 P2d 990; State v. Jensen, (1956) 209 Or 239, 289 P2d 687, 296 P2d 618; State v. Nunn, (1958) 212 Or 546, 321 P2d 356; State v. Freeman, (1962) 232 Or 267, 374 P2d 453; State v. Gross, (1964) 237 Or 71, 390 P2d 612; Freeman v. Gladden, (1964) 239 Or 144, 396 P2d 779; State v. Dayton, (1965) 242 Or 269, 409 P2d 189; State v. Brewton, (1967) 247 Or 241, 422 P2d 581; State v. Phillips, (1967) 245 Or 466, 422 P2d 670; State v. Hanson, (1967) 250 Or 188, 433 P2d 828; State v. Cafarelli, (1969) 254 Or 73, 456 P2d 999; State v. Goodin, (1970) 1 Or App 559, 465 P2d 487; State v. Hollingsworth, (1970) 2 Or App 186, 465 P2d 490, Sup Ct **review denied**; State v. McIntire, (1970) 2 Or App 429, 468 P2d 536, Sup Ct **review denied**; State v. Mathison, (1970) 2 Or App 563, 469 P2d 38; State v. Smallwood, (1971) 5 Or App 245, 481 P2d 378; State ex rel. Connall v. Roth, (1971) 258 Or 428, 482 P2d 740; State v. Eddins, (1971) 5 Or App 277, 482 P2d 757.

State v. Rader, (1919) 94 Or 432, 186 P 79; State v. Wilson, (1948) 182 Or 681, 189 P2d 403; State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182; Anderson v. Gladden, (1961) 293 F2d 463; State v. Jackson, (1963) 235 Or 481, 385 P2d 623; State v. Herrera, (1963) 236 Or 1, 386 P2d 448; State v. Nichols, (1964) 236 Or 521, 388 P2d 739; State v. Van Kleeck, (1967) 248 Or 7, 432 P2d 173; State v. Smith, (1969) 1 Or App 153, 458 P2d 687, Sup Ct **review denied**; Frady v. Cupp, (1970) 2 Or App 14, 465 P2d 485; State v. Charles, (1970) 3 Or App 172, 469 P2d 792, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Validity of imposition of death penalty, 1920-22, p 200; authority of Governor to parole prisoner sentenced for murder in the second degree, 1932-34, p 86.

LAW REVIEW CITATIONS: 45 OLR 1-36.

163.125

NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Under a sudden heat of passion (ORS 163.040)
   (3) Involuntary manslaughter
   (4) Cause to commit suicide (ORS 163.050)

1. Under former similar statute

(1) In general. Prior to the 1941 amendment, if the jury was in doubt as to whether the killing was with malice, and they were satisfied that the act was not excusable, they were bound to find a verdict of manslaughter. State v. Butler, (1920) 96 Or 219, 186 P 55.

The statute was intended as a "catch-all" to encompass those killings not otherwise covered by statute and which were not justifiable or excusable. State v. Harris, (1965) 241 Or 224, 405 P2d 492.

There was sufficient evidence of both second degree murder and manslaughter to create a jury question. State v. Bates, (1965) 241 Or 263, 405 P2d 551.

The measure of proof required of a defendant who, by a plea of not guilty, raised the issue of self-defense was enough proof merely to raise a reasonable doubt of his guilt in the minds of the jurors. State v. Jarvi, (1970) 3 Or App 391, 474 P2d 363.

(2) Under a sudden heat of passion (ORS 163.040). Upon an indictment charging murder, a conviction of manslaughter was proper. State v. Trent, (1927) 122 Or 444, 252 P 975, 259 P 893; State v. Nortin, (1943) 170 Or 296, 133 P2d 252.

A husband was not justified in killing or attempting to kill another to prevent the seduction of his wife by artifice or fraud, and a husband killing one in the act of committing adultery with his wife was guilty of manslaughter. State v. Young, (1908) 52 Or 227, 96 P 1067.

An indictment alleging that accused feloniously and voluntarily administered a suppository containing poison to another, from the effects of which she died, was insufficient under this section. State v. Whitney, (1909) 54 Or 438, 102 P 288.

The only case in which our law recognized any irresistible impulse to kill was this former section. State v. Hossing, (1911) 60 Or 81, 118 P 195.

In determining the applicability of the word "irresistible," the difference between an impulse to kill arising from mental disease or from sudden and sufficient provocation, and an impulse to kill arising from anger or a wicked and furious desire for revenge, was to be kept in mind. Id.

Manslaughter was not a degree of murder, but was usually treated as a degree of homicide. State v. Trent, (1927) 122 Or 444, 252 P 975, 259 P 893.

The statute defined voluntary and involuntary manslaughter, and the legislature in enacting the sections intended to adopt the common-law meaning of the words used therein. Id.

It appeared that the statute was enacted to make it clear that "irresistible impulse" was not available as a complete defense, although it could reduce the offense to the grade of manslaughter. State v. Nortin, (1943) 170 Or 296, 133 P2d 252.

The indictment for first degree murder was sufficient to support a verdict of involuntary manslaughter. State v. Thomas, (1965) 240 Or 181, 400 P2d 549.

The court's instructions properly stated the elements of manslaughter. State v. Gairson, (1971) 5 Or App 464, 484 P2d 854.

(3) Involuntary manslaughter. In prosecution for involuntary manslaughter, whether defendant exercised due care was a question for the jury. State v. Clark, (1921) 99 Or 629, 196 P 360; State v. Miller, (1926) 119 Or 409, 243 P 72.

The negligent performance of a legal act which causes the death of another was manslaughter. State v. Justus, (1883) 11 Or 178, 8 P 337.

On a trial for murder it was not necessary for the court to instruct as to involuntary manslaughter if there was no evidence tending to indicate involuntary manslaughter. State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130.

An indictment, alleging that accused feloniously and voluntarily administered poison to another, from the effects of which she died did not charge involuntary manslaughter. State v. Whitney, (1909) 54 Or 438, 102 P 288.

The indictment need not allege an intent to kill or malice. Id.

If defendant fired his rifle and in so doing failed to use due caution and circumspection, and involuntarily killed deceased, he was guilty of "involuntary manslaughter." State v. Clark, (1921) 99 Or 629, 196 P 360.

An indictment which charged the doing of lawful acts "without due caution or circumspection," should allege specifically facts constituting such negligence; but if the

homicide occurred while the defendant was perpetrating an "unlawful act," it was enough to allege such act with sufficient particularity to identify it. State v. Miller, (1926) 119 Or 409, 243 P 72.

Contributory negligence in prosecution for involuntary manslaughter was no defense. Id.

Where defendant's act was of required degree of culpability and operated as an efficient proximate cause of the death, defendant was guilty of involuntary manslaughter even though someone else's negligence may have concurred. State v. Newberg, (1929) 129 Or 564, 278 P 568.

A conviction under the statute of one who killed a man riding a horse which defendant and his companion mistook for a deer, was sustained by the evidence. Id.

Operating a motor vehicle while intoxicated was forbidden by statute, was malum in se, and was therefore such an unlawful act that if death of another was caused in its commission, the one committing it was guilty of manslaughter. State v. Boag, (1936) 154 Or 354, 59 P2d 396.

Prior to the 1941 amendment, causing the death of a person by operating a motor vehicle without due care or circumspection constituted manslaughter. Id.

The homicide will be of higher degree than manslaughter if the unlawful act which the defendant was committing when he brought death to his victim amounted to a felony. State v. Henderson, (1947) 182 Or 147, 184 P2d 392.

Drawing a gun upon another unnecessarily was involuntary manslaughter if the gun accidentally discharged and killed the person at whom the gun was pointed. State v. Nodine, (1953) 198 Or 679, 259 P2d 1056.

The trial court's failure to give an instruction on involuntary manslaughter as a lesser included offense was a reversible error, even though such an instruction was not requested. Id.

After adoption of revision in 1953, causing the death of a person by operating a motor vehicle while intoxicated or while in the performance of the unlawful act of reckless driving was manslaughter. State v. Davis, (1956) 207 Or 525, 296 P2d 240.

Indictment charging parent with death of child while parent was disciplining child, without due caution and circumspection, was demurrable because of the excusable homicide statute. State v. England, (1960) 220 Or 395, 349 P2d 668, 89 ALR2d 392.

The statute did not apply to corporations. State v. Pacific Powder Co., (1961) 226 Or 502, 360 P2d 530, 83 ALR2d 1111.

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

The manslaughter statute, not the negligent homicide (while driving a vehicle) statute, applied where the vehicle when the death occurred had been stopped for 15 minutes at the place of the accident. State v. Martinelli, (1971) 92 Or App Adv. Sh. 1278, 485 P2d 647, Sup Ct **review denied.**

(4) Cause to commit suicide (ORS 163.050). The active assisting in the act which caused death, such as shooting or stabbing the victim, was murder, even if done pursuant to a mutual suicide pact. State v. Bouse, (1953) 199 Or 676, 264 P2d 800.

FURTHER CITATIONS: State v. Browning, (1895) 47 Or 470, 473, 82 P 955; State v. Caseday, (1911) 58 Or 429, 115 P 287; State v. Setsor, (1912) 61 Or 90, 93, 119 P 346; State v. Louie Hing, (1915) 77 Or 462, 472, 151 P 706; 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; State v. Cram, (1945) 176 Or 577, 160 P2d 283; State v. Wilson, (1948) 182 Or 681, 189 P2d 403; State v. Ruff, (1962) 230 Or 546, 370 P2d 942; State v. Joseph, (1962) 230 Or 585, 371 P2d 689; State v. Flett, (1963) 234 Or 124, 380 P2d 634; State v. Gross, (1964) 237 Or 71, 390 P 2d 612; State v. Jones, (1965) 241 Or 142, 405 P2d 514; State v. Collis, (1966) 243 Or 222, 413 P2d 53; State v. Thornton, (1967) 246 Or 377, 425 P2d 529; State v. Krause, (1968) 251 Or 318, 445 P2d 500; State v. Gabie, (1970) 1 Or App 576, 463 P2d 595, Sup Ct **review denied;** State v. Eddins, (1971) 5 Or App 277, 482 P2d 757; State v. House, (1971) 5 Or App 519, 485 P2d 33, Sup Ct **review allowed.**

ATTY. GEN. OPINIONS: Death caused by leaving explosives within easy access of child as involuntary manslaughter, 1922-24, p 230; attempted involuntary manslaughter, 1936-38, p 70.

LAW REVIEW CITATIONS: 3 OLR 347; 49 OLR 320; 1 WLJ 632; 5 WLJ 24.

163.145

NOTES OF DECISIONS

1. Under former similar statute

Before the 1953 amendment, the only act which was condemned as negligent homicide was the act of driving in a negligent manner; it related to the way in which the vehicle was operated and not to the character of the vehicle itself. State v. Smith, (1953) 197 Or 96, 252 P2d 550.

Before the 1953 amendment, the violation of subsection (2) of ORS 483.508, providing that when one vehicle was towing another the coupling device shall be provided with suitable locking means, did not constitute driving "in a negligent manner." Id.

The statute was constitutional. State v. Wojahn, (1955) 204 Or 84, 282 P2d 675.

Causing death of a person by operating a motor vehicle while intoxicated or while in the performance of the unlawful act of reckless driving was manslaughter, not negligent homicide. State v. Davis, (1956) 207 Or 525, 296 P2d 240.

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.

The statute was intended to deal only with grossly negligent conduct with or without a wilful and wanton state of mind. Id.

It was not necessary for the state to prove two or more negligent acts in order to prove gross negligence. State v. Betts, (1963) 235 Or 127, 384 P2d 198.

The findings supported the conclusion that defendant was grossly negligent. State v. Fitzgerald, (1966) 242 Or 618, 411 P2d 261.

"Gross negligence," expressive of a pattern of human misbehavior, was the same when applied to civil law as when used to define an ingredient of a crime. State v. Hodgdon, (1966) 244 Or 219, 416 P2d 647.

The state could elect to prosecute a drunken driver who caused the death of another person under either the negligent homicide (by driving a vehicle) statute or the manslaughter statute. State v. Montieth, (1966) 247 Or 43, 417 P2d 1012, app. dis., 386 US 780, 87 S Ct 1496, 18 L Ed 2d 526.

A driver so contemptuous of the law as to violate the drunk-driving statute demonstrated a reckless disregard for the rights of others and where the state produced evidence of such driving, together with any act of negligence causing death, there was sufficient connection between the drunkeness and the negligence to constitute gross negligence. State v. Montieth, (1966) 247 Or 43, 417 P2d 1012, app. dis., 386 US 780, 87 S Ct 1496, 18 L Ed 2d 526; State v. West, (1969) 1 Or App 41, 458 P2d 706.

The indictment did not need to contain the word "cause." State v. Wilkinson, (1966) 245 Or 274, 420 P2d 629.

"Driving" was construed to require that the vehicle be

in motion. State v. Martinelli, (1971) 92 Or App Adv. Sh. 1278, 485 P2d 647, Sup Ct **review denied.**

The statute did not apply where the vehicle, when the death occurred, had been stopped for 15 minutes at the place of the accident. Id.

FURTHER CITATIONS: State v. Coffman, (1943) 171 Or 166, 136 P2d 687; State v. Berrian, (1966) 245 Or 77, 414 P2d 432; State v. Robbins, (1970) 3 Or App 472, 474 P2d 772.

ATTY. GEN. OPINIONS: Proceedings not required to use the uniform traffic citation and complaint, 1960-62, p 267.

LAW REVIEW CITATIONS: 37 OLR 82; 39 OLR 161; 1 WLJ 629.

163.165

NOTES OF DECISIONS

1. Under former similar statute

To constitute an assault, there had to be an intentional attempt by violence to do injury to the person of another and such attempt had to be coupled with the present ability to do such injury. State v. Godfrey, (1889) 17 Or 300, 20 P 625, 11 Am. St. Rep. 830.

One could be convicted of assault under indictment charging larceny from the person. State v. Houghton, (1905) 46 Or 12, 75 P 822.

An assault was any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with an apparent intention to do it, coupled with a present ability to carry such intention into effect. State v. Carroll, (1936) 155 Or 85, 62 P2d 830.

Indictment charging aggravated assault was not demurrable for charging more than one crime where indictment and evidence revealed one single transaction committed by different acts of violence, striking with the hands and kicking. State v. Anderson, (1958) 215 Or 72, 332 P2d 884.

The statute was not unconstitutional for vagueness and failure to meet the due process requirements of U.S. Const., Am. 14. State v. Samter, (1970) 4 Or App 349, 479 P2d 237.

FURTHER CITATIONS: State v. Sly, (1872) 4 Or 277; State v. Sheppard, (1888) 15 Or 598, 16 P 483; (Alaska) Ex parte Martin, (1890) 46 Fed 482; State v. Fetsch, (1917) 85 Or 45, 165 P 1179; State v. Black, (1935) 150 Or 269, 42 P2d 171, 44 P2d 162; State v. Greeley, (1939) 160 Or 435, 86 P2d 437.

ATTY. GEN. OPINIONS: Right of district attorney to elect whether justice shall proceed as committing magistrate or proceed to trial, 1922-24, p 543.

163.175

NOTES OF DECISIONS

1. Under former similar statute
   (1) Assault while armed (ORS 163.240)
   (2) Assault with a dangerous weapon (ORS 163.250)
      (a) In general
      (b) Assault; intent
      (c) Dangerous weapon
   (3) Aggravated assault (ORS 163.255)
   (4) Assault with intent to rob, etc. (ORS 163.270)

1. Under former similar statute

(1) Assault while armed (ORS 163.240). The use of an excess of force to remove trespasser or to resist assault was insufficient for conviction; being armed with intent to intimidate was necessary. State v. Taylor, (1908) 50 Or 449, 93 P 252.

The theory of self-defense or justification was not available to the defendant. State v. Weber, (1967) 246 Or 312, 423 P2d 767, cert. denied, 389 US 863.

(2) Assault with a dangerous weapon (ORS 163.250)

(a) In general. One charged with assault with intent to kill could be convicted of the lesser crime, assault with a dangerous weapon. State v. McLennen, (1888) 16 Or 59, 16 P 879; State v. Lavery, (1899) 35 Or 402, 58 P 107; State v. Kelly, (1902) 41 Or 20, 68 P 1; State v. Branton, (1907) 49 Or 86, 87 P 535.

The language used in the indictment, being that of the statute, was sufficient even though there was no allegation that the gun was loaded. State v. Noblin, (1958) 214 Or 60, 328 P2d 139; State v. Steagall, (1958) 214 Or 116, 328 P2d 142; State v. Hedrick, (1960) 224 Or 329, 356 P2d 91.

The former statute was not unconstitutional as denying equal protection of the laws under U.S. Const., Am. 14, §1, and Oregon Const. Art. I, §20. State v. Steagall, (1958) 214 Or 116, 328 P2d 142; State v. Baker, (1965) 242 Or 207, 408 P2d 928; Rose v. Gladden, (1965) 241 Or 202, 405 P2d 543.

Where defendant offered character evidence in own behalf, state could prove reputation as peaceable, law-abiding citizen was bad. State v. Selby, (1914) 173 Or 378, 144 P 657.

Evidence of other offenses was admissible in a prosecution of a labor union official for assault with a dangerous weapon where the assaults were part of the same composite plan or scheme. State v. Gillis, (1936) 154 Or 232, 59 P2d 679.

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

An indictment charging assault with a dangerous weapon included lesser degrees of assault. State v. Gibbons, (1961) 228 Or 238, 364 P2d 611.

An indictment stating facts showing that the acts committed constituted a felonious crime did not need to allege also that the acts were feloniously done. Rose v. Gladden, (1966) 245 Or 119, 420 P2d 622, cert. denied, 386 US 1024, 18 L Ed 2d 99, 87 S Ct 1161.

The former statute and ORS 163.320 [now ORS 166.190] covered two separate crimes. Hibbard v. Gladden, (1966) 368 F2d 311.

On trial on indictment for assault with intent to kill, it was not prejudicial error to fail to instruct on lesser included offense of attempted manslaughter which carried a greater maximum penalty than the lesser included offense (assault with a dangerous weapon) of which defendant was convicted. State v. Speer, (1970) 1 Or App 514, 464 P2d 709, Sup Ct **review dismissed.**

(b) Assault; intent. Intent to injure the one assailed could be inferred from the assault. State v. Bock, (1907) 49 Or 25, 88 P 318; State v. Erickson, (1910) 57 Or 262, 110 P 785, 111 P 17; State v. Hood, (1960) 225 Or 40, 356 P2d 1100.

The elements of the offense were being armed with a dangerous weapon and assaulting another. State v. McLennen, (1888) 16 Or 59, 16 P 879.

An assault was any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to another. Id.

To constitute an assault, there had to be an intentional attempt by violence to do injury to the person of another, and such attempt had to be coupled with the present ability to do such injury. State v. Godfrey, (1889) 17 Or 300, 20 P 625, 11 Am. St. Rep. 830.

No specific intent to inflict death or great bodily harm was necessary; being armed with a dangerous weapon and making an assault upon another with such weapon was sufficient. State v. Godfrey, (1889) 17 Or 300, 20 P 625, 11

Am St Rep 830; State v. Erickson, (1910) 57 Or 262, 110 P 785, 111 P 17.

That the act was purposely and maliciously done or that it was done with premeditation or with malice aforethought need not be alleged. State v. Kelly, (1902) 41 Or 20, 68 P 1.

(c) Dangerous weapon. A "dangerous weapon" was one by which death or great bodily harm could be inflicted. State v. Godfrey, (1889) 17 Or 300, 20 P 625, 11 Am St Rep 830; State v. Anderson, (1966) 242 Or 585, 411 P2d 259.

Where a gun was pointed in a threatening manner at and in obvious range of a victim, whether the gun was loaded was a question for the jury, which was justified in inferring that the gun was loaded. State v. Noblin, (1958) 214 Or 60, 328 P2d 139; State v. Roisland, (1969) 1 Or App 68, 459 P2d 555.

A loaded pistol was a dangerous weapon within the knowledge of the court. (Alaska) United States v. Williams, (1880) 6 Sawy 244, 2 Fed 61.

When the court could declare the weapon to be dangerous, it was required to do so; but, when the question was one of law and fact, it was submitted to the jury. Id.

Guns, swords, pistols, knives, and the like were lethal weapons, as a matter of law, when used within striking distance. State v. Godfrey, (1889) 17 Or 300, 20 P 625, 11 Am St Rep 830.

An unloaded gun in the hands of defendant who was some distance from the prosecuting witness was not a dangerous weapon. State v. Godfrey, (1889) 17 Or 300, 20 P 625, 11 Am St Rep 830.

A flashlight was a dangerous weapon. State v. Linville, (1928) 127 Or 565, 273 P 338.

Indictment describing weapon as hardwood, leaded cane or walking stick was not subject to demurrer. State v. Knight, (1930) 133 Or 701, 289 P 1053.

The jury could reasonably find that a stubby beer bottle used as a club was a dangerous weapon. State v. Anderson, (1966) 242 Or 585, 411 P2d 259.

(3) Aggravated assault (ORS 163.255). The determining factor in determining whether the statute was applicable was the amount of force used. State v. Bonner, (1965) 241 Or 404, 406 P2d 160; State v. Manni, (1970) 1 Or App 589, 465 P2d 493.

Indictment charging aggravated assault was not demurrable for charging more than one crime where indictment and evidence revealed one single transaction committed by different acts of violence, stricking with the hands and kicking. State v. Anderson, (1958) 215 Or 72, 332 P2d 884.

The crime created by the words "force likely to produce great bodily injury" differed from assault and assault and battery in a reasonable and substantial way, notwithstanding that there was an element of degree as to which estimates might differ. State v. Popeil, (1959) 216 Or 140, 337 P2d 303.

An indictment charging assault with a dangerous weapon included lesser degrees of assault. State v. Gibbons, (1961) 228 Or 238, 364 P2d 611.

The exact time of the crime was not material to the defense. State v. Newton, (1970) 1 Or App 419, 463 P2d 372.

Whether the requisite force was used was a question for the jury. State v. Manni, (1970) 1 Or App 589, 465 P2d 493.

(4) Assault with intent to rob, etc. (ORS 163.270). One charged with assault with intent to kill could be convicted of the lesser crime, assault with dangerous weapon. State v. McLennen, (1888) 16 Or 59, 16 P 879; State v. Lavery, (1899) 35 Or 402, 58 P 107; State v. Kelly, (1902) 41 Or 20, 68 P 1; State v. Branton, (1907) 49 Or 86, 87 P 535.

That the act was purposely and maliciously done or that it was done with premeditation or with malice aforethought did not need to be alleged. State v. Lynch, (1891) 20 Or 389, 26 P 219; State v. Kelly, (1902) 41 Or 20, 68 P 1.

The determination of intent of defendant was for the jury. State v. Daly, (1888) 16 Or 240, 18 P 357.

Consent, when female was under age of consent, was no defense in charge of assault with intent to commit rape. State v. Sargent, (1897) 32 Or 110, 49 P 889.

The act of one participant was that of another in prosecution for assault with intent to rob where they were acting together with common intent. State v. Milo, (1928) 126 Or 238, 269 P 225.

Defendant was guilty of assault with intent to commit rape where he forced another to attempt the act. State v. Olsen, (1932) 138 Or 666, 7 P2d 792.

Both assault and intent were essential elements of assault with intent to commit rape. Id.

An information was not fatally defective when collaterally attacked because it omitted an allegation that the defendant intended to kill and murder the person whom he assaulted and shot. Smallman v. Gladden, (1956) 206 Or 262, 291 P2d 749.

The word "kill" connoted a felonious killing without malice, in a word, manslaughter. State v. Smith, (1961) 228 Or 340, 364 P2d 786.

The penalty provision adopted by the 1957 amendment was not unconstitutional for vagueness. Smith v. State, (1963) 321 F2d 816, acquiescing in State v. Smith, (1961) 228 Or 340, 364 P2d 786.

The statute did not violate the equal protection clause of the Federal and State Constitutions. State v. Cook, (1966) 242 Or 509, 411 P2d 78.

FURTHER CITATIONS: Under former similar statutes: (1) State v. Bonner, (1965) 241 Or 404, 406 P2d 160; State v. Laurel, (1970) 4 Or App 122, 476 P2d 817, Sup Ct **review denied**; State v. Seigler, (1970) 4 Or App 405, 478 P2d 436, Sup Ct **review denied**; State v. Wolberg, (1971) 5 Or App 295, 483 P2d 104, US appeal pending.

(2) State v. Kelly, (1902) 41 Or 20, 68 P 1; State v. Taylor, (1908) 50 Or 449, 93 P 252; Coghlan v. Miller, (1922) 106 Or 46, 211 P 163; State v. Wilson, (1959) 218 Or 575, 346 P2d 115, 79 ALR2d 587; State v. Bowman, (1964) 236 Or 475, 389 P2d 458; State v. Bonner, (1965) 241 Or 404, 406 P2d 160; State v. West, (1970) 1 Or App 422, 463 P2d 383; State v. Hecket, (1970) 2 Or App 273, 467 P2d 122, Sup Ct **review denied**; State v. Hammick, (1970) 2 Or App 470, 469 P2d 800; State v. Planck, (1970) 3 Or App 331, 473 P2d 694, Sup Ct **review denied.**

(3) State v. McLean, (1969) 1 Or App 147, 459 P2d 559, aff'd, 255 Or 464, 468 P2d 521; State v. Walley, (1969) 1 Or App 189, 460 P2d 370; State v. Cantrell, (1970) 1 Or App 454, 463 P2d 593; Mora v. Cupp, (1970) 3 Or App 583, 475 P2d 985; State v. Jones, (1970) 4 Or App 170, 477 P2d 914.

(4) State v. Branton, (1907) 49 Or 86, 87 P 535; State v. Edy, (1926) 117 Or 430, 244 P 538; State v. Cameron, (1940) 165 Or 176, 106 P2d 563; State v. Lanegan, (1951) 192 Or 691, 236 P2d 438; Cannon v. Gladden, (1955) 203 Or 629, 281 P2d 233; Merrill v. Gladden, (1959) 216 Or 460, 337 P2d 774; Delaney v. Gladden, (1962) 232 Or 306, 374 P2d 746; State v. Nelson, (1962) 233 Or 56, 377 P2d 29; State v. Hedrick, (1962) 233 Or 76, 377 P2d 23; State v. Hedrick, (1962) 233 Or 135, 377 P2d 323; State v. Froembling, (1964) 237 Or 616, 391 P2d 390; State v. Collis, (1966) 243 Or 222, 413 P2d 53; State v. Jairl, (1968) 249 Or 534, 439 P2d 632; State v. Eddins, (1971) 5 Or App 277, 482 P2d 757.

ATTY. GEN. OPINIONS: Assault with intent to kill and larceny as separate crimes when one arose from other, 1930-32, p 116.

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NOTES OF DECISIONS

1. Under former similar statute

(a) Mayhem (ORS 163.230)
(b) Assault with intent to kill; assault while armed (ORS 163.280)

1. Under former similar statute

(a) Mayhem (ORS 163.230). Any offense made punishable under the former statute could be denominated "mayhem" in the indictment. State v. Vowels, (1873) 4 Or 324.

The evidence had to show that the accused did the cutting, slitting, or mutilation purposely, unless it was done in the commission or attempt to commit a felony. State v. Cody, (1890) 18 Or 506, 23 P 891, 24 P 895.

The statute was intended to cover every case of great bodily harm which would justify killing in self defense at common law. State v. Butler, (1920) 96 Or 219, 248, 186 P 55.

(b) Assault with intent to kill; assault while armed (ORS 163.280). It was not necessary to allege that the money taken was the property of another than the defendant. State v. Dilley, (1887) 15 Or 70, 13 P 648; State v. Eddy, (1905) 46 Or 625, 81 P 941, 82 P 707.

It was not essential that state prove any particular amount of money was taken, but only that some money of character mentioned in indictment was taken. State v. Lenhardt, (1936) 152 Or 372, 53 P2d 720; State v. Townsend, (1964) 237 Or 527, 392 P2d 459.

The indictment was held sufficient. State v. Carlson, (1901) 39 Or 19, 28, 62 P 1016, 1119; State v. Broom, (1931) 135 Or 641, 297 P 340; State v. Andrews, (1970) 2 Or App 595, 469 P2d 802, Sup Ct **review denied.**

"Assault with intent to kill" was the crime of "attempted unlawful homicide;" but an attempt was not necessarily an assault. State v. Collis, (1966) 243 Or 222, 413 P2d 53; State v. Olson, (1969) 1 Or App 90, 459 P2d 445; 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**; State v. Eddins, (1971) 5 Or App 277, 482 P2d 757. State v. Collis, supra, overruling Smallman v. Gladden, (1956) 206 Or 262, 291 P2d 749.

There was a presumption that the pistol was loaded where an assault was shown to have been made with a pistol and hence it was a dangerous weapon. State v. Parr, (1909) 54 Or 316, 103 P 434.

Under an indictment under the former statute there could be a conviction for larceny from the person. State v. Broom, (1931) 135 Or 641, 297 P 340.

Indictment charging first degree murder, the killing taking place while defendants were engaged in crime of assault and robbery being armed with a dangerous weapon, was not duplicitous. State v. Merten, (1944) 175 Or 254, 152 P2d 942.

Indictment was sufficient to sustain assault conviction although intent was not alleged but facts from which intent could be inferred were alleged. Merrill v. Gladden, (1959) 216 Or 460, 337 P2d 774.

Whether the pistol was pointed at the victim was essential neither to the statement of the crime nor to its proof. State v. Shaw, (1962) 231 Or 345, 372 P2d 777.

The personal possession of the property by the party robbed could be actual or constructive. State v. Carcerano, (1964) 238 Or 208, 390 P2d 923, cert. denied, 380 US 923.

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, should have given 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.**

Where the gravamen of the offense was an assault upon and theft from the person, each assault and theft from a different person, although occuring at the same time and place, was a separate crime. State v. Gratz, (1969) 254 Or 474, 461 P2d 829.

On trial on indictment for assault with intent to kill, it was not prejudicial error to fail to instruct on lesser included offense of attempted manslaughter which carried a greater maximum penalty than the lesser included offense (assault with a dangerous weapon) of which defendant was convicted. State v. Speer, (1970) 1 Or App 514, 464 P2d 709, Sup Ct **review dismissed.**

A sentence within that authorized by the statute did not constitute cruel and unusual punishment. State v. Hecket, (1970) 2 Or App 273, 467 P2d 122, Sup Ct **review denied.**

FURTHER CITATIONS: State v. Smith, (1883) 11 Or 205, 8 P 343; State v. Smith, (1910) 56 Or 21, 107 P 980; State v. Bailey, (1919) 90 Or 627, 178 P 201; State v. Evans, (1924) 109 Or 503, 211 P 822; State v. Goodloe, (1933) 144 Or 193, 24 P2d 28; State v. Thompson, (1961) 228 Or 496, 364 P2d 783; State v. Smith, (1961) 228 Or 340, 364 P2d 786; State v. Crater, (1962) 230 Or 513, 370 P2d 700; State v. Fleming, (1962) 232 Or 412, 375 P2d 831; State v. Huitt, (1963) 234 Or 47, 380 P2d 110; State v. Hunter, (1963) 235 Or 308, 384 P2d 983; Eubanks v. Gladden, (1964) 236 F Supp 129; State v. Thomas, (1965) 240 Or 181, 400 P2d 549; State v. Atherton, (1965) 242 Or 621, 410 P2d 208; State v. Collis, (1966) 243 Or 222, 413 P2d 53; State v. Roberts, (1966) 245 Or 97, 420 P2d 391; State v. Rohde, (1966) 245 Or 593, 421 P2d 690; State v. Bunch, (1968) 250 Or 16, 439 P2d 6; State v. Sutton, (1968) 249 Or 527, 439 P2d 627; Simmons v. Gladden, (1968) 251 Or 527, 446 P2d 675; State v. Humphrey, (1969) 253 Or 183, 452 P2d 755; State v. Roisland, (1969) 1 Or App 68, 459 P2d 555; State v. Gaffield, (1969) 1 Or App 202, 460 P2d 863; Harper v. Cupp, (1969) 1 Or App 256, 461 P2d 841; State v. Madden, (1969) 1 Or App 242, 461 P2d 834; Erickson v. Reed, (1969) 1 Or App 251, 461 P2d 839; State v. Miller, (1970) 2 Or App 353, 467 P2d 683, Sup Ct **review denied**; State v. Miller, (1970) 2 Or App 408, 467 P2d 973, Sup Ct **review denied**; State v. Pressel, (1970) 2 Or App 477, 468 P2d 915, Sup Ct **review denied**; State v. Calhoun, (1970) 2 Or App 381, 468 P2d 908; State v. Lemery, (1970) 3 Or App 339, 473 P2d 146, Sup Ct **review denied**; State v. Tremblay, (1971) 4 Or App 512, 479 P2d 507, Sup Ct **review denied**; State v. Phillips, (1971) 5 Or App 60, 481 P2d 381, Sup Ct **review denied**; State v. Eddins, (1971) 5 Or App 277, 482 P2d 757; State v. Zimmerlee, (1971) 5 Or App 253, 483 P2d 111; State v. Atkison, (1971) 92 Or App Adv Sh 1380, 485 P2d 1117, Sup Ct **review denied**; State v. Howard, (1971) 92 Or App Adv Sh 1763, 486 P2d 1301.

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CASE CITATIONS: Latshaw v. Territory, (1854) 1 Or 140; Longshore Printing Co. v. Howell, (1894) 26 Or 527, 38 P 547, 46 Am St Rep 640, 28 LRA 464; State v. Scott, (1912) 63 Or 444, 128 P 441; Mannix v. Portland Telegram, (1931) 136 Or 474, 501, 284 P 837, 297 P 350, 300 P 350.

LAW REVIEW CITATIONS: 6 WLJ 394.

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NOTES OF DECISIONS

1. Under former similar statute

(1) Kidnapping (ORS 163.610). The kidnapping statute treated the offense as one against the person unlawfully taken, while the statute against child stealing was concerned with the right of the parent to the custody, dominion and care of the child, so that stealing the child was primarily an offense against the parents. State v. Metcalf, (1929) 129 Or 577, 278 P 974.

(2) Prisoner taking hostage (ORS 163.635). The evil legislated against by a former statute was the forcible holding

of prison employes by prison inmates for the purpose of exploiting the captives. State v. Gann, (1969) 254 Or 549, 463 P2d 570; State v. Shaffer, (1970) 2 Or App 11, 464 P2d 840.

It is not necessary that the inmate communicate his purpose or intent in taking and holding captives. State v. Gann, (1969) 254 Or 549, 463 P2d 570.

FURTHER CITATIONS: State v. Stewart, (1883) 11 Or 52, 238, 4 P 128; In re Kelly, (1890) 46 Fed 653; State v. White, (1906) 48 Or 416, 87 P 137; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614; State v. Ellis, (1962) 232 Or 70, 374 P2d 461; State v. Ellis, (1966) 243 Or 190, 412 P2d 518; Barnett v. Gladden, (1966) 255 F Supp 450; Doane v. Gladden, (1967) 246 Or 183, 424 P2d 234; Barnett v. Gladden, (1967) 375 F2d 235.

ATTY. GEN. OPINIONS: Presentence examination of sex offenders, 1952-54, p 176.

LAW REVIEW CITATIONS: 13 OLR 187, 189; 19 OLR 301; 45 OLR 1.

163.257

NOTES OF DECISIONS

1. Under former similar statute

The kidnaping statutes, which were applicable alike to adults and children, treat the offense as one against the person unlawfully taken, while the child stealing statute was concerned with the right of the parent to the custody, dominion and care of the child, so that stealing the child was primarily an offense against the parents. State v. Metcalf, (1929) 129 Or 577, 278 P 974.

Evidence established that defendant maliciously detained and concealed the children from their parents. State v. Wheeler, (1970) 2 Or App 349, 465 P2d 898, Sup Ct review denied.

FURTHER CITATIONS: State v. Nodine, (1953) 198 Or 679, 259 P2d 1056.

ATTY. GEN. OPINIONS: Parent as a child stealer, 1952-54, p 160.

LAW REVIEW CITATIONS: 13 OLR 187, 189.

163.355 to 163.375

NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Statutory rape generally
   (3) Indictment
   (4) Consentual capacity of female
   (5) Penetration
   (6) Resistance of female to forcible rape
   (7) Prosecutrix's complaint of crime
   (8) Res gestae evidence
   (9) Corroborative evidence
   (10) Admissibility of evidence of other intimacies between parties
   (11) Promiscuity and reputation of prosecutrix

1. Under former similar statute

(1) In general. Where prosecutrix, daughter of defendant, was under age of consent, the crime was rape, since incest required consent. State v. Winfree, (1931) 136 Or 531, 299 P 1005.

(2) Statutory rape generally. Actual force was not necessarily an ingredient of statutory rape. State v. Horne, (1891) 20 Or 485, 26 P 665; State v. Lee, (1899) 33 Or 506, 56 P 415; State v. Ralph, (1931) 135 Or 599, 296 P 1065.

The issues in a prosecution for statutory rape were whether the defendant had intercourse with the prosecutrix and whether she was under 16 years of age. State v. Gauthier, (1925) 113 Or 297, 231 P 141; State v. Poole, (1939) 161 Or 481, 90 P2d 472.

An acquittal on one count charging statutory rape was not res judicata on a second count arising out of the same occasion charging contributing to the delinquency of a minor. State v. Hoffman, (1963) 236 Or 98, 385 P2d 741.

The question of whether defendant was below the requisite age was a matter of defense. State v. Cole, (1966) 244 Or 455, 418 P2d 844.

Evidence was admissible to show that the prosecutrix made similar accusations against other persons which were later admitted to be false or were disproved. State v. Nab, (1966) 245 Or 454, 421 P2d 388.

(3) Indictment. The age of defendant did not need to be alleged in an indictment charging statutory rape. State v. Knighten, (1901) 39 Or 63, 64 P 866, 87 Am St Rep 647; State v. Edy, (1926) 117 Or 430, 244 P 538; State v. Ralph, (1931) 135 Or 599, 296 P 1065; State v. Nesmith, (1931) 136 Or 593, 300 P 536; State v. Cole, (1966) 244 Or 455, 418 P2d 844.

An indictment for statutory rape did not need to allege that the victim was not the wife of the defendant. State v. Haynes, (1926) 116 Or 635, 242 P 603; State v. Edy, (1926) 117 Or 430, 244 P 538; State v. Hilton, (1926) 119 Or 441, 249 P 1103; State v. Nesmith, (1931) 136 Or 593, 300 P 356.

An indictment charging both forcible rape and incest was demurrable. State v. Jarvis, (1890) 18 Or 360, 23 P 251.

Where indictment charged forcible as well as statutory rape, it was subject to demurrer. State v. Lee, (1899) 33 Or 506, 56 P 415.

An indictment for statutory rape which charged that said A.B., on the _____day of _____, 19____, in the county aforesaid, being then and there a male person over the age of 16 years, carnally knew one C.D., a female child under the age of 16 years, would state facts sufficient to constitute crime. Id.

The allegation of prosecutrix's age in an indictment for statutory rape as 13 years precluded the inference that she was married. State v. Gauthier, (1925) 113 Or 297, 231 P 141.

An allegation that the victim of the offense was a female child of the age of 15 years was equivalent to an allegation that she was under the statutory age. State v. Nesmith, (1931) 136 Or 593, 300 P 356.

An indictment charging the crime of rape in the words of the statute was sufficient without alleging the defendant committed the rape by forcing another to have intercourse with defendant's wife. State v. Blackwell, (1965) 241 Or 528, 407 P2d 617.

(4) Consentual capacity of female. A female under 16 was conclusively presumed incapable of consenting and actual consent was immaterial. State v. Sargent, (1897) 32 Or 110, 49 P 889; State v. Lee, (1899) 33 Or 506, 56 P 415.

Proof of the age of either party was not necessary if forcible rape was proved. State v. Lee, (1899) 33 Or 506, 56 P 415.

Consent of a female under the age of 16 was no defense to civil liability for the act. Hough v. Iderhoof, (1914) 69 Or 568, 139 P 931, Ann Cas 1916A, 247, 51 LRA(NS) 982.

(5) Penetration. Any penetration, however slight, was sufficient for the offense of statutory rape. State v. Chase, (1923) 106 Or 263, 211 P 920; State v. Poole, (1939) 161 Or 481, 90 P2d 472; State v. Kendrick, (1965) 239 Or 512, 398 P2d 471.

Instructions given of penetration necessary to constitute rape were proper. State v. Wisdom, (1927) 122 Or 149, 257 P 826; State v. Haworth, (1933) 143 Or 495, 21 P2d 1091.

In a prosecution for statutory rape, penetration could be inferred from the fact that the defendant for weeks occupied

with the female a room with only one bed. State v. Welch, (1902) 41 Or 35, 68 P 808.

It was proper to instruct as to penetration where there was evidence to show it, as well as evidence that the hymen had not been broken. State v. Poole, (1939) 161 Or 481, 90 P2d 472.

(6) Resistance of female to forcible rape. Resistance by the female had to be in good faith and continue to the extent of her ability until the act was consummated. State v. Risen, (1951) 192 Or 557, 235 P2d 764; State v. Sloan, (1971) 4 Or App 614, 481 P2d 646.

That the female should have resisted to the uttermost of her ability was not necessary to support a charge of rape; it was enough if the act was accomplished by force, without consent and against a genuine resistance. State v. Colestock, (1902) 41 Or 9, 67 P 418. **But see** State v. Risen, (1951) 192 Or 557, 235 P2d 764.

If the defendant was a person the prosecuting witness was accustomed to obey, the law was satisfied with less resistance than normally was required. State v. Risen, (1951) 192 Or 557, 235 P2d 764.

(7) Prosecutrix's complaint of crime. Declaration of the prosecutrix made immediately after crime were not admissible to show truth of particulars stated in declaration but to show that she made complaint. State v. Tom, (1879) 8 Or 177; State v. Sargent, (1897) 32 Or 110, 49 P 889.

When prosecutrix was under the age of consent, it was not necessary to corroborate her testimony by showing she made complaint. State v. Birchard, (1899) 35 Or 484, 59 P 468; State v. Haworth, (1933) 143 Or 495, 21 P2d 1091.

It was competent for prosecutrix to state when and to whom she complained of alleged assault. State v. Ogden, (1901) 39 Or 195, 65 P 449.

The unfavorable inference from the failure of prosecutrix to complain immediately could be rebutted by evidence of threats by defendant. State v. Friddles, (1912) 62 Or 209, 123 P 904.

The mother of prosecutrix could testify that prosecutrix complained to her of alleged crime. State v. Haworth, (1933) 143 Or 495, 21 P2d 1091.

Failure to make complaint as soon as possible was evidence of consent. State v. Risen, (1951) 192 Or 557, 235 P2d 764.

Testimony of hearsay statements by prosecutrix were inadmissible under any exception to the rule. State v. Emery, (1971) 4 Or App 527, 480 P2d 445.

(8) Res gestae evidence. As part of the res gestae, statements of defendant during intercourse were admissible. State v. Putney, (1924) 110 Or 634, 224 P 279; State v. Poole, (1939) 161 Or 481, 90 P2d 472.

To complete the story of the crime on trial by proving its immediate context showing happenings near in time and place, the courts recognized an exception to the rule that excludes evidence of other crimes. State v. Hamilton, (1971) 5 Or App 266, 483 P2d 90.

(9) Corroborative evidence. The manner and appearance of the prosecutrix and the condition of her person shortly after the alleged assault, were a proper subject of proof. State v. Tom, (1879) 8 Or 177; State v. Sargent, (1897) 32 Or 110, 49 P 889.

The uncorroborated testimony of the prosecutrix was sufficient to sustain a conviction of statutory rape. State v. Knighten, (1901) 39 Or 63, 64 P 866, 87 Am St Rep 647; State v. Edy, (1926) 117 Or 430, 244 P 538; State v. Yates, (1965) 239 Or 596, 399 P2d 161.

Where court held prosecutrix did not have sufficient intelligence to testify it was error for court to allow parents to testify of her declarations. State v. Tom, (1879) 8 Or 177.

That the prosecutrix was delivered of a child was an admissible fact. State v. Robinson, (1897) 32 Or 43, 48 P 357.

Evidence that medicine was given prosecutrix by accused's accomplice in accused's presence was admissible as a part of the entire transaction. State v. Gauthier, (1925) 113 Or 297, 231 P 141.

That the defendant sent money to the mother of prosecutrix for abortion was admissible. State v. McCarroll, (1927) 123 Or 173, 261 P 411.

(10) Admissibility of evidence of other intimacies between parties. Evidence of other acts of sexual intercourse between prosecutrix and defendant than that which was charged were admissible in a prosecution for statutory rape. **To show relationship between parties and to corroborate prosecutrix's testimony of the particular act charged,** State v. Robinson, (1897) 32 Or 43, 48 P 357; State v. Kristich, (1961) 226 Or 240, 359 P2d 1106; **to show disposition of defendant to commit particular act charged,** State v. Hardin, (1912) 63 Or 305, 127 P 789.

Where defendant allegedly took prosecutrix and sister-in-law to bed and ravished prosecutrix twice and sister-in-law once, evidence as to all three offenses as part of the same transaction was admissible. State v. Gerrish, (1939) 161 Or 76, 87 P2d 769.

Other similar assaults on the prosecutrix of forcible rape were admissible as evidence of the propensity to commit sexual offenses. State v. Risen, (1951) 192 Or 557, 235 P2d 764.

Evidence of other acts between parties was admissible on the basis that the probative relevance of the evidence overbalanced the prejudice the evidence could create. State v. Kristich, (1961) 226 Or 240, 359 P2d 1106.

(11) Promiscuity and reputation of prosecutrix. The defense could show previous specific acts of intimacy with defendant but not with others in case where female was of age of consent. State v. Ogden, (1901) 39 Or 195, 65 P 449.

The reputation of the prosecutrix for chastity could be shown to be bad if she was of the age of consent. Id.

It was error not to allow defense to ask witness, who had testified of prosecutrix's good reputation, concerning derogatory rumors in regard to prosecutrix's morals. Id.

That the prosecutrix had intercourse with others was immaterial where she was under age of consent; such evidence was relevant, however, to rebut testimony of physician that prosecutrix had had intercourse with someone. State v. Haynes, (1926) 116 Or 635, 242 P 603.

FURTHER CITATIONS: State v. Daly, (1888) 16 Or 240, 18 P 357; State v. Chaims, (1894) 25 Or 221, 35 P 450; State v. Coss, (1909) 53 Or 462, 101 P 193; State v. Osborne, (1909) 54 Or 289, 103 P 62, 20 Ann Cas 627; State v. Hardin, (1912) 63 Or 305, 127 P 789; State v. Goddard, (1914) 69 Or 73, 133 P 90, 138 P 243, Ann Cas 1916A, 146; State v. Oden, (1914) 69 Or 385, 138 P 1083; State v. Mallory, (1919) 92 Or 133, 180 P 99; State v. Drake, (1928) 127 Or 585, 272 P 889; State v. Newburn, (1946) 178 Or 238, 166 P2d 470; State v. Pace, (1949) 187 Or 498, 212 P2d 755; State v. Chinn, (1962) 231 Or 259, 373 P2d 392; Enyart v. Gladden, (1962) 233 Or 37, 377 P2d 25; State v. Nelson, (1962) 233 Or 56, 377 P2d 29; Kloss v. Gladden, (1962) 233 Or 98, 377 P2d 146; State v. Hedrick, (1962) 233 Or 131, 377 P2d 323; State v. Dixon, (1964) 238 Or 121, 393 P2d 204; State v. Harp, (1965) 239 Or 481, 398 P2d 182; State v. Cook, (1966) 242 Or 509, 411 P2d 78; State v. Walgraeve, (1966) 243 Or 328, 412 P2d 23, 413 P2d 609; State v. Gill, (1966) 243 Or 621, 415 P2d 166; State v. Huennekens, (1966) 245 Or 150, 420 P2d 384; Delaney v. Gladden, (1968) 297 F2d 17; State v. Lee, (1969) 254 Or 295, 453 P2d 170, 459 P2d 1001; State v. Dodson, (1969) 1 Or App 359, 462 P2d 692; State v. Glisan, (1970) 2 Or App 314, 465 P2d 253, 468 P2d 653; State v. Rutledge, (1970) 2 Or App 374, 468 P2d 913; State v. Calhoun, (1970) 2 Or App 381, 468 P2d 908; State v. Birt, (1970) 3 Or App 265, 473 P2d 669; Cole v. Cupp, (1970) 3 Or App 616, 475 P2d 428,

Sup Ct **review denied**; State v. Fitzmaurice, (1970) 3 Or App 601, 475 P2d 426, Sup Ct **review denied**; State v. Conkle, (1970) 4 Or App 392, 478 P2d 427, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Acquittal of statutory rape as defense in prosecution for contributing to delinquency of child, 1920-22, p 422.

LAW REVIEW CITATIONS: 23 OLR 69, 84; 44 OLR 245; 49 OLR 305.

163.375

NOTES OF DECISIONS

1. Under former similar statute

Where prosecutrix, daughter of defendant, was under age of consent, the crime was rape, since incest required consent. State v. Winfree, (1931) 136 Or 531, 299 P 1005.

Evidence of several offenses upon defendant's daughter and sister-in-law were admitted where part of the same transaction. State v. Gerrish, (1939) 161 Or 76, 87 P2d 769.

Under charge of rape of the daughter of defendant's wife, it was not necessary for the state to prove or negate defendant's parentage of the child; it was required to prove defendant was then married to the child's mother. State v. Dodson, (1969) 1 Or App 359, 462 P2d 692.

Where submission of a girl was induced through the coercion of one whom she was accustomed to obey, the law was satisfied with less than the utmost physical resistence of which she was capable. State v. Sunderland, (1970) 4 Or App 1, 468 P2d 900, 476 P2d 563, Sup Ct **review denied.**

FURTHER CITATIONS: State v. Jarvis, (1890) 18 Or 360, 23 P 251; State v. Ralph, (1931) 135 Or 599, 296 P 1065; State v. Pace, (1949) 187 Or 498, 212 P2d 755; State v. Gidley, (1962) 231 Or 89, 371 P2d 992; State v. Nelson, (1962) 233 Or 56, 377 P2d 29; State v. Kristich, (1963) 235 Or 1, 383 P2d 380; State v. Yielding, (1964) 238 Or 419, 395 P2d 172; State v. Harp, (1965) 239 Or 481, 398 P2d 182; State v. Neely, (1965) 239 Or 487, 395 P2d 557, 398 P2d 482; Miotke v. Gladden, (1968) 250 Or 466, 443 P2d 617; State v. Washington, (1969) 1 Or App 96, 458 P2d 694, 459 P2d 455; State v. Amory, (1970) 1 Or App 496, 464 P2d 714; State v. Conkle, (1970) 4 Or App 392, 478 P2d 427, Sup Ct **review denied**; State v. Tremblay, (1971) 4 Or App 512, 479 P2d 507, Sup Ct **review denied**; State v. Emery, (1971) 4 Or App 527, 480 P2d 445.

ATTY. GEN. OPINIONS: Maximum sentence for violation of this section, 1940-42, p 455.

LAW REVIEW CITATIONS: 23 OLR 69, 84; 49 OLR 305.

163.385 to 163.405

NOTES OF DECISIONS

1. Under former similar statute

That portion of the section making any act or practice of sexual perversity a punishable offense was not unconstitutional as denying due process of law under U.S. Const. Amend. 14, §1. State v. Anthony, (1946) 179 Or 282, 169 P2d 587, cert. denied 330 US 826, 67 S Ct 865, 91 L Ed 1276; Jellum v. Cupp, (1970) 4 Or App 210, 476 P2d 205, Sup Ct **review denied.**

Whether juvenile prosecuting witness was an accomplice was a question to be determined by the jury. State v. Ewing, (1944) 174 Or 487, 149 P2d 765; State v. Nice, (1965) 240 Or 343, 401 P2d 296.

Compulsion or force was not an element of the crime of sodomy. State v. Weitzel, (1937) 157 Or 334, 69 P2d 958; State v. Birt, (1970) 3 Or App 265, 473 P2d 669.

Actual penetration of the virile member into any orifice of the human body except the vaginal opening of a female was sufficient for the establishment of the crime of sodomy. State v. Start, (1913) 65 Or 178, 132 P 512, 46 LRA(NS) 266.

An indictment charging that the defendant "did feloniously commit the crime against nature" without setting forth the crime more fully was sufficient. State v. McAllister, (1913) 67 Or 480, 136 P 354.

Corroboration of the prosecuting witness was not necessary to sustain a conviction where it was shown that the prosecuting witness resisted the commission of the act. State v. Kapsales, (1918) 90 Or 56, 175 P 433.

Practicing masturbation by a man upon a boy was an act of sexual perversion. State v. Brazell, (1928) 126 Or 579, 269 P 884.

Where a companion of the accomplice testified as to the commission of the crime, the accomplice's testimony was sufficiently corroborated and the conviction was sustained. State v. Young, (1932) 140 Or 228, 13 P2d 604.

FURTHER CITATIONS: State v. Bateham, (1919) 94 Or 524, 186 P 5; State v. Casson, (1960) 223 Or 421, 354 P2d 815; State v. Black, (1961) 229 Or 132, 366 P2d 323; State v. Day, (1964) 236 Or 461, 389 P2d 30; State v. Jones, (1965) 240 Or 129, 400 P2d 524; State v. Stanley, (1965) 240 Or 310, 401 P2d 30; State v. Walgraeve, (1966) 243 Or 328, 412 P2d 23, 413 P2d 609; State v. Edwards, (1966) 243 Or 440, 412 P2d 526; State v. Huennekens, (1966) 245 Or 150, 420 P2d 384; State v. Miller, (1969) 1 Or App 460, 460 P2d 874, Sup Ct **review denied**; State v. Wade, (1969) 1 Or App 480, 462 P2d 701, Sup Ct **review denied**; Nealy v. Cupp, (1970) 2 Or App 240, 467 P2d 649; State v. Bostrom, (1970) 2 Or App 466, 467 P2d 970, 469 P2d 645; State v. Kuykendall, (1970) 3 Or App 362, 473 P2d 670, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Denial of teaching certificate based on this section, 1962-64, p 230.

163.415

CASE CITATIONS: State v. Williamson, (1970) 4 Or App 41, 475 P2d 593, Sup Ct **review denied**; State v. Stich, (1971) 5 Or App 511, 484 P2d 861.

163.435

NOTES OF DECISIONS

1. Under former similar statute

Whether the child was an accomplice was for the court's determination as a matter of law. State v. Harvey, (1926) 117 Or 466, 242 P 440; State v. DuBois, (1944) 175 Or 341, 153 P2d 521.

The testimony of the prosecutrix did not need to be corroborated in a prosecution under a former similar statute. State v. Mallory, (1919) 92 Or 133, 180 P 99.

Issue as to whether defendant's manipulation of the child's genitals tended to cause her to become delinquent was for the jury's determination. State v. Stone, (1924) 111 Or 227, 226 P 430.

The indictment did not need to allege that the act was committed by the defendant in such manner as did not make the act rape. State v. Gilson, (1925) 113 Or 202, 232 P 621.

The section required a wilful act before there was a crime but "wilful" did not mean an intent to commit a crime but merely an intent to do the act that was consummated. State v. Doud, (1950) 190 Or 218, 225 P2d 400.

A person could be convicted under the statute even though he proved that the child was a delinquent before the alleged acts were committed. State v. Caputo, (1954) 202 Or 456, 274 P2d 798.

The indictment did not need to include an allegation negating that defendant was a juvenile. State v. Iverson, (1962) 231 Or 15, 371 P2d 672.

It was not necessary that the indictment recite the particular delinquency which resulted from defendant's alleged conduct. State v. Williams, (1963) 236 Or 18, 386 P2d 461.

Petitioners convicted under the part of the statute held unconstitutional in Hodges, were entitled to have the judgments of conviction set aside under the statutes providing for post-conviction relief. Blakely v. Cupp, (1970) 2 Or App 110, 467 P2d 138.

ORS 138.530(1)(b) commands the courts, when petitioned, to set aside convictions under the contributing statute found unconstitutional in the Hodges case, but it does not follow that the release of petitioner must be ordered. Coon v. Cupp, (1970) 2 Or App 114, 467 P2d 140.

An indictment charging that two adults slept in the same bed in the presence of minors was insufficient. State v. Peebler, (1954) 200 Or 321, 265 P2d 1081.

Evidence showing similar acts of indecency by defendant against the victim were admissible to establish intent. State v. Schell, (1960) 224 Or 321, 356 P2d 155.

The acts alleged were such that fair-minded people could find that they tended to persuade the girl to commit an immoral act. Bonnie v. Gladden, (1965) 240 Or 462, 402 P2d 237.

The child came within the definition of a delinquent child. State v. Day, (1966) 242 Or 559, 410 P2d 1018.

FURTHER CITATIONS: State v. Eisen, (1909) 53 Or 297, 99 P 282, 100 P 257; Westfall v. Westfall, (1921) 100 Or 224, 197 P 271, 13 ALR 1428; State v. Moore, (1952) 194 Or 232, 241 P2d 455; State v. Waterhouse, (1957) 209 Or 424, 307 P2d 327; State v. Hutchison, (1960) 222 Or 533, 353 P2d 1047; State v. Casson, (1960) 223 Or 421, 354 P2d 815; State v. Harmon, (1961) 225 Or 571, 358 P2d 1048; Jensen v. Gladden, (1962) 231 Or 141, 372 P2d 183; State v. Palmer, (1962) 232 Or 300, 375 P2d 243; State v. Hoffman, (1963) 236 Or 98, 385 P2d 741; State v. Ely, (1964) 237 Or 329, 390 P2d 348; State v. Griffin, (1965) 242 Or 284, 409 P2d 326; State v. Sisney, (1968) 250 Or 198, 440 P2d 372; Bonnie v. Gladden, (1968) 400 F2d 547; United States v. Benner, (1969) 417 F2d 421; State v. Lee, (1969) 254 Or 295, 453 P2d 170, 459 P2d 1001; State v. Hodges, (1969) 254 Or 21, 457 P2d 491; State v. Whitted, (1969) 254 Or 31, 457 P2d 495; State v. Oman, (1969) 254 Or 59, 457 P2d 496; State v. Joe, (1969) 254 Or 234, 458 P2d 926; State v. Chatman, (1969) 1 Or App 78, 459 P2d 442; State v. Mason, (1969) 1 Or App 144, 459 P2d 889; State v. Dunning, (1969) 1 Or App 258, 461 P2d 833; State v. Glisan, (1970) 2 Or App 314, 465 P2d 253, 468 P2d 653; State v. Kabachenko, (1970) 2 Or App 202, 465 P2d 891, Sup Ct **review denied;** State v. Lammon, (1970) 2 Or App 205, 465 P2d 490; Coon v. Cupp, (1970) 2 Or App 114, 467 P2d 140; State v. McCarthy, (1970) 2 Or App 346, 468 P2d 652; State v. McMaster, (1971) 259 Or 291, 486 P2d 567.

ATTY. GEN. OPINIONS: Whether acquittal of statutory rape charge bars prosecution under this section, 1920-22, p 422; "delinquent child" and "dependent child" defined, 1958-60, p 356.

LAW REVIEW CITATIONS: 5 WLJ 104-120; 6 WLJ 546.

163.465

CASE CITATIONS: Jensen v. Gladden, (1962) 231 Or 141, 372 P2d 183.

163.515

NOTES OF DECISIONS

Under former similar statute the information was required to show that the former husband or wife was living and still the husband or wife of the accused. State v. Durphy, (1903) 43 Or 79, 71 P 63.

FURTHER CITATIONS: State v. Locke, (1915) 77 Or 492, 151 P 717; Lahey v. Lahey, (1923) 109 Or 146, 219 P 807.

ATTY. GEN. OPINIONS: Marriage after divorce decree, 1938-40, p 613.

163.525

NOTES OF DECISIONS

1. Under former similar statute

A party to the crime of incest was an accomplice and the defendant could not be convicted on the accomplice's uncorroborated testimony. State v. Jarvis, (1890) 18 Or 360, 23 P 251.

Rape and incest could not be committed by the same act; incest required the consent of both parties. State v. Jarvis, (1891) 20 Or 437, 26 P 302, 23 Am St Rep 141.

Incest, a voluntary act of both parties, could not be predicated on facts showing the female to be under 16 years of age. State v. Winfree, (1931) 136 Or 531, 299 P 1005.

FURTHER CITATIONS: State v. Russell, (1913) 64 Or 247, 129 P 1051; Leefield v. Leefield, (1917) 85 Or 287, 166 P 953; Estate of Paquet, (1921) 101 Or 393, 200 P 911.

LAW REVIEW CITATIONS: 17 OLR 118; 23 OLR 69; 49 OLR 305.

163.555

NOTES OF DECISIONS

1. Under former similar statute

A divorced father was within the purview of the section. State v. Francis, (1928) 126 Or 253, 269 P 878; Bartlett v. Bartlett, (1944) 175 Or 215, 152 P2d 402.

In criminal action against father for nonsupport of child, where father had remarried, his second wife's testimony as to her earning power was admissible, being relevant in determining father's ability to support child. State v. Langford, (1918) 90 Or 251, 176 P 197.

Proof of a complete failure to support was not necessary to conviction; proof of failure to provide adequate support being sufficient. Id.

That the wife had means and supported the children was not a defense. Id.

The former statute was not unconstitutional as denying due process of law under U.S Const. Amend. 14, §1; nor did it deny equal privileges and immunities under Ore. Const. Art. I, §20; nor did it fail to inform the defendant of the nature and the cause of the accusation against him under Ore. Const. Art. I, §11; nor did it invalidly delegate legislative power under Ore. Const. Art. IV, §1. State v. Bailey, (1925) 115 Or 428, 236 P 1053.

Failure to support alone was insufficient to sustain the charge of nonsupport; it was necessary for the failure to be accompanied with circumstances indicating that it was without just or sufficient cause. State v. Francis, (1928) 126 Or 253, 269 P 878.

The precise date of a crime stated in the indictment could not be changed by the prosecution where prejudice resulted to the defendant. State v. Combs, (1970) 3 Or App 260, 473 P2d 672.

FURTHER CITATIONS: State v. Stillwell, (1916) 80 Or 610, 157 P 970; State v. LaFollett, (1930) 134 Or 218, 292 P 98; Shelley v. Shelley, (1960) 223 Or 328, 354 P2d 282, 91 ALR2d 250; Rowley v. Rowley, (1962) 232 Or 285, 375 P2d 84; State v. Moore, (1964) 239 Or 277, 397 P2d 197; State v. Tucker, (1969) 252 Or 597, 451 P2d 471; McFerron v. Trask, (1970) 3 Or App 311, 472 P2d 847.

ATTY. GEN. OPINIONS: Venue of prosecution and extra-

dition for offense, 1922-24, p 782, 1940-42, p 574, 1942-44, p 293.

163.565

CASE CITATIONS: State v. LaFollett, (1930) 134 Or 218, 292 P 98.

LAW REVIEW CITATIONS: 36 OLR 136, 138.

163.575

NOTES OF DECISIONS

1. Under former similar statute

The sole act of giving intoxicating liquor to a minor would not of itself violate the statute. State v. Gordineer, (1961) 229 Or 105, 366 P2d 161; State v. Williams, (1963) 236 Or 18, 386 P2d 461.

To charge or to prove that the minor had become delinquent was not essential to a conviction. State v. Dunn, (1909) 53 Or 304, 99 P 278, 100 P 258.

In a prosecution for contributing to a female child's delinquency, the state was required to allege and prove the girl was unmarried and under eighteen years of age, commission of the act charged, and tendency of the act manifestly to cause the child to become delinquent. State v. Stone, (1924) 111 Or 227, 226 P 430.

Possession of alcohol had to be coupled with full control with the right to enjoy its consumption to the exclusion of others. State v. Gordineer, (1961) 229 Or 105, 366 P2d 161.

FURTHER CITATIONS: State v. Eisen, (1909) 53 Or 297, 99 P 282, 100 P 257; State v. Harmon, (1961) 225 Or 571, 358 P2d 1048; State v. Brammeier, (1970) 1 Or App 612, 464 P2d 717, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Sale or use of cigarettes to or by minors, 1928-30, p 116; smoking by minor inmates of MacLaren and Hillcrest schools, 1956-58, p 103; "delinquent child" and "dependent child" defined, 1958-60, p 356; minor employed by person selling tobacco products, 1958-60, p 412.

LAW REVIEW CITATIONS: 5 WLJ 115.

163.605

NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Publication
   (3) Malice
   (4) Defamatory matter

1. Under former similar statute

(1) In general. Justices' courts did not have jurisdiction over criminal libel. Wallowa County v. Oakes, (1905) 46 Or 33, 78 P 892.

It was doubtful whether evidence of rumors corroborative of the alleged defamatory matter was admissible. State v. Conklin, (1906) 47 Or 509, 84 P 482.

The section changed the common law rule that it was immaterial in criminal prosecutions for libel whether the matter charged as libelous was true or false. State v. Putnam, (1909) 53 Or 266, 100 P 2.

The crime defined by the statute involved moral turpitude. State v. Edmunson, (1922) 103 Or 243, 204 P 619.

The publication had to be false and scandalous and it was incumbent upon the state to prove such falsity. State v. Pierce, (1932) 140 Or 1, 12 P2d 320.

The statute did not prohibit fair comment and criticism but protected legitimate business against false and malicious statements. Wooley v. Hiner, (1940) 164 Or 161, 100 P2d 608.

(2) Publication. The proprietor of a newspaper was prima facie responsible for statements published in the paper. State v. Mason, (1894) 26 Or 273, 38 P 130, 46 Am St Rep 629, 26 LRA 779.

That the libelous article was published without the consent or knowledge of defendant was no defense unless it appeared that it did not occur through his negligence or want of care. Id.

One who published statement of third person was responsible although state failed to prove that the third person did not make statements. State v. Hosmer, (1914) 72 Or 57, 142 P 814.

It was no defense that person libeled was a corporation. Id.

(3) Malice. A specific malicious intent was not necessary; the injurious publication was presumed malicious. State v. Mason, (1894) 26 Or 273, 38 P 130, 46 Am St Rep 629, 26 LRA 779.

An indictment was not faulty where it failed to allege that publication was malicious. State v. Hosmer, (1914) 72 Or 57, 142 P 581, 814.

The privilege was qualified by the absence of actual malice. State v. Kerekes, (1960) 225 Or 352, 357 P2d 413, 358 P2d 523.

When privilege was an issue, malice was not presumed from publication, but actual malice had to be proven. Id.

Where a citizen addressed a written complaint to a public official concerning a matter within the addressee's area of responsibility, the defense of qualified privilege was available. Id.

(4) Defamatory matter. Words concerning property were defamatory if they exposed the owner to hatred, contempt or ridicule. State v. Mason, (1894) 26 Or 273, 38 P 130, 46 Am St Rep 629, 26 LRA 779.

When the words were ambiguous as to the person intended, persons who read the libel and were acquainted with the parties and circumstances could state their opinion as to whom the libelous charges referred. Id.

Words were libelous per se if they imputed a crime, tended to disgrace or degrade, or held person up to public hatred, contempt or ridicule or caused that person to be shunned and avoided. State v. Hosmer, (1914) 72 Or 57, 142 P 814.

FURTHER CITATIONS: Mannix v. Portland Telegram, (1931) 136 Or 474, 515, 284 P 837, 297 P 350, 300 P 350; Garrison v. Louisiana, (1964) 379 US 64, 71, 85 S Ct 209, 214, 13 L Ed 2d 125.

LAW REVIEW CITATIONS: 14 OLR 492; 17 OLR 307; 20 OLR 82.