Chapter 164

Offenses Against Property

164.045

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1. Under former similar statute

(1) Larceny (ORS 164.310)

(a) In general. Obtaining possession of goods but not the title to the goods was within the statute. Lilly v. Gladden, (1959) 220 Or 84, 348 P2d 1; State v. Thompson, (1965) 240 Or 468, 402 P2d 243.

The corpus delecti of the crime of larceny consisted of (1) the property was lost by the owner, and (2) it was lost by a felonious taking. State v. O'Donnell, (1962) 229 Or 487, 367 P2d 445; State v. Lewis, (1967) 248 Or 217, 431 P2d 617; State v. Smith, (1969) 253 Or 280, 453 P2d 942.

Larceny consisted of taking the personal property of another, without the owner's consent, coupled with the intent wholly to deprive the owner thereof; such intents must have existed concurrently and contemporaneously. State v. Teller, (1904) 45 Or 571, 78 P 980.

Secrecy was not an element of larceny, but could be urged as evidence of a felonious intent, which was an essential element and had to exist at the time of taking. State v. Albert, (1926) 117 Or 179, 242 P 1116.

Larceny of property of United States was punishable under the state law. State v. Frach, (1939) 162 Or 602, 94 P2d 143.

Only that property which was the subject of larceny could be the subject of embezzlement. State v. Tauscher, (1961) 227 Or 1, 360 P2d 764, 88 ALR2d 674.

"Property" as defined in the statute included tangible but not intangible chose in action. Id.

For a person to convert property intrusted to him with limited authority for a specific purpose was larceny rather than embezzlement. State v. Harris, (1967) 246 Or 617, 427 P2d 107.

A motel guest did not have "possession" of property in the rented room and could have been guilty of larceny of such property. State v. Lewis, (1967) 248 Or 217, 433 P2d 617.

In the absence of contrary legislative intent, one breaking and entering with intent to commit larceny could only be convicted and sentenced for burglary and not for larceny and not for both. State v. Smith, (1971) 92 Or App Adv Sh 1655, 487 P2d 90.

The evidence was sufficient to support the finding of guilt. State v. Archey, (1970) 3 Or App 243, 471 P2d 860, Sup Ct **review denied.**

(b) Taking and asportation. One who received a payment of money in excess of what he was entitled to receive and appropriated the money to his own use, with intent to defraud the owner thereof, was guilty of larceny. State v. Ducker, (1880) 8 Or 394, 34 Am Rep 590.

Property was not taken without the owner's consent within the meaning of the term larceny where an authorized agent of the owner cooperated with the suspected thieves in planning and carrying out the asportation. State v. Hull, (1898) 33 Or 56, 54 P 159, 72 Am St Rep 694.

One who obtained money by pretense of making a bet, the owner not intending to part with the title, was guilty of larceny. State v. Ryan, (1905) 47 Or 338, 82 P 703, 1 LRA(NS) 862.

Where stock was indorsed and delivered to a bank for sale, and the bank, a mere pretended institution organized by the buyer, delivered it to the buyer in pursuance of a fraudulent scheme, the stock was not stolen by the buyer since the owner intended to part with it. Beckwith v. Galice Mines Co., (1908) 50 Or 542, 92 P 453, 16 LRA(NS) 723.

Where defendant drove an auto to a garage at owner's request and then later took the car from the garage and sold it, the conviction of larceny was sustained. State v. Dooley, (1922) 102 Or 563, 203 P 304.

In larceny there had to be a trespass to the possession, actual or constructive, of the owner of the property. Id.

Larceny involved the idea of unlawful acquisition, whereas embezzlement was fraudulent conversion of property, possession of which was lawfully acquired. State v. Coleman, (1926) 119 Or 430, 249 P 1049.

Intent to deprive the owner of the property permanently could be inferred from abandonment under certain circumstances. State v. Langis, (1968) 251 Or 130, 444 P2d 959.

(c) Ownership. A taking of animals from the range with intent to convert them to the taker's use was not presumed to have been felonious, where he set up a claim at the time that such animals were lost or abandoned property. State v. Swayze, (1884) 11 Or 357, 3 P 574; State v. Hunsaker, (1888) 16 Or 497, 19 P 605.

An instruction that proof of ownership by a partnership would be insufficient where ownership by one person only was alleged, unless the one person held some special property interest in the goods, was not erroneous. State v. Wilson, (1877) 6 Or 428.

A man could not be guilty of stealing his own goods if he was also entitled to the possession at the time of taking. State v. Luckey, (1935) 150 Or 566, 46 P2d 1042.

An indictment alleging that the articles were the "property of" a corporation implied not only ownership but also that the thing owned had some value. State v. Poyntz, (1942) 168 Or 69, 120 P2d 966.

(d) Indictment. The indictment did not need to state the aggregate value of the articles stolen where the several items were specifically described and the value of each was alleged; and a general verdict of guilty did not need to state the value of the property stolen, either severally or in the aggregate. Howell v. State, (1859) 1 Or 241; State v. Kelliher, (1897) 32 Or 240, 50 P 532.

An allegation relative to the sum stolen was necessary in order to determine the value of the property taken, and the extent of punishment. State v. Hanlon, (1897) 32 Or 95, 48 P 353; State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128; State v. Poyntz, (1942) 168 Or 69, 120 P2d 966.

Where a person was charged with the larceny of a horse, saddle and bridle, taken at the same time and place, and from the same person, the whole transaction constituted but one crime, and but one indictment could be sustained for such taking. State v. McCormack, (1880) 8 Or 236.

An allegation that the defendant "feloniously took and carried away" the described property, without employing the word "steal" in any form was sufficient. State v. Lee Yan Yan, (1882) 10 Or 365.

An indictment charging that the defendant did take, steal, and carry away, without using the word "feloniously," sufficiently charged the crime of simple larceny at least. State v. Minnick, (1909) 54 Or 86, 102 P 605.

In charging larceny of a bank check, it was sufficient to describe the instrument by giving its usual name, amount and value. State v. Hinton, (1910) 56 Or 428, 109 P 24.

The property was sufficiently described in the words of the section which made it a subject of larceny. State v. Wilson, (1912) 63 Or 344, 127 P 980, Ann Cas 1914D 646.

An indictment which charged larceny of saw logs was sufficient and not subject to the objection that prosecution would lie for trespass under another statute. State v. Donahue, (1915) 75 Or 409, 144 P 755, 147 P 548, 5 ALR 1121.

An allegation in the indictment that the value of the stolen property was in excess of the amount specified in the statute did not reduce or raise the offense. State v. Wright, (1927) 122 Or 377, 257 P 699, 259 P 298.

An indictment which charged larceny did not charge two crimes because it charged stealing of a cow, prohibited by another statute. Id.

An indictment which charged larceny of articles of the value of less than the amount specified in the statute, no specific values or aggregate value being stated, was sufficient. State v. Poyntz, (1942) 168 Or 69, 120 P2d 966.

Indictment framed to charge embezzlement under another statute was insufficient to charge larceny. State v. Tauscher, (1961) 227 Or. 1, 360 P2d 764, 88 ALR2d 674. **But see** State v. Harris, (1967) 246 Or 617, 427 P2d 107.

It was not necessary for the state to prove defendant stole every item the indictment charged him with stealing. State v. Daniels, (1971) 5 Or App 86, 482 P2d 756.

(e) Other related offenses. An indictment for larceny from a building or boat would sustain a conviction of the crime of simple larceny. State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128.

The crimes of larceny from a store and larceny from the person consisted of simple larceny aggravated by circumstances, the value of the property not being an ingredient of the offense. State v. Reyner, (1907) 50 Or 224, 91 P 301.

Larceny by a bailee, was an offense separate and distinct from the crime of larceny defined by the section. State v. Dooley, (1922) 102 Or 563, 203 P 304.

(2) Larceny in a building or boat (ORS 164.320). An indictment which charged larceny in a dwelling, naming a hotel, was sufficient. State v. O'Neil, (1891) 21 Or 170, 27 P 1038.

A building wherein a workman pursued his business and kept his tools, or the products of his labor, though no article was sold or offered for sale therein, was a shop within the meaning of the statute. State v. Hanlon, (1897) 32 Or 95, 48 P 353.

The crime consisted of simple larceny aggravated by circumstances, the value of the property stolen not being an element. State v. Reyner, (1907) 50 Or 224, 91 P 301.

An indictment which charged burglarious entry of a warehouse and stealing from a warehouse charged two distinct crimes and was insufficient. State v. Briggen, (1924) 112 Or 681, 231 P 125.

An indictment of a deputy sheriff for larceny of collected tax money was sufficient and conviction was sustained. State v. Coleman, (1926) 119 Or 430, 249 P 1049.

Failure to include the words "feloniously" in the indictment did not render the indictment insufficient. State v. Christiansen, (1935) 150 Or 11, 41 P2d 442.

The state had a choice whether to prosecute under the former statute or the shoplifting statute. State v. Ponton, (1965) 240 Or 30, 399 P2d 30, cert. denied, 382 US 1014.

One breaking and entering with intent to commit larceny could only be convicted and sentenced for burglary and not larceny, and not for both. State v. Woolard, (1971) 259 Or 232, 484 P2d 314, 485 P2d 1194, rev'g 3 Or App 291, 472 P2d 837.

(3) Stealing from the person (ORS 164.340). An indictment for stealing from the person would sustain a conviction of the crime of simple larceny. State v. Taylor, (1868) 3 Or 10; State v. Reyner, (1907) 50 Or 224, 91 P 301.

An indictment which charged taking "from and on the person" was not defective. State v. Lee Ping Bow, (1881) 10 Or 27.

A conviction for the crime of larceny from the person could not be sustained under an indictment for robbery which failed to state that the property was taken from the person. State v. Lawrence, (1891) 20 Or 236, 25 P 638.

The crime consisted of simple larceny aggravated by special circumstances, the value of the property stolen not being an element. State v. Reyner, (1907) 50 Or 224, 91 P 301.

Where defendant was indicted for robbery of a pistol from a deputy sheriff, conviction of larceny from the person was sustained. State v. Broom, (1931) 135 Or 641, 297 P 340.

It was sufficient if the goods were taken from the conscious custody of the victim. State v. Fichter, (1961) 226 Or 526, 360 P2d 278.

(4) Stealing livestock (ORS 164.380)

(a) In general. The theft of a horse, saddle and bridle at the same time and place constituted but one crime, that of larceny; and where the transaction was split into two offenses by two indictments, one under the simple larceny statute and the other under this former section, conviction for one barred prosecution for the other. State v. McCormack, (1880) 8 Or 236.

The taking of cattle from the range was not felonious where the defendant in good faith believed them to be lost or abandoned. State v. Swayze, (1884) 11 Or 357, 3 P 574.

A witness who had nothing to do with the unlawful taking did not become an accomplice by reason of his subsequent purchase of the animal. State v. Moxley, (1909) 54 Or 409, 103 P 655, 20 Ann Cas 593.

Venue was sufficiently established by evidence that the alleged stolen cow ranged in and about a farm located in

the county in which the prosecution was brought. State v. Eppers, (1932) 138 Or 340, 3 P2d 989, 6 P2d 1086.

Allegation of the larceny of a heifer was material, and there was a failure of proof when it was shown a steer was the subject of the offense. State v. Russell, (1962) 231 Or 317, 372 P2d 770. **Distinguished in** State v. Hixson, (1964) 237 Or 402, 391 P2d 388.

(b) Indictment. An indictment which alleged ownership of the stolen property in a certain person was sufficient where some evidence of a contingent interest in another was shown and an instruction to that effect was proper. State v. Wilson, (1877) 6 Or 428.

An indictment describing the stolen animal as a calf was sufficient. State v. Brinkley, (1909) 55 Or 134, 104 P 893, 105 P 708.

An allegation that the value of the stolen calf was $8 did not reduce the offense to petit larceny. Id.

An indictment which charged the stealing of a cow did not charge two crimes, that of larceny under another statute and larceny of an animal under this former section. State v. Wright, (1927) 122 Or 377, 257 P 699, 259 P 298.

Allegations that the crime was committed in a certain month of a certain year, which was within the time limited by law for commencing the action, were sufficient. State v. Christy, (1929) 131 Or 314, 282 P 105.

An indictment charged but one crime although it alleged that the defendant stole certain described animals and the phrases describing each were set off by periods. Id.

Value, age, color or stock did not need to be alleged in the indictment for larceny of animals. State v. Eppers, (1932) 138 Or 340, 3 P2d 989, 6 P2d 1086.

(c) Evidence. Ownership and identity of stolen calves was properly established by evidence of ownership and identity of the cows. State v. Brinkley, (1909) 55 Or 134, 104 P 893, 105 P 708; State v. Henderson, (1914) 72 Or 201, 143 P 627.

Evidence of the defendant's possession of stolen property other than that described in the indictment properly was admitted where such proof was so intermingled and connected with evidence tending to show the commission of the crime charged as to form one entire transaction. State v. Baker, (1893) 23 Or 441, 32 P 161.

Evidence concerning the identity of a certain horse was admissible as competent although it tended to show an illegal use of a brand. State v. Rea, (1905) 46 Or 620, 81 P 822.

Evidence that the defendant changed the brand upon the animal was admissible as tending to show a general plan or an attempt to conceal the offense. State v. McLennan, (1917) 82 Or 621, 162 P 838.

The showing of a branded horse, diagrams of brands and the showing of unrecorded brands was admissible evidence to show ownership in a prosecution for larceny of a horse. State v. Morris, (1918) 90 Or 60, 175 P 668.

The state had the burden of proving that cattle were property of individuals named as owners in the indictment, and that the defendant took or asported the animals. State v. Moss, (1920) 95 Or 616, 182 P 149, 188 P 702.

Evidence that cattle with mutilated brands, not belonging to the defendant, were found among defendant's cattle upon an open range was insufficient to show asportation by the defendant. Id.

Testimony by a witness who purchased an allegedly stolen cow from the defendant that the cow was worth $100 was sufficient to sustain the allegation in the indictment as to its value. State v. Eppers, (1932) 138 Or 340, 3 P2d 989, 6 P2d 1086.

The corpus delicti was sufficiently established where a cow had disappeared and was later found two hundred miles away in the possession of another, having been delivered there by the defendant. Id.

The state did not have to prove exclusive possession, control and management in the owner named in the indictment. State v. Smith, (1969) 253 Or 280, 453 P2d 942.

(d) Instructions. Where the jury could reasonably infer from the evidence that a calf bore the descriptive marks set forth in the indictment, the question was properly submitted for their consideration. State v. Couper, (1897) 32 Or 212, 49 P 959.

Where the evidence shows the alteration of a brand after the theft, the jury should be instructed, where requested, that if the animal was taken without an intent to steal subsequent alteration of the brand was immaterial. State v. Howard, (1902) 41 Or 49, 69 P 50.

Where the killing of animals might be attributed to different causes, an instruction that if the jury found that the defendant killed the animals for the purpose of concealment they might consider the same as tending to show guilt of the crime charged was error. State v. McLennan, (1917) 82 621, 162 P 838.

In a prosecution for larceny of a calf instruction was proper. State v. Smith, (1969) 253 Or 280, 453 P2d 942.

(5) Taking animal without consent of owner (ORS 164.730). The former statute was not void for indefiniteness; the element of guilty knowledge was implied. State v. Opie, (1946) 179 Or 187, 170 P2d 736.

The word "take" used in the statute referred to the physical possession of an animal. Id.

(6) Shoplifting (ORS 164.390). That a person could be charged with shoplifting or simple larceny was not unconstitutional as a denial of equal protection of the laws. Black v. Gladden, (1964) 237 Or 631, 393 P2d 190; State v. Ponton, (1965) 240 Or 30, 399 P2d 30, cert denied, 382 US 1014.

(7) Interference with coin operated device (ORS 164.635). The specific acts prohibited under the statute were separate from the acts prohibited under the burglary statutes. State v. Keys, (1966) 244 Or 606, 419 P2d 943.

(8) Trustee converting trust property (ORS 165.025, 165.035). Where an indictment charged the crime of larceny by bailee, the mere fact that it alleged the accused was "bailee and trustee" did not allege a crime under this former section so the indictment did not charge two crimes. State v. Thompson, (1895) 28 Or 296, 42 P 1002.

It was enough for an indictment for conversion by a trustee to charge the conversion of "$10,000," without alleging what kind of money it was. State v. Mishler, (1916) 81 Or 548, 160 P 382.

The state had no duty to prove who had "title" to the money in a prosecution against an agent, attorney, broker, banker, employe or merchant for converting any kind of entrusted property. State v. Altig, (1966) 243 Or 138, 412 P2d 25.

(9) Embezzlement (ORS 165.005)

(a) In general. A felonious intent was an essential ingredient of the crime of embezzlement. State v. Marco, (1897) 32 Or 175, 50 P 799; State v. Johnston, (1933) 143 Or 395, 22 P2d 879; State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214; State v. Stanley, (1969) 1 Or App 193, 460 P2d 369.

Embezzlement was a form of larceny, but embezzlement was a fraudulent conversion by the embezzler to his own use of personal property after he had lawfully acquired possession, while larceny involved the idea of an unlawful acquisition. State v. Browning, (1906) 47 Or 470, 82 P 955; State v. Coleman, (1926) 119 Or 430, 249 P 1049; State v. Johnston, (1933) 143 Or 395, 22 P2d 879.

The crime of embezzlement was unknown to the common law. State v. Coleman, (1926) 119 Or 430, 249 P 1049; State v. Dormitzer, (1927) 123 Or 165, 261 P 426; State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214; State v. Tauscher, (1961) 227 Or 1, 360 P2d 764.

Only property which was tangible and capable of being possessed could be the subject of embezzlement. State v. Tauscher, (1961) 227 Or 1, 360 P2d 764, 88 ALR2d 674.

The terms "embezzles" and "fraudulently converts" were synonymous. Id.

For a person to convert property intrusted to him with limited authority for a specific purpose was larceny rather than embezzlement. State v. Harris, (1967) 246 Or 617, 427 P2d 107.

(b) Applicability. Where a clerk or employe was charged with the duty of receiving and accounting for funds, and he fraudulently converted any of them to his own use, he was guilty of embezzlement. State v. Reinhart, (1894) 26 Or 466, 479, 38 P 822.

Prior to the 1907 amendment, an agent receiving money who had a right to mingle it with his own, was not guilty of embezzlement if he failed to pay over the balance according to contract. State v. Stearns, (1895) 28 Or 262, 42 P 615.

An accusation that a collector of money failed to pay over a sum to his employer, admitting that he had used it and offering to give his note for it, charged the crime of embezzlement and was libelous. State v. Conklin, (1906) 47 Or 509, 516, 84 P 482.

A deputy sheriff who converted tax money in the sheriff's vault to his own use was guilty of larceny but not embezzlement. State v. Coleman, (1926) 119 Or 430, 249 P 1049.

The relation between defendant broker and his customer was agent and principal not debtor and creditor, where the customer had directed the broker to sell certain shares of stock and remit the proceeds to him. State v. Cooke, (1929) 130 Or 552, 278 P 936.

A position as officer of the victim company gave the officer custody and possession of the company's bank account. State v. Bengtson, (1961) 230 Or 19, 367 P2d 363, 96 ALR2d 150.

Defendant was an agent for his function included bringing about contractual relations between a distributor and third persons. State v. Needham, (1971) 92 Or App Adv Sh 985, 484 P2d 1123.

(c) Sufficiency of indictment. The indictment did not need to allege that the defendant did feloniously "take, steal and carry away" the property referred to. State v. Sweet, (1865) 2 Or 127; State v. Reinhart, (1894) 26 Or 466, 38 P 822; State v. Browning, (1906) 47 Or 470, 82 P 955.

The source of the property embezzled did not need to be pleaded or proved. State v. Dormitzer, (1927) 123 Or 165, 261 P 426; State v. Cooke, (1929) 130 Or 552, 278 P 936.

The indictment did not need to name the violation as larceny. State v. Sweet, (1865) 2 Or 127.

Charging the defendant with embezzling promissory notes and cash was not a charge of different crimes where the circumstances showed it was but one offense. State v. Morris, (1911) 58 Or 397, 114 P 476.

The description in the indictment of the property embezzled as "promissory notes" was sufficient, the name of the makers of the notes not being necessary. Id.

Under an indictment charging defendant with embezzlement of divers coins, currency, checks, drafts, bonds, certificates of deposit, bills of exchange and other valuable securities, proof that defendant misappropriated proceeds of the sale of certificates of stock did not constitute a variance from the indictment. State v. Cooke, (1929) 130 Or 552, 278 P 936.

Where the indictment neither alleged the status nor the name of the owner of property so as to import the owner's status as a copartnership or corporation, it was not fatally defective if it was not challenged in the trial court, and evidence was given without objection proving the owner was incorporated. The defect was cured by the verdict. State v. Monk, (1951) 193 Or 450, 238 P2d 1110.

An undelivered check was not "property." State v. Tauscher, (1961) 227 Or 1, 360 P2d 764, 88 ALR2d 674. **Distinguished in** State v. Bengtson, (1961) 230 Or 19, 367 P2d 363, 96 ALR2d 150.

Checking account of the victim as a general depositor was an intangible chose in action, and was not capable of being possessed. Id.

(10) Embezzlement by bailee, mortgagor or contract purchaser (ORS 165.010)

(a) In general. The offense was generally called "embezzlement," and was not known at common law. (Alaska) United States v. Clark, (1896) 76 Fed 560; State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214.

If the bailee feloniously converted the bailed property to his own use, the fact that his bailor had stolen the property was immaterial, but evidence of that fact and the demand by the rightful owner was admissible on the question of whether the bailee in fact feloniously converted the property to his own use. State v. Littschke, (1895) 27 Or 189, 40 P 167.

Criminal intent was necessary to make out the crime of larceny by a bailee. State v. Hanna, (1960) 224 Or 588, 356 P2d 1046; State v. Littschke, (1895) 27 Or 189, 40 P 167; State v. Humphreys, (1903) 43 Or 44, 70 P 824. State v. Hanna, supra, overruling State v. Chapin, (1915) 74 Or 346, 144 P 1187; State v. Stiles, (1916) 81 Or 497, 160 P 126 and State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214.

The statute was not intended to include that which was larceny at common law. State v. Keelen, (1922) 103 Or 172, 181, 203 P 306, 204 P 162, 164.

In an action for false arrest, defendant-mortgagee was entitled to an instruction from which jury could evaluate whether there were facts from which defendant could conclude that plaintiff-mortgagor was committing larceny by bailee, since malice was an issue in the case. McNeff v. Heider, (1959) 215 Or 583, 337 P2d 819, 340 P2d 180.

Pledge and hypothecation of goods by bailee without bailor's authority was a violation of the statute. Shoemaker v. Selnes, (1960) 220 Or 574, 349 P2d 473.

(b) Indictment. The indictment was sufficient if it was in the language of the statute. State v. Chew Muck You, (1890) 20 Or 215, 25 P 355; State v. Lucas, (1893) 24 Or 168, 33 P 538; State v. Thompson, (1895) 28 Or 296, 42 P 1002; State v. Humphreys, (1903) 43 Or 44, 70 P 824; State v. Chapin, (1915) 74 Or 346, 144 P 1187; State v. German, (1939) 162 Or 166, 90 P2d 185.

There was a fatal variance between the proof and allegation as to the description or ownership of the property converted only if the defendant was misled in making his defense or could not successfully plead former jeopardy in another prosecution for the same offense. State v. Thompson, (1895) 28 Or 296, 42 P 1002; State v. Chapin, (1915) 74 Or 346, 144 P 1187.

If the information charged a failure to account by the bailee for hire, an allegation of tender of the compensation agreed upon for its care might be necessary, but where the information charged a conversion to defendant's own use such an allegation is not necessary. State v. Humphreys, (1915) 43 Or 44, 70 P 824.

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

(c) Bailment. A bailment took place when any article of personal property was put into the hands of one for a special purpose and was to be returned by the bailee to the bailor or delivered to some third person. State v. Chew Muck You, (1890) 20 Or 215, 25 P 355; State v. Lucas, (1893) 24 Or 168, 33 P 538; State v. Skinner, (1896) 29 Or 599, 46 P 368.

Where money was specially deposited with an attorney to be used as cash bail and to be returned as soon as that purpose was accomplished, the attorney's conversion of it to his own use would authorize a prosecution for larceny by bailee. State v. Lucas, (1893) 24 Or 168, 172, 33 P 538.

Where prospective purchaser of real estate delivered $200

to broker which was to be returned if the sale did not go through, the broker was guilty of larceny by bailee in converting the $200 to his own use and not accounting for the money. State v. Stiles, (1916) 81 Or 497, 160 P 126.

Where owners of ranch indorsed a note payable to them to broker as part of his commission for sale of the ranch, the conversion of the note by defendant prior to delivery to the broker was not larceny as to the broker because title to the note had never passed to him. State v. Andrews, (1918) 89 Or 295, 173 P 1173.

An officer of a corporation who received money to invest in a mortgage and failed to account for it according to the nature of his trust was guilty of larceny by bailee. State v. German, (1939) 162 Or 166, 90 P2d 185.

The relationship of bailee and bailor existed where a prospective purchaser of shares of stock gave defendant broker a check with which to purchase certain shares of stock. State v. Ankeny, (1949) 185 Or 549, 204 P2d 133.

(d) Necessity of demand for return. Where the bailee was charged with conversion to his own use, no demand by the bailor for a return of the property was necessary. Kuhnhausen v. Stadelman, (1944) 174 Or 290, 148 P2d 239, 149 P2d 168; State v. Ankeny, (1949) 185 Or 549, 204 P2d 133.

(11) Conversion of public funds (ORS 165.015). Since the statute made conversion or failure to pay over a crime, an indictment was good if it charged both a conversion and a failure to pay over but was bad if it charged in the disjunctive form. State v. Dale, (1880) 8 Or 229.

The statute specified three acts, the commission of any one of which constituted the crime: (1) conversion; (2) loaning; (3) refusing to pay over; and for a prosecution on any one of these to be a bar to a prosecution for committing one of the other acts, it had to appear that both charges were for the same act, or that the defendant could not possibly have been guilty of the second charge if he was innocent of the first one. State v. Howe, (1895) 27 Or 138, 44 P 672.

A mere deposit of public funds in a bank for safe keeping was not prohibited by the statute. Baker v. Williams Banking Co., (1902) 42 Or 213, 70 P 711.

In a prosecution, a public officer charged with the duty of collecting taxes could not deny his authority to collect the taxes after he had in fact collected them. State v. Neilon, (1903) 43 Or 168, 73 P 321.

Where the State Treasurer could deposit certain state funds in special deposits for safe keeping only, which funds could not be commingled with other moneys of the depository, the president of a trust company which accepted these deposits was guilty of larceny of public money when these funds were commingled and the trust company became insolvent. State v. Ross, (1910) 55 Or 450, 104 P 596, 106 P 1022, 42 LRA(NS) 601, writ of error dismissed, (1912) 227 US 150, 33 S Ct 220, 57 L Ed 458.

Criminal intent was not involved under the statute; it was enough to constitute the offense that there had been such a conversion. Id.

A demand for return of the money was necessary only when the conversion was not otherwise shown. Id.

The great amount of a fine, although within the maximum of the statute, was cruel and unusual punishment within the prohibition of the constitution. Id.

A felonious intent was not an essential element of the crime of embezzlement by converting public funds. State v. Cahill, (1956) 208 Or 538, 292 P2d 169, 298 P2d 214. **Distinguished in** State v. Lewis, (1964) 236 Or 613, 390 P2d 180.

The only intent which had to be proved on a charge of conversion of public funds is the intent to do the prohibited act. Id.

The offense was generally called "embezzlement," and was unknown at common law. Id.

It was of no consequence that funds received in an official capacity would ultimately go to private persons. State v. Lewis, (1964) 236 Or 613, 390 P2d 180.

FURTHER CITATIONS: Under former similar statute: (1) State v. Johnson, (1864) 2 Or 115; State v. Dale, (1880) 8 Or 229; State v. Browning, (1906) 47 Or 470, 82 P 955; State v. Morris, (1911) 58 Or 397, 114 P 476; State v. Stickel, (1918) 90 Or 415, 176 P 799; State v. Briggen, (1924) 112 Or 681, 231 P 125; Nugent v. Union Automobile Ins. Co., (1932) 140 Or 61, 13 P2d 343; State v. Christiansen, (1935) 150 Or 11, 41 P2d 442; Frach v. Mass, (1939) 106 F2d 820; State v. Grinolds, (1960) 223 Or 68, 353 P2d 851; State v. Carlton, (1963) 233 Or 296, 378 P2d 557; Black v. Gladden, (1964) 237 Or 631, 393 P2d 190; State v. Stuart, (1968) 250 Or 303, 442 P2d 231; State v. Matt, (1970) 1 Or App 624, 463 P2d 874, Sup Ct **review denied;** State v. Woolard, (1970) 2 Or App 446, 467 P2d 652, Sup Ct **review denied.**

(2) State v. Lee Yan Yan, (1882) 10 Or 365; Ex parte Kie, (1891) 46 Fed 485; State v. Grinolds, (1960) 223 Or 68, 353 P2d 851; State v. LeBrun, (1965) 249 Or 530, 402 P2d 515; State v. Meidel, (1965) 241 Or 367, 405 P2d 844; State v. Capitan, (1970) 2 Or App 338, 468 P2d 533.

(3) State v. Lewis, (1908) 51 Or 467, 94 P 831.

(4) State v. Maloney, (1895) 27 Or 53, 39 P 398; State v. Minnick, (1909) 54 Or 86, 102 P 605; State v. Swikert, (1913) 65 Or 286, 132 P 709; State v. Garrett, (1914) 71 Or 298, 141 P 1123; State v. Randolph, (1917) 85 Or 172, 166 P 555; State v. Clark, (1917) 86 Or 464, 168 P 944; State v. Huitt, (1963) 234 Or 47, 380 P2d 110; State v. Sands, (1970) 2 Or App 575, 469 P2d 795, Sup Ct **review denied.**

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

(8) State v. Vawter, (1963) 236 Or 85, 386 P2d 915.

(9) State v. Teller, (1904) 45 Or 571, 78 P 980; State v. Ross, (1910) 55 Or 450, 477, 104 P 596, 106 P 1022, 42 LRA(NS) 601; In re Richter, (1900) 100 Fed 295, 297; State v. Rice, (1956) 206 Or 237, 291 P2d 1019; State v. Hanna, (1960) 224 Or 588, 356 P2d 1046; State v. Bengston, (1962) 231 Or 506, 373 P2d 655.

(10) State v. Browning, (1895) 47 Or 470, 82 P 955; Gowin v. Heider, (1963) 237 Or 266, 386 P2d 1; Pearson v. Galvin, (1969) 253 Or 331, 454 P2d 638; State v. Morasch, (1971) 5 Or App 211, 483 P2d 474.

(11) State v. Browning, (1905) 47 Or 470, 82 P 955; Seaside v. Ore. Sur. & Cas. Co., (1918) 87 Or 624, 171 P 396; State v. Coleman, (1926) 119 Or 430, 249 P 1049; State v. Hanna, (1960) 224 Or 588, 356 P2d 1046.

ATTY. GEN. OPINIONS: Embezzlement of insurance premiums by agent of company, 1920-22, p 36; forms of indictment charging stealing livestock, 1920-22, p 403; sale and removal of improvements on mortgaged premises by mortgagor of real property as embezzlement, 1924-26, p 34; release of impounded trespassing animals, 1926-28, p 519; term "livestock" as being too indefinite, 1926-28, p 557; failure of justice of the peace to pay over fines collected in criminal cases, 1928-30, p 179; jurisdiction of courts in cases for wrongful taking up of estrays, 1936-38, p 125; construing as larceny "felony" in insurance licensing law, 1964-66, p 370.

LAW REVIEW CITATIONS: 2 OLR 156; 11 OLR 92; 13 OLR 177; 17 OLR 345; 37 OLR 83; 39 OLR 137; 48 OLR 293-299.

164.055

NOTES OF DECISIONS

See cases under ORS 164.045.

164.085

NOTES OF DECISIONS

1. Under former similar statute

(1) Obtaining property by false pretenses (ORS 165.205)

(a) In general
(b) False pretense or token
(c) Indictment
(d) Defenses
(e) Evidence
(2) Destroying property with intent to defraud insurer (ORS 164.100)

1. Under former similar statute

(1) Obtaining property by false pretenses (ORS 165.205)

(a) In general. The accused must have intended to defraud the injured party, the latter must have relied on the false representation believing it to be true and must thereby have been induced to part with something of value. State v. Miller, (1906) 47 Or 562, 85 P 81, 6 LRA(NS) 365; State v. Hammelsy, (1908) 52 Or 156, 96 P 865, 132 Am St Rep 686, 17 LRA(NS) 244.

Where the injured party intended to part with title to property the fraud of the accused was a violation of the statute; if possession only was fraudulently secured, the offense was larceny. Beckwith v. Galice Mines Co., (1908) 50 Or 542, 93 P 453, 16 LRA(NS) 723; State v. Germain, (1909) 54 Or 395, 103 P 521.

The statute was violated only if the defrauded person intended to part with his title as a result of the false pretense. Lilly v. Gladden, (1959) 220 Or 84, 348 P2d 1; State v. Thompson, (1965) 240 Or 468, 402 P2d 243.

To constitute a crime the false representations had to relate to past or present facts;representations as to things to be done in the future by the party making them were not false pretenses within the meaning of the statute. State v. Leonard, (1914) 73 Or 451, 144 P 113, 681.

An information charging a person with obtaining money under false pretenses charged a felony. State v. Cody, (1925) 116 Or 509, 241 P 983.

Credit was not "property" within the meaning of the statute. State v. Miller, (1951) 192 Or 188, 233 P2d 786.

The word "theft" in an insurance policy applied to violation of the former statute. Nugent v. Union Automobile Ins. Co., (1932) 140 Or 61, 13 P2d 343.

It was proper to prosecute, convict and sentence one under the statute even though the property obtained by the false pretense did not exceed $75 in value. Lilly v. Gladden, (1959) 220 Or 84, 348 P2d 1.

It was sufficient if the intent to defraud was directed against anyone in lawful possession of the goods. State v. Wilson, (1962) 230 Or 251, 369 P2d 739.

This section was not unconstitutional in allowing punishment for either a felony or a misdemeanor, after conviction, in the discretion of the sentencing judge. State v. Losey, (1970) 3 Or App 612, 475 P2d 430, Sup Ct **review denied.**

(b) False pretense or token. Where a person obtained money or property by means of his check drawn on a bank in which he knew he had no funds or insufficient funds, it was a false pretense and a violation of the statute. State v. Hammelsy, (1908) 52 OR 156, 96 P 865, 132 Am St Rep 686, 17 LRA(NS) 244; State v. Cody, (1925) 116 Or 509, 241 P 983; State v. Gilbert, (1932) 138 Or 291, 4 P2d 923.

A person who obtained money from another on a promise of marriage and by falsely representing himself to be unmarried and of another name was not guilty of a violation of the statute because although there was a false pretense, it was not accompanied by any token or writing. State v. Renick, (1899) 33 Or 584, 56 P 275, 72 Am St Rep 758, 44 LRA 266.

Defendant was guilty of an attempt to obtain money by false pretenses when after a fire destroyed his personal property the proof of loss he filed with his insurance company was false as to the number and value of the items of property destroyed. State v. Jaynes, (1940) 165 Or 321, 107 P2d 528.

Refund slip was a false token where defendant fraudulently induced clerk to prepare it. State v. Ewers, (1969) 1 Or App 47, 458 P2d 708.

There was no requirement that the document containing false items be signed by or be in favor of the one charged. State v. Hunt, (1970) 3 Or App 634, 475 P2d 596, Sup Ct **review denied.**

It was unnecessary in order to sustain an indictment under this section to prove a dishonored check was formally presented. State v. Hodges, (1971) 5 Or App 362, 484 P2d 1107.

(c) Indictment. Where no debtor-creditor relationship existed between accused and the drawee bank, the drawer could be prosecuted under the statute. Broome v. Gladden, (1962) 231 Or 502, 373 P2d 611; State v. Scott, (1964) 237 Or 390, 390 P2d 328; State v. Hodges, (1971) 5 Or App 362, 484 P2d 1107. Broome v. Gladden, supra, **distinguished in** State v. MacMullen, (1971) 5 Or App 38, 482 P2d 544.

The indictment had to show that the prosecuting witness was induced to part with his property by his reliance upon the misrepresentations of the defendant, but the allegation that the defendant obtained the property "by means" of the false representations necessarily implied the reliance and was sufficient. State v. Bloodsworth, (1893) 25 Or 83, 34 P 1023.

An indictment charging that by false pretenses defendant obtained, and attempted to obtain, the signature of a person to a writing did not charge two separate offenses. State v. Leonard, (1914) 73 Or 451, 459, 144 P 113, 681.

The indictment failed to allege defendant made a false representation. State v. Mims, (1963) 235 Or 540, 385 P2d 1002.

The indictment was sufficient. State v. Hunt, (1970) 3 Or App 634, 475 P2d 596, Sup Ct **review denied.**

(d) Defenses. Lack of delivery of the deed was no defense to a prosecution for obtaining the signatures of two persons to the deed by means of false pretenses. State v. Leonard, (1914) 73 Or 451, 144 P 113, 681.

The fact that the cheated party's conduct might have been unlawful was not a defense to a charge of obtaining money by false pretenses. State v. Mellenberger, (1939) 163 Or 233, 95 P2d 709. Overruling State v. Alexander, (1915) 76 Or 329, 148 P 1136.

Returning part of the property did not change the fact of the original obtaining. State v. Hodges, (1971) 5 Or App 362, 484 P2d 1107.

(e) Evidence. If the false pretense was expressed orally it had to be accompanied by a false token or writing, but if not expressed orally there had to be a note or memorandum thereof in writing either subscribed by or in the handwriting of the defendant. State v. Germain (1909) 54 Or 395, 103 P 521; State v. Whiteaker, (1913) 64 Or 297, 129 P 534; State v. Leonard, (1914) 73 Or 451, 144 P 113, 681; State v. Keep, (1917) 85 Or 265, 166 P 936.

Testimony concerning similar offenses was admissible to show motive and fraudulent intent. State v. Germain, (1909) 54 Or 395, 103 P 521; State v. Cruse, (1962) 231 Or 326, 372 P2d 974.

Where defendant was charged with obtaining money by falsely representing two signatures to a note to be genuine, it was reversible error not to permit him to show that he signed their names under their direction and authority. State v. Lurch, (1885) 12 Or 95, 6 P 405.

Under an indictment charging that on a certain date the defendant made false representations, it was proper to admit evidence of representations made before that date. State v. Whiteaker, (1913) 64 Or 297, 129 P 534.

Where defendant was charged with obtaining the signature of the prosecuting witness to a deed by means of false representations, the testimony of the prosecuting witness was sufficient proof of her title to the land involved. State v. Hammer, (1915) 74 Or 426, 145 P 35.

(2) Destroying property with intent to defraud insurer

(ORS 164.100). Over insurance could be shown by the state in a prosecution under the statute. State v. High, (1935) 151 Or 685, 51 P2d 1044.

The guilt or innocence of the defendant did not depend upon the validity of the policy; the pertinent inquiry was whether he believed the property to have been insured. Id.

FURTHER CITATIONS: State v. Byam, (1893) 23 Or 568, 32 P 623; State v. Hanscom, (1896) 28 Or 427, 43 P 167; State v. Rogoway, (1904) 45 Or 601, 78 P 987, 81 P 234, 2 Ann Cas 431; Clatsop County v. Wuopio, (1920) 95 Or 30, 186 P 547; State v. Gilbert, (1932) 138 Or 291, 4 P2d 923; Parker v. Title & Trust Co., (1956) 233 F2d 505; State v. Jones, (1965) 240 Or 546, 402 P2d 738; State v. Gage, (1965) 242 Or 300, 409 P2d 332; State v. Johnson, (1966) 243 Or 532, 413 P2d 383; State v. Seydell, (1968) 252 Or 160, 446 P2d 678; State v. Fraley, (1970) 2 Or App 238, 467 P2d 683; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct **review denied;** State v. Mathewson, (1970) 4 Or App 104, 477 P2d 222; Losey v. Cupp, (1971) 4 Or App 454, 479 P2d 1023.

ATTY. GEN OPINIONS: Issuance of certificates of deposit by trust company when assets of trust company are valueless, 1934-36, p 364; place of crime where bad check was written in California to purchase horses in Oregon after false representation made in Oregon by drawer of check, 1938-40, p 140; place of prosecution where false receipts were mailed from Umatilla County to Illinois and check received in Umatilla County, 1944-46, p 354; applicability of this section to drawer of check given to pay a fine, 1950-52, p 40; construing "felony" in insurance licensing law, 1964-66, p 370.

LAW REVIEW CITATIONS: 17 OLR 345; 33 OLR 162; 37 OLR 83; 45 OLR 81-84, 137; 48 OLR 298; 50 OLR 116.

164.095

NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Sufficiency of indictment
   (3) Sufficiency and weight of evidence
   (4) Admissibility of evidence of receipt of other stolen property

1. Under former similar statute

(1) In general. The statute made the crime of receiving stolen goods a substantive rather than accessorial offense. State v. Moxley, (1909) 54 Or 409, 103 P 655; State v. Robinson, (1915) 74 Or 481, 145 P 1057.

Proof of larceny under a charge of concealing did not preclude establishment of concealing. State v. Carlton, (1963) 233 Or 296, 378 P2d 557; State v. Smith, (1970) 1 Or App 583, 465 P2d 247.

The fact that defendant might be guilty of being an accessory to the larceny was no defense to a prosecution under the former statute. State v. Pomeroy, (1896) 30 Or 16, 46 P 797.

Guilty knowledge was the gravamen of the offense. State v. Long, (1966) 243 Or 561, 415 P2d 171.

Concealment included any act or conduct which assisted the thief in converting the property to his own use, or which could prevent or render more difficult its discovery by the owner. State v. Doster, (1967) 247 Or 336, 427 P2d 413.

Charging possession of a stolen credit card under the statute was different from having a stolen card with intent to use it, prohibited by another statute. State v. Pearson, (1968) 250 Or 54, 440 P2d 229.

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

Juvenile thief was accomplice of defendant in committing crime of receiving and concealing stolen property. State v. Smith (1970) 1 Or App 583, 465 P2d 247.

(2) Sufficiency of indictment. The indictment sufficiently described the property as "two horses and thirty mares and twenty geldings" the personal property of the prosecuting witness. State v. Hanna, (1899) 35 Or 195, 57 P 629.

The indictment did not need to set forth the name of the thief. Id.

If the indictment did not allege the name of the owner of the stolen property or offer an excuse for not averring the ownership, it was fatally defective, and this defect was not waived by failing to demur. State v. Robinson, (1915) 74 Or 481, 145 P 1057.

Where the indictment charged the stolen property was owned by two named persons operating as a partnership, proof that it was owned by such persons was sufficient and the failure to prove the existence of the partnership was not a material variance. State v. Savan, (1934) 148 Or 423, 36 P2d 594.

(3) Sufficiency and weight of evidence. The inference to be drawn from the fact of finding recently stolen property in the possession of the accused was one of fact and not of law. State v. Pomeroy, (1896) 30 Or 16, 46 P 797; State v. Long, (1966) 243 Or 561, 415 P2d 171.

The evidence was sufficient from which the jury could infer that the defendant knew the property was stolen. State v. Savan, (1934) 148 Or 423, 36 P2d 594; State v. Stacey, (1936) 153 Or 449, 56 P2d 1152; State v. Sparrow, (1970) 4 Or App 345, 478 P2d 660.

Mere possession of recently stolen goods was not sufficient to prove guilty knowledge, in the absence of other proof that the accused knew or had reason to know that the goods were stolen. State v. Long, (1966) 243 Or 561, 415 P2d 171; State v. Cameron, (1967) 247 Or 199, 427 P2d 1017; State v. Murphy, (1969) 253 Or 444, 455 P2d 178; State v. Shipman, (1970) 2 Or App 359, 468 P2d 921; State v. Darnell, (1970) 3 Or App 524, 475 P2d 424; State v. Pickens, (1971) 92 Or App Adv Sh 1817, 487 P2d 95.

Conflicting stories as to defendant's acquisition of the stolen property were sufficient to enable the jury to infer that the requisite guilty knowledge was present. State v. Morris, (1970) 2 Or App 149, 465 P2d 892, Sup Ct **review denied;** State v. Pickens, (1971) 92 Or App Adv Sh 1817, 487 P2d 95.

Proof that the goods received were stolen had to be established as if it were the crime charged and therefore could not be established by the uncorroborated confession of the accused. State v. Hanna, (1899) 35 Or 195, 57 P 629.

Evidence that the property was stolen was the most direct and positive testimony of which the case was susceptible. State v. Baker (1968) 249 Or 549, 438 P2d 978.

A mere act of concealment of recently stolen goods was not sufficient to prove the requisite guilty knowledge. State v. Kibler, (1969) 1 Or App 208, 461 P2d 72.

The act of carrying a stolen rifle in an automobile was sufficient concealment to come within the terms of the statute. State v. Pickens, (1971) 92 Or App Adv Sh 1817, 487 P2d 95.

(4) Admissibility of evidence of receipt of other stolen property. Evidence of defendant's conduct involving other stolen property subsequent to the date of the alleged crime was properly admitted only where such evidence had a logical connection with the crime charged for the purpose of showing defendant's guilty knowledge. State v. Goldstein, (1924) 111 Or 221, 224 P 1087; State v. Stacey, (1936) 153 Or 449, 56 P2d 1152; State v. Albert, (1938) 159 Or 667, 82 P2d 689; State v. Kibler, (1969) 1 Or App 208, 461 P2d 72.

FURTHER CITATIONS: State v. Hill, (1901) 39 Or 90, 65 P 518; State v. Foster, (1961) 229 Or 293, 366 P2d 896; State v. Klutke, (1966) 245 Or 302, 421 P2d 956; State v. Green, (1966) 245 Or 319, 422 P2d 272; State v. Smith, (1967) 245 Or 461, 422 P2d 576; State v. Rogers, (1967) 248 Or 354, 434 P2d 338; State v. Oland, (1969) 1 Or App 272, 461 P2d 277, Sup Ct **reviewed denied;** State v. Augustine, (1969) 1 Or App 372, 462 P2d 693; State v. Stuart, (1968) 250 Or 303, 442 P2d 231; State v. Penland, (1971) 92 Or App Adv Sh 1766, 486 P2d 1314, Sup Ct **review denied;** State v. Winslow, (1970) 3 Or App 140, 472 P2d 852.

ATTY. GEN. OPINIONS: Jurisdiction of justice of peace as to violations of this section, 1940-42, p 586; imposition of sentence as determinative of whether conviction is for felony or misdemeanor, 1956-58, p 183.

LAW REVIEW CITATIONS: 48 OLR 294-299.

164.125

ATTY. GEN. OPINIONS: University dormitories as being under the protection of former similar statute, 1920-22, p 34.

164.135

NOTES OF DECISIONS

Under former similar statute the prosecution did not need to prove the offense of joyriding was committed "without intent to steal." State v. Eyle, (1963) 236 Or 199, 388 P2d 110; 9 ALR3d 628.

FURTHER CITATIONS: State v. Wickenheiser, (1970) 3 Or App 509, 475 P2d 422; State Forester v. Umpqua R. Nav. Co., (1970) 258 Or 10, 478 P2d 631.

164.205

NOTES OF DECISIONS

Under former similar statute a house which one had hired to live in, and brought part of his goods into but has not yet lodged in, would sufficiently satisfy the words "dwelling house" in an indictment. State v. Matson, (1970) 3 Or App 518, 475 P2d 436.

FURTHER CITATIONS: State v. Morris, (1917) 83 Or 429, 163 P 567.

164.215

NOTES OF DECISIONS

1. Under former similar statute

(1) Breaking and entering (ORS 164.220). The statute provided a rule of evidence by which unlawful breaking and entering could be proven in prosecutions under the burglary statutes. State v. Huntley, (1894) 25 Or 349, 35 P 1065.

Every unlawful entry of a warehouse with intent to steal or commit a felony therein constituted a breaking and entry. State v. Briggen, (1924) 112 Or 681, 231 P 125.

An indictment which charged that the defendant "wilfully, unlawfully and feloniously" broke and entered a building in which there was property kept at that time, to commit larceny, sufficiently informed defendant of the charge. State v. Tovrea, (1927) 123 Or 231, 261 P 431.

The defendant entered the house unlawfully and intended to commit one or more crimes therein. State v. Morris, (1965) 241 Or 253, 405 P2d 369.

The statute was intended to enlarge the scope of constructive breaking as known at common law to include every unlawful entry. State v. Keys, (1966) 244 Or 606, 419 P2d 943.

Entry into a structure open to the public with the intent to commit a felony therein constituted an unlawful entry. Id.

(2) Structure other than dwelling (ORS 164.240). In order to convict for burglary not in a dwelling the state had to prove that the defendant broke and entered a building, that there was property kept therein and that at the time of breaking and entering the defendant had an intent to steal therein or commit some felony therein. State v. Luckey, (1935) 150 Or 566, 46 P2d 1042; State v. Kemano, (1946) 178 Or 229, 166 P2d 472.

Intent was an element of the crime State v. Commedore, (1964) 237 Or 348, 391 P2d 644; State v. Howard, (1971) 5 Or App 643, 485 P2d 439.

Circumstantial evidence could be used to establish any element of the crime of burglary. State v. Walker, (1966) 244 Or 404, 417 P2d 1004; State v. Devlin, (1968) 249 Or 678, 439 P2d 1008. **Entry,** State v. Walker, supra; State v. Devlin, supra. **Intent,** State v. Christensen, (1971) 5 Or App 335, 483 P2d 84; State v. Howard, (1971) 5 Or App 643, 485 P2d 439.

In order to convict under the statute, the state had to prove that defendant broke into and entered a building, that there was property kept in the building and that at the time of breaking and entering the defendant had an intent to steal therein or commit some felony therein. State v. Higgins, (1969) 1 Or App 84, 459 P2d 452; State v. Christensen, (1971) 5 Or App 335, 483 P2d 84.

An indictment which alleged a breaking and entering with intent to steal personal property "there situate" was sufficient, the words used did import that the property was in the room at the time of the breaking and entry. State v. Johns, (1887) 15 Or 27, 13 P 647.

An indictment which did not give the name of the owner of the building was sufficient. State v. Wright, (1890) 19 Or 258, 24 P 229.

An indictment which alleged entry of a dwelling house was not sufficient to charge burglary under the section. State v. Mack, (1891) 20 Or 234, 25 P 639.

Testimony pertinent to the establishment of the larceny was relevant to substantiate the crime of burglary. State v. Tucker, (1900) 36 Or 291, 61 P 894.

Burglarious entry of a warehouse with intent to steal, denounced by this former section, and stealing in a warehouse, denounced by another, were distinct offenses; if both were charged in the same indictment, the former could not be disregarded as surplusage. State v. Briggen, (1924) 112 Or 681, 231 P 125.

A husband and wife who broke into a service station to take property owned by the husband and pledged by the wife without authority were not guilty of burglary. State v. Luckey, (1935) 150 Or 566, 46 P2d 1042.

The statutory definition did not control the provisions of insurance policies relating to burglary. Terminal News Stands v. General Cas. Co., (1954) 203 Or 54, 278 P2d 158.

Thrusting hand through hole defendant had made in wall was sufficient entry. State v. Hicks, (1958) 213 Or 619, 325 P2d 794, cert. denied, 359 US 917, 79 S Ct 594, 3 L Ed 2d 579.

The state did not need to allege the intent was "feloniously" to take and steal property after the breaking of the building. State v. Marshall, (1963) 234 Or 540, 382 P2d 857.

Only when the state attempted to prove motive was an instruction on it proper. State v. Walker (dictum), (1966) 244 Or 404, 417 P2d 1004.

The state had to prove a specific intent to steal or commit a felony. State v. Marshall, (1970) 3 Or App 536, 474 P2d 787, Sup Ct **review denied.**

Burglary was not an offense against a building as such

but against the security of the habitation or premises therein. State v. Casey, (1970) 4 Or App 243, 478 P2d 414.

In the absence of contrary legislative intent, one breaking and entering with intent to commit larceny could only be convicted and sentenced for burglary and not for larceny and not for both. State v. Smith, (1971) 92 Or App Adv Sh 1655, 487 P2d 90.

(3) Burglary with explosives (ORS 164.260). The former statute was not unconstitutional as violating due process of law under U.S. Const., Am. 14, or preventing accused from being informed of the nature of the accusation against him under Oregon Const. Art I, §11. Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192.

The indictment was sufficient. Barber v. Gladden, (1963) 220 F Supp 308, aff'd, Barber v. Gladden, (1964) 327 F2d 101, cert. denied, 84 S Ct 1654.

FURTHER CITATIONS: State v. Tovrea, (1927) 123 Or 231, 261 P 431; Fehl v. Jackson Co., (1945) 177 Or 200, 161 P2d 782; State v. Kemano, (1946) 178 Or 229, 166 P2d 472; State v. Grinolds, (1960) 223 Or 68, 353 P2d 851; State v. Gardner, (1961) 225 Or 376, 358 P2d 557; State v. Foss, (1962) 230 Or 579, 371 P2d 564; State v. Gardner, (1962) 231 Or 193, 372 P2d 783; State v. McKenzie, (1962) 232 Or 633, 377 P2d 18; State v. North, (1964) 238 Or 90, 390 P2d 637; State v. Commedore, (1964) 239 Or 82, 396 P2d 216; State v. Haynes, (1964) 239 Or 132, 396 P2d 694; State v. Cotton, (1965) 240 Or 252, 400 P2d 1022; State v. Larson, (1965) 240 Or 474, 402 P2d 239; State v. Shannon, (1965) 242 Or 404, 409 P2d 911; Summers v. McNamara, (1965) 239 F Supp 806; State v. Guerrero, (1966) 243 Or 616, 415 P2d 28; Ortega v. Williard, (1966) 245 Or 331, 421 P2d 966; State v. Keys, (1966) 244 Or 606, 419 P2d 943; State v. Hill, (1967) 245 Or 510, 422 P2d 675; State v. Simmons, (1967) 247 Or 334, 429 P2d 573; State v. Adkins, (1968) 250 Or 418, 443 P2d 170; State v. Brown, (1968) 251 Or 126, 444 P2d 957; State v. Skinner, (1969) 254 Or 447, 461 P2d 62; State v. Matinka, (1970) 2 Or App 499, 468 P2d 903, Sup Ct **review denied;** State v. Douglas, (1971) 5 Or App 175, 481 P2d 653; State v. Woolard, (1971) 259 Or 232, 484 P2d 314; State v. Frailey, (1971) 92 Or App Adv Sh 1392, 485 P2d 1126, Sup Ct **review denied;** State v. Nichols, (1971) 5 Or App 575, 485 P2d 634.

Burglary with explosives: State v. North, (1964) 238 Or 90, 390 P2d 637; North v. Cupp, (1969) 254 Or 451, 461 P2d 271.

LAW REVIEW CITATIONS: 4 WLJ 285-290.

164.225

NOTES OF DECISIONS

See also cases under ORS 164.215.

Want of consent by the owner to the entry could be proved by circumstantial evidence. State v. Spaise, (1968) 250 Or 354, 442 P2d 611; State v. Hanna, (1969) 1 Or App 110, 459 P2d 564.

Circumstantial evidence was sufficient to prove an intent to steal. State v. Kelly, (1971) 5 Or App 103, 482 P2d 748; State v. Smith, (1971) 92 Or App Adv Sh 1655, 487 P2d 90.

It was not necessary to allege that there was a human being in the house at the time of the burglary. Wix v. Gladden, (1955) 204 Or 597, 284 P2d 356, cert. denied, 350 US 865, 76 S Ct 109, 100 L Ed 767.

In the absence of contrary legislative intent, one breaking and entering with intent to commit larceny could only be convicted and sentenced for burglary and not larceny, and not for both. State v. Woolard, (1971) 259 Or 232, 484 P2d 314, 485 P2d 1194, rev'g 3 Or App 291, 472 P2d 837.

FURTHER CITATIONS: State v. Ryan, (1888) 15 Or 572, 16 P 417; State v. Wright, (1890) 19 Or 258, 24 P 229; State v. Mack, (1891) 20 Or 234, 25 P 639; State v. Huntley, (1894) 25 Or 349, 35 P 1065; State v. North, (1964) 238 Or 90, 390 P2d 637; State v. Morris, (1965) 241 Or 253, 405 P2d 369; Miller v. Gladden, (1965) 341 F2d 972; State v. Sanford, (1966) 245 Or 397, 421 P2d 988; Clark v. Gladden, (1967) 247 Or 629, 432 P2d 182; State v. Cathey, (1969) 1 Or App 356, 462 P2d 465; State v. Matson, (1970) 3 Or App 518, 475 P2d 436; State v. Gross, (1970) 4 Or App 26, 476 P2d 928; State v. Williams, (1971) 5 Or App 508, 484 P2d 1113.

ATTY. GEN. OPINIONS: Whether burglary is a felony against the person or the property of another, 1946-48, p 245.

164.245

NOTES OF DECISIONS

1. Under former similar statute

An officer going upon premises during the continuance of a dance was not an unlawful trespasser where, though he was not invited to come either orally or in writing, neither was he forbidden to come upon the premises nor asked to depart therefrom. State v. Walker, (1931) 135 Or 680, 296 P 850.

Officers who went upon the premises of another to get possession of a team of horses by lawful means or who went upon the premises to demand possession of the horses were licensees until they committed some unlawful act or were requested to leave the premises. Bowles v. Creason, (1937) 156 Or 278, 66 P2d 1183.

The police officers were not trespassers. State v. Dalebout, (1971) 4 Or App 601, 480 P2d 451, Sup Ct **review denied.**

FURTHER CITATIONS: Packwood v. State, (1893) 24 Or 261, 33 P 674; Binhoff v. State, (1907) 49 Or 419, 90 P 586; State v. Cartwright, (1966) 246 Or 120, 418 P2d 822; State v. Cole, (1968) 252 Or 146, 448 P2d 523.

ATTY. GEN. OPINIONS: Authority of State Game Commission to enter private lands to salvage game fish, 1936-38, p 350; section distinguished from legislation prohibiting trespassing and grazing in Bull Run National Forest, 1946-48, p 168; trespassers on uninclosed lands within Klamath Indian Reservation, 1954-56, p 172; trustee managed property as an Indian Reservation, 1960-62, p 313; trespass in public schools, (1970) Vol 34, p 1146.

LAW REVIEW CITATIONS: 24 OLR 63; 37 OLR 84.

164.315

NOTES OF DECISIONS

1. Under former similar statute

An indictment which charged the burning of a stable was insufficient where ownership of the stable was not alleged. State v. Moyer, (1915) 76 Or 396, 149 P 84.

The word "malicious" was necessary in the indictment to charge arson. State v. Murphy, (1930) 134 Or 63, 290 P 1096.

That the fire was started on the outside of the building by some person was sufficient to establish the corpus delicti without the confession. State v. Breen, (1968) 250 Or 474, 443 P2d 624; State v. Washington, (1971) 5 Or App 347, 483 P2d 465.

FURTHER CITATIONS: State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295; State v. Stephenson, (1970) 2 Or App 38, 465 P2d 720; State v. Fitz, (1970) 2 Or App 383, 468 P2d 898.

164.325

NOTES OF DECISIONS

Under former similar statute the corpus delicti of arson was (1) that the building burned, (2) as a result of the criminal act of some person. State v. Washington, (1971) 5 Or App 345, 483 P2d 465.

FURTHER CITATIONS: Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185; State v. Director, (1924) 113 Or 74, 227 P 298, 231 P 191; State v. Murphy, (1930) 134 Or 63, 290 P 1096; Carter v. LaDee Logging Co., (1933) 142 Or 439, 18 P2d 234, 20 P2d 1086; Silver Falls Timber Co. v. Eastern & Western Lbr. Co., (1935) 149 Or 126, 40 P2d 703; State v. Ridder, (1949) 185 Or 134, 202 P2d 482; State v. Molitor, (1955) 205 Or 698, 289 P2d 1090; State v. Peden, (1960) 220 Or 205, 348 P2d 451; State v. Paquin, (1962) 229 Or 555, 368 P2d 85; State v. Dill, (1966) 244 Or 188, 416 P2d 651; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct review denied.

LAW REVIEW CITATIONS: 2 WLJ 322.

164.335

NOTES OF DECISIONS

Under former similar statute shutting down logging operations emitting sparks during periods of drought, if that was the only available means of overcoming fire hazards created by it, was not an unreasonable requirement. Silver Falls Timber Co. v. Eastern & Western Lbr. Co., (1935) 149 Or 126, 40 P2d 703.

FURTHER CITATIONS: Eastman v Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185; Johnson v. Jennings Logging Co., (1914) 70 Or 16, 138 P 236; Sullivan v. Mountain States Power Co., (1932) 139 Or 282, 9 P2d 1038; Carter v. LaDee Logging Co., (1933) 142 Or 439, 18 P2d 234, 20 P2d 1086; Arneil v. Schnitzer, (1944) 173 Or 179, 144 P2d 707; State Forester v. Obrist, (1964) 237 Or 63, 390 P2d 333.

ATTY. GEN. OPINIONS: State Forester notifying owners of liability for fires which may occur, 1934-36, p 755; responsibility of timberland owner for suppression of fire, 1940-42, p 85; scope of this and related sections, 1946-48, p 312.

LAW REVIEW CITATIONS: 2 WLJ 322.

164.345

CASE CITATIONS: State v. Magone, (1899) 33 Or 570, 56 P 648; Kellogg v. Ford, (1914) 70 Or 213, 139 P 751; State v. McLennan, (1917) 82 Or 621, 162 P 838; State v. Reynolds, (1939) 160 Or 445, 86 P2d 413; State v. Estabrook, (1939) 162 Or 476, 91 P2d 838; State v. Reynolds, (1940) 164 Or 446, 100 P2d 593; State v. Peddicord, (1957) 209 Or 360, 306 P2d 416; State v. McDonald, (1961) 231 Or 24, 361 P2d 1001, cert denied, 370 US 903, 82 S Ct 1247, 8 L Ed 2d 399; State v. Haynes, (1964) 239 Or 132, 396 P2d 694; State v. Cheek, (1966) 245 Or 232, 421 P2d 685; State v. Puckett, (1967) 246 Or 463, 425 P2d 836; State Forester v. Umpqua R. Nav. Co., (1970) 258 Or 10, 478 P2d 631; State v. Bennett, (1971) 5 Or App 367, 484 P2d 111.

ATTY. GEN. OPINIONS: Removing insignia of consulate, 1924-26, p 61; admissibility of evidence obtained through wire tapping, 1954-56, p 50; persons entitled to pay as informers, 1954-56, p 69.

Injuring public ways: whether this section can apply to lanes other than public highways, 1924-26, p 145; public beach as highway, 1924-26, p 618; authority to prevent destruction of shrubs and flowers in state parks, 1924-26, p 603; obstruction of county road, 1940-42, p 307; obstruction of drainage ditch resulting in damage to highway, 1944-46, p 176.

LAW REVIEW CITATIONS: 44 OLR 185.

164.354

NOTES OF DECISIONS

Felling timber on the land of another, cutting the timber into logs, and removing the logs, constituted the crime of larceny, not merely the offense under a former similar statute prohibiting cutting and removing trees. State v. Donahue, (1915) 75 Or 409, 144 P 755, 147 P 548, 5 ALR 1121.

164.395

NOTES OF DECISIONS

1. Under a former similar statute

An indictment which failed to charge that the offense was committed by force and violence, or by putting in fear of force and violence or assault was defective. State v. Lawrence, (1891) 20 Or 236, 25 P 638.

An indictment which failed to charge that the property was taken from the person was defective. Id.

Evidence was sufficient to show that property was taken from prosecuting witness by force or intimidation and against his will. State v. Bailey, (1919) 90 Or 627, 178 P 201.

The evidence was sufficient for the jury to draw the conclusion that the three participants were acting in concert. State v. Casey, (1966) 244 Or 168, 416 P2d 665.

The indictment was sufficient. State v. Freeman, (1971) 4 Or App 627, 481 P2d 638.

FURTHER CITATIONS: Ex parte Stacey, (1904) 45 Or 85, 75 P 1060; State v. Dixon, (1958) 212 Or 572, 321 P2d 305; Merrill v. Gladden, (1959) 216 Or 460, 337 P2d 774; State v. Thomas, (1965) 240 Or 181, 400 P2d 549; State v. Bunch, (1968) 250 Or 16, 439 P2d 6; Wheeler v. Cupp, (1970) 3 Or App 1, 470 P2d 957, Sup Ct review denied; State v. Birt, (1970) 3 Or App 265, 473 P2d 669; State v. Jones, (1970) 4 Or App 170, 477 P2d 914.