Chapter 167

Offenses Against Public Health and Decency

167.012

NOTES OF DECISIONS

1. Under former similar statute

(1) Keeping a bawdy house (ORS 167.105). Evidence of common reputation was sufficient to establish ownership or right to possession of the premises. State v. McGinnis, (1910) 56 Or 163, 108 P 132; State v. Richie, (1910) 56 Or 169, 108 P 134; State v. Thomas, (1910) 56 Or 170, 108 P 135.

City of Astoria had power under its charter to pass an ordinance to suppress and prohibit bawdyhouses. Wong v. City of Astoria, (1886) 13 Or 538, 11 P 295.

Evidence that the defendant was the landlady of the premises was sufficient proof of proprietorship. State v. Gold, (1930) 133 Or 635, 290 P 1093.

Possession of the premises was implied by the defendant's authority over the premises and employes. Id.

(2) Receiving earnings of a prostitute (ORS 167.120). An indictment which charged the defendant with having attempted to solicit a male person to have sexual intercourse with a prostitute was insufficient, being uncertain in identifying the offense or the alleged prostitute. State v. Underwood, (1916) 79 Or 338, 155 P 194.

A prostitute could not be an accomplice of a man who violated the statute since she could not be indicted under the same section. State v. McCowan, (1955) 203 Or 551, 280 P2d 976.

A woman could be indicted for aiding and abetting a man who violated the section. State v. Goesser, (1955) 203 Or 315, 280 P2d 354.

The essential elements of a crime charged under the section, in addition to the time and place of the alleged crime, were that the named woman was a common prostitute and that some of her earnings as a prostitute were received by defendant. State v. Zusman, (1969) 1 Or App 268, 460 P2d 872, Sup Ct **review denied,** cert. denied, 398 US 905.

An agreement between the defendant and the prostitute was not an essential element of the crime. Id.

The statute was not unconstitutionally void for vagueness. State v. Hargon, (1970) 2 Or App 553, 470 P2d 383.

(3) Other offenses (ORS 167.125, 167.130). The performance or nonperformance of a separate offense by the female was not a necessary element of the offense of transporting a female for prostitution purposes. State v. Brown, (1966) 245 Or 245, 421 P2d 692.

The statute against procuring was not violated when one merely obtained or attempted to obtain sexual favors for himself. State v. Leach, (1971) 92 Or App Adv Sh 1840, 487 P2d 114.

FURTHER CITATIONS: State v. Ash, (1898) 33 Or 86, 54 P 184; In re Lee Tong, (1883) 9 Sawy. 333, 18 Fed 253; State v. Gagnon, (1970) 2 Or App 261, 465 P2d 737, Sup Ct **review denied**; State v. Young, (1970) 1 Or App 562, 463 P2d 374, Sup Ct **review denied.**

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CASE CITATIONS: State v. McCowan, (1955) 203 Or 551, 280 P2d 976; State v. Hargon, (1970) 2 Or App 553, 470 P2d 383.

167.060 to 167.095

NOTES OF DECISIONS

1. Under former similar statute

Prior similar statute was held to impose no prior restraint. State v. Jackson, (1960) 224 Or 337, 356 P2d 495.

A former statute proscribing dissemination under all circumstances, was over broad, offending constitutional guarantees of free speech and free press. Hayse v. Van Hoomissen, (1970) 321 F Supp 642.

Before objectionable material could be constitutionally suppressed, it had to be pandered, obtrusively advertised or be placed in an environment in which it was likely to fall into hands of children. Id.

The fact that a publication was obscene or offensive was not controlling and before objectionable matter could be constitutionally suppressed, it had to be pandered, obtrusively advertized or placed in an environment in which it was likely to fall into the hands of children. Childs v. Oregon, (1971) 91 S Ct 1248. Superseding State v. Childs, (1968) 252 Or 91, 447 P2d 304, cert. denied, 394 US 931, 89 S Ct 1198, 22 L Ed 2d 460.

An instruction, that the jury must find the predominant theme of the material appealed to purient interest, accorded with federal constitutional standards. Id.

FURTHER CITATIONS: State v. Andrews, (1899) 35 Or 388, 58 P 765; Winters v. New York, (1948) 333 US 507, 68 S Ct 665, 92 L Ed 840; Portland v. Welch, (1961) 229 Or 308, 364 P2d 1009, 367 P2d 403; State v. Mesher, (1962) 231 Or 436, 373 P2d 410; State v. Watson, (1966) 243 Or 454, 414 P2d 337; State ex rel. Maizels v. Juba, (1969) 254 Or 323, 460 P2d 850.

ATTY. GEN. OPINIONS: Constitutionality and application of this section, 1948-50, p 96; availability of in rem proceeding against obscene literature, 1964-66, p 132.

167.122

NOTES OF DECISIONS

See cases under ORS 167.127

167.127

NOTES OF DECISIONS

1. Under former similar statute

(1) Setting up or promoting lotteries (ORS 167.405)

(a) In general

(b) Particular schemes

(c) Indictment and evidence

(2) Selling or advertising lottery tickets (ORS 167.410, 167.415)

(3) Conducting or playing games, permitting on premises (ORS 167.505, 167.510)
(a) In general
(b) Games and devices
(c) Indictment or complaint

1. Under former similar statute

(1) Setting up or promoting lotteries (ORS 167.405)

(a) In general. The elements of a lottery were consideration, prize and chance. National Thrift Assn. v. Crews, (1925) 116 Or 352, 241 P 72, 41 ALR 1481; State v. Schwemler, (1936) 154 Or 533, 60 P2d 938; State v. Coats, (1938) 158 Or 122, 74 P2d 1102; McFadden v. Bain, (1939) 162 Or 250, 91 P2d 292.

A lottery was any scheme whereby one, on paying money or other valuable thing to another, became entitled to receive from him such a return in value, or nothing, as some formula of chance might determine. State v. Schwemler, (1936) 154 Or 533, 60 P2d 938; State v. Coats, (1938) 158 Or 122, 74 P2d 1102.

Chance, as distinguished from skill, was the predominant factor of a lottery. Multnomah County Fair Assn. v. Langley, (1932) 140 Or 172, 13 P2d 354.

If any substantial degree of skill or judgment was involved, it was not a lottery. State v. Coats, (1938) 158 Or 122,.74 P2d 1102.

The character of a gambling plan or scheme determined whether it constituted a lottery, rather than its widespread evil consequences or the number of persons who participated therein. Id.

"Lottery" contemplated a prize tangible in nature and having a value in the market place, but did not include the "free-play" feature of a replay pinball machine. McKee v. Foster, (1959) 219 Or 322, 347 P2d 585.

It was sufficient to constitute a lottery if only some participants paid for their chance by purchasing an admission ticket and receiving in addition thereto a chance to win a prize. McFadden v. Bain, (1939) 162 Or 250, 91 P2d 292. **Distinguished in** Cudd v. Aschenbrenner, (1962) 233 Or 272, 377 P2d 150.

The scheme had to require that a participant part with a consideration and that the consideration be something of economic value to him. Cudd v. Aschenbrenner, (1962) 233 Or 272, 377 P2d 150.

(b) Particular schemes. A scheme or game whereby eight dice were cast and a prize awarded if the dice number total corresponded to that of a box in which a prize was located was a lottery. Fleming v. Bills, (1871) 3 Or 286.

A contract whereby the defendant was to pay a stated sum for tickets to be distributed by him with the sale of merchandise, such tickets not awarding a chance for a prize but only affecting to whom the award would eventually go, was not a lottery contract. Quatsoe v. Eggleston, (1903) 42 Or 315, 71 P 66.

A scheme whereby the defendant upon selling merchandise would issue ballots entitling such holders to express their choice in favor of certain persons competing for prizes was not a lottery. National Sales Co. v. Manciet, (1917) 83 Or 34, 162 P 1055, LRA 1917D, 485.

A scheme whereby upon sale of tickets a company agreed to distribute cash to ticket holders who voted among themselves to determine which ones should receive certain sums of money was a lottery. National Thrift Assn. v. Crews, (1925) 116 Or 352, 241 P 72, 41 ALR 1481.

A game whereby a player upon punching a number in a board and solving a problem in a checker game received a trivial prize was not a lottery. Johnson v. McDonald, (1930) 132 Or 622, 287 P 220.

A scheme whereby contributions were solicited and used to offer purses to owners of horses as an inducement for the entry of their horses and contributors were entitled to a share of the earnings of a horse selected was not a lottery. Multnomah County Fair Assn. v. Langley, (1932) 140 Or 172, 13 P2d 354.

A dart game, played for money or merchandise offered as a prize in consideration of moneys paid by each player, constituted a lottery. State v. Schwemler, (1936) 154 Or 533, 60 P2d 938.

Slot machines and similar devices, whereby small amounts were hazarded on the chance of winning larger sums, constituted lotteries. State v. Coats, (1938) 158 Or 102, 74 P2d 1120.

A pinball machine came within the definition of a lottery. Id.

Distribution of prizes to persons in a theater or outside holding numbers drawn from a receptacle in theater was a lottery. McFadden v. Bain, (1939) 162 Or 250, 91 P2d 292.

(c) Indictment and evidence. An indictment specifying the time, place and general type of lottery, incorporating the phraseology of the statute, and alleging that a more particular description of the lottery was unknown to the grand jury was sufficient. State v. Lee Wye, (1928) 123 Or 595, 263 P 60.

(2) Selling or advertising lottery tickets (ORS 167.410, 167.415). "Lottery" contemplated a prize tangible in nature and having a value in the market place, but did not include the "free-play" feature of a replay pinball machine. McKee v. Foster, (1959) 219 Or 322, 347 P2d 585.

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

(3) Conducting or playing games, permitting on premises (ORS 167.505, 167.510)

(a) In general. Authority granted by charter to a city to suppress gaming or gambling houses did not repeal or affect the general laws upon the subject. State v. Bay, (1909) 53 Or 241, 99 P 939; State v. Short, (1909) 53 Or 245, 99 P 1043.

The dealer in a game of poker was an accomplice so that his testimony needed to be corroborated to sustain defendant's conviction. State v. Light, (1889) 17 Or 358, 21 P 132.

(b) Games and devices. To be a gambling device the thing must be something tangible and adapted or designed for the purpose of playing a game of chance for money, etc. State v. Mann, (1867) 2 Or 238; State v. Gitt Lee, (1877) 6 Or 425.

The game of "fan-tan" was within the purview of the statute. In re Lee Tong, (1883) 9 Sawy. 333, 18 Fed 253.

A person who bet money at a game of faro dealt by another, played faro within the meaning of the statute. State v. McDaniel, (1891) 20 Or 523, 26 P 837.

Sale of tickets on a horse race was not within the statute since the ticket could not be considered a gambling device. State v. Ayers, (1907) 49 Or 61, 88 P 653, 124 Am St Rep 1036, 10 LRA(NS) 992.

A gambling device was any contrivance by the operation of which chances were determined whereby money or property was lost or won. State v. Ayers, (1907) 49 Or 61, 88 P 653, 124 Am St Rep 1036, 10 LRA(NS) 992.

Throwing balls into a box divided into numbered spaces for prizes was a gambling game. State v. Randall, (1927) 121 Or 545, 256 P 393.

(c) Indictment or complaint. Designation of the prohibited game by name in the indictment was sufficiently definite to describe the offense. State v. Carr, (1876) 6 Or 133.

An indictment that charged that defendant did deal, play and carry on a game of faro charged but one crime. Id.

Although it was not necessary to name the unlawful game or to name the device by which it was played, the indictment had to describe the device by which the unlawful game was played and set forth that it was adapted, designed, devised or used for playing games for money. State v. Gitt Lee, (1877) 6 Or 425.

An indictment for betting at a game called "studpoker" did not need to allege the names of the other persons who bet at the same time. State v. Light, (1889) 17 Or 358, 21 P 132.

An indictment stating that person winning would receive from proprietors of game a box of candy or electric percolator or various other articles of representative value was sufficient. State v. Randall, (1927) 121 Or 545, 256 P 393.

FURTHER CITATIONS: Frisbie v. State, (1859) 1 Or 264; Remington v. State, (1860) 1 Or 281; State v. Gitt Lee, (1877) 6 Or 425; O'Keefe v. Weber, (1886) 14 Or 55, 12 P 74; State v. Adams, (1891) 20 Or 525, 26 P 837; State v. Williams, (1904) 45 Or 314, 77 P 965, 67 LRA 166; State v. Nease, (1905) 46 Or 433, 80 P 897; Mozorosky v. Hurlburt, (1923) 106 Or 274, 198 P 556, 211 P 893, 15 ALR 1076; State v. Coats, (1938) 158 Or 122, 74 P2d 1102; State v. Pulver, (1938) 159 Or 296, 79 P2d 990; State v. Mellenberger, (1939) 163 Or 233, 95 P2d 709; Lairmore v. Drake, (1949) 185 Or 239, 202 P2d 473; State v. Langley, (1958) 214 Or 445, 315 P2d 560, 323 P2d 301; State v. Middleton, (1970) 2 Or App 70, 465 P2d 913.

ATTY. GEN. OPINIONS: Chances to win prizes given with purchases, 1920-22, pp 182, 383, 1922-24, p 499, 1924-26, p 531, 1926-28, p 35, 1930-32, p 489, 1934-36, pp 739, 769; attendance at a store as consideration, 1960-62, p 240; discount coupon booklets plus chance at prize as a lottery, (1970) Vol 34, p 1072.

Punch boards as lotteries, 1920-22, p 185, 1928-30, p 176, 1936-38, p 627, 1938-40, p 506, 1952-54, p 144; dice games, 1920-22, p 566; charging loser for use of table and cards, 1924-26, p 269; trade slips awarded on punch board sales, 1926-28, p 35; operation of slot machines by fraternal organizations, 1928-30, p 624; dart games, 1934-36, p 627; "beano" and "fishpond," 1934-36, p 817; pinball machines awarding free plays, 1946-48, pp 329, 343; legality of punchboard, 1960-62, p 342; legality of punch card scheme, 1960-62, p 415.

Legality of certain games and concessions at fairs, 1934-36, p 817, 1938-40, p 430; distribution of prizes to holders of certain distinctive book match covers, 1938-40, p 26; "defense bond night" at theaters, 1940-42, p 360; legality of "Box Score, Baseball Game," 1946-48, p 458.

Consumer stimulation plan as a lottery, 1948-50, p 355; deer hunting contest as a lottery, 1950-52, p 34; bingo by broadcast or telecast, 1962-64, p 228; advertising scheme promoting tourist purchase, 1962-64, p 262; pony giveaway at State Fair rodeo show as a lottery, 1962-64, p 280; guessing pennies in a glass jar as a lottery, 1964-66, p 255; application to machines awarding free replays, (1970) Vol 34, p 930.

Club members drawing for merchandise, 1922-24, p 390; "suit club" plan for members, 1938-40, p 134.

Pari mutuel betting, 1934-36, p 255.

Validity of municipalities licensing card rooms, 1930-32, p 420; authority of municipalities to license slot machines, punch boards or pinball machines, 1944-46, p 486; nature of tax on certain coin-operated machines, 1946-48, p 343.

Public utility corporation furnishing services to gambling houses, 1936-38, p 442.

Disposition of fines collected for violation of certain gambling statutes, 1936-38, p 606.

LAW REVIEW CITATIONS: 12 OLR 255; 16 OLR 97, 164; 17 OLR 118, 229; 28 OLR 391, 408.

167.147

NOTES OF DECISIONS

1. Under former similar statute

(1) Slot machines (ORS 167.535). The operation of a nickel-in-the-slot machine constituted a lottery. State v. Coats, (1938) 158 Or 102, 74 P2d 1120. **Distinguished in** McKee v. Foster, (1959) 219 Or 322, 347 P2d 585.

(2) Games of chance (ORS 167.555). A complaint seeking an injunction restraining seizure and destruction of vending machines and games was insufficient for failure to describe the machines or games and their method of operation. Stangier v. Goad, (1939) 163 Or 314, 97 P2d 191.

The purpose of the statute was to prohibit use of slot machines, etc., played for a prize given in the form of cash or merchandise determined by chance, in consideration of moneys paid by players. State v. Fuller, (1940) 164 Or 383, 101 P2d 1010.

A machine similar to a pinball machine played for amusement only lacked one of the essential elements of lottery, the prize. Id.

Proof of any one of the acts charged, i.e., that defendant did "possess, display and operate" the machine, was sufficient to make out the offense. State v. Soasey, (1964) 237 Or 167, 390 P2d 190.

The indictment was sufficient. State v. Soasey, (1964) 237 Or 167, 390 P2d 190; State v. Katzberg, (1967) 247 Or 296, 428 P2d 170.

FURTHER CITATIONS: State v. Coats, (1938) 158 Or 122, 74 P2d 1102; Moore v. Snell, (1938) 159 Or 675, 82 P2d 888; McKee v. Foster, (1959) 219 Or 322, 347 P2d 585; State v. Wheelhouse, (1971) 92 Or App Adv Sh 1837, 486 P2d 1292.

ATTY. GEN. OPINIONS: Vending machines involving element of chance, 1922-24, p 117, 1928-30, p 145; pinball machines awarding free plays, 1946-48, pp 329, 343, 1956-58, p 257; a "digger" as an illegal device, 1950-52, p 217; Operation of slot machines by fraternal organizations, 1928-30, p 624; lawfulness of possession of slot machines, 1944-46, p 226; Effect on pari mutuel betting, 1936-38, p 188; regularity of 1937 amendment, 1936-38, p 201; lawfulness of licensing, possessing, displaying, operating or playing machines or devices under this section, 1938-40, p 150, 1944-46, p 226; Destruction of slot machines which may be used for other than gambling purposes, 1952-54, p 197; gambling device on liquor licensee's premises, 1956-58, p 281; possession of "one-armed bandit," 1962-64, p 49; application to machines awarding free replays, (1970) Vol 34, p 930.

Proposed licensing and taxing of slot machines, 1934-36, pp 197, 250; authority of county to license slot machines, 1934-36, p 652; authority of municipality to license slot machines, punch boards or pinball machines, 1944-46, p 486; nature of tax on certain coin-operated machines, 1946-48, p 343.

167.158

CASE CITATIONS: State v. Middleton, (1970) 2 Or App 70, 465 P2d 913.

167.162

NOTES OF DECISIONS

Under former similar statute a sheriff could not be enjoined from seizing a slot machine since the judicial determination provided for in the statute constituted an adequate remedy at law. Stangier v. Goad, (1939) 163 Or 314, 97 P2d 191.

FURTHER CITATIONS: Moore v. Snell, (1938) 159 Or 675, 82 P2d 888.

ATTY. GEN. OPINIONS: Disposition of confiscated slot machines and money therein, 1930-32, p 24, 1938-40, p 777; confiscation of certain machines, 1930-32, p 592; disposition of fines collected for violation of statutes prohibiting gambling and operation of slot machines, 1936-38, p 606; proper-

ty right in money found in confiscated machines, 1942-44, p 50; destruction of slot machines which may be used for other than gambling purposes, 1952-54, p 197; seizing and confiscating of slot machines without a search warrant or a conviction, 1954-56, p 55; possession of "one-armed bandit," 1962-64, p 49; application to machines awarding free replays, (1970) Vol 34, p 930.

167.207

NOTES OF DECISIONS

1. Under former similar statute

Purchaser of narcotics was not an accomplice of seller. State v. Nasholm, (1970) 2 Or App 385, 467 P2d 647, Sup Ct **review denied.**

The elements of possession and of sale were different. State v. Moltare, (1970) 3 Or App 424, 474 P2d 7; State v. Harp, (1971) 92 Or App Adv Sh. 1396, 485 P2d 1123.

Possession was possible whether the plants were growing or not. State v. Rutherford, (1970) 4 Or App 164, 477 P2d 911, Sup Ct **review denied.**

There was sufficient evidence of possession. State v. Nasholm, (1970) 2 Or App 385, 467 P2d 647; State v. Harris, (1970) 3 Or App 610, 475 P2d 439, Sup Ct **review denied**; State v. Holliday, (1971) 5 Or App 461, 485 P2d 634; State v. O'Brien, (1971) 92 Or App Adv Sh 1238, 485 P2d 434, 486 P2d 592, Sup Ct **review allowed.**

There was insufficient evidence of possession. State v. Oare, (1968) 249 Or 597, 439 P2d 885.

FURTHER CITATIONS: Ex parte Mon Luck, (1896) 29 Or 421, 425, 44 P 693, 54 Am St Rep 804, 32 LRA 738; State v. Johnson, (1962) 232 Or 118, 374 P2d 481; State v. Layne, (1966) 244 Or 510, 419 P2d 35; State v. Varney, (1966) 244 Or 583, 419 P2d 430; State v. Cartwright, (1966) 246 Or 120, 418 P2d 822; State v. Cortman, (1968) 251 Or 566, 446 P2d 681; State v. Albertson, (1969) 1 Or App 486, 462 P2d 458, Sup Ct **review denied**; State v. Olson, (1969) 1 Or App 380, 462 P2d 681; State v. Evans, (1970) 1 Or App 489, 463 P2d 378, Sup Ct **review denied**; State v. Brammeier, (1970) 1 Or App 612, 464 P2d 717, Sup Ct **review denied**; State v. Chilton, (1970) 1 Or App 593, 465 P2d 495; State v. Shirley, (1970) 1 Or App 635, 465 P2d 743; State v. Brotherton, (1970) 2 Or App 157, 465 P2d 749 , Sup Ct **review denied**; State v. Canaday, (1970) 2 Or App 390, 467 P2d 666, Sup Ct **review denied**; State v. Peterson, (1970) 3 Or App 17, 469 P2d 40, Sup Ct **review denied**; State v. Keffer, (1970) 3 Or App 52, 471 P2d 438; State v. Winslow, (1970) 3 Or App 140, 472 P2d 852; State v. Burgess, (1971) 5 Or App 164, 483 P2d 101; State v. Fisher, (1971) 5 Or App 483, 484 P2d 864; State v. Williams, (1971) 92 Or App Adv Sh 1674, 487 P2d 100, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Kind and character of proof necessary to negative defendant's authority to possess narcotics, 1922-24, p 689.

LAW REVIEW CITATIONS: 37 OLR 84.

167.228

CASE CITATIONS: State v. Powell, (1958) 212 Or 684, 321 P2d 333; State v. Powell, (1967) 247 Or 239, 427 P2d 1019; State v. Livingston, (1970) 2 Or App 587, 469 P2d 632.

LAW REVIEW CITATIONS: 36 OLR 156.

167.247

NOTES OF DECISIONS

Under former similar statute warrantless search of an automobile was unreasonable when the vehicle and the accused were both in police custody and the search remote in time and place from the arrest. Ramon v. Cupp, (1970) 423 F2d 248. Superseding State v. Ramon, (1967) 248 Or 96, 432 P2d 507.

ATTY. GEN. OPINIONS: Availability of in rem proceeding against obscene literature, 1964-66, p 132.

167.830

ATTY. GEN. OPINIONS: Holder of license to operate dance hall permitting minor, an independent contractor, to assist in furnishing music, 1924-26, p 355.

167.850

NOTES OF DECISIONS

Riding a horse suffering with an ulcerated sore on its back and shoulders and depriving the horse of necessary sustenance constituted the crime of torturing and tormenting under a former similar statute. State v. Goodall, (1919) 90 Or 485, 175 P 857.

Evidence that accused shot and killed the cow of another because she was breaking into his hay corral did not prove that the killing was malicious and wanton so as to justify his conviction under a former similar statute. State v. Kilien, (1920) 98 Or 116, 193 P 208.

FURTHER CITATIONS: State v. Goodall, (1916) 82 Or 329, 160 P 595; State v. McLennan, (1917) 82 Or 621, 162 P 838; Martin v. Reynolds Metals Co., (1963) 224 F Supp 978.

ATTY. GEN. OPINIONS: Application of section to government officials engaged in predatory animal control, 1926-28, p 199; Vivisection as unjustifiable cruelty to animals, 1930-32, p 109; Killing cow upon garden tract, 1934-36, p 61; putting out poison by sheep owner for dogs or predatory animals suspected of killing sheep, 1940-42, p 127; killing hogs upon stackyard, 1942-44, p 106; whether dogs are within purview of section, 1946-48, p 51.