

CRIMINAL LAW REVISION COMMISSION
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CRIMINAL PROCEDURE

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 4. ARRESTS AND RELATED PROCEDURES

Arrests

Preliminary Draft No. 2; July 1972

Reporter: Donald L. Paillette

Subcommittee No. 1

ARTICLE 4. ARRESTS AND RELATED PROCEDURES

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Section 1. Sections 2, 3, 9 and 11 of this Article are added to and made a part of ORS chapter 133.

Section 2. Definitions. As used in this Article, unless the context requires otherwise:

(1) "Accusatory instrument" means a grand jury indictment, an information or a complaint.

(2) "Arrest" means to place a person under actual or constructive restraint or to take a person into custody. A "stop," as authorized by Article 2, [Stopping of Persons], is not an arrest.

(3) "Complaint" means a written accusation, verified by the oath of a person, filed with a magistrate, and charging another person with the commission of an offense, other than an offense punishable as a felony. A complaint serves both to commence an action and as a basis for prosecution thereof.

(4) "Information" means a district attorney's information or a complainant's information.

(5) "Complainant's information" means a written accusation, verified by the oath of a person, filed with a magistrate, and charging another person with the commission of an offense punishable as a felony. A complainant's information serves to commence an action, but not as a basis for prosecution thereof.

(6) "District attorney's information" means a written accusation by a district attorney and:

(a) If filed with a magistrate to charge a person with the commission of an offense, other than an offense punishable as a felony, serves both to commence an action and as a basis for prosecution thereof; or

(b) If filed with a magistrate to charge a person with the commission of an offense punishable as a felony, serves to commence an action, but not as a basis for prosecution thereof; or

(c) If, as is otherwise authorized by law, it is filed in circuit court to charge a person with the commission of an offense and serves as a basis for prosecution thereof.

(7) "Reasonable cause" means that there is a substantial objective basis for believing that the person to be arrested has committed an offense.

(8) "Peace officer" means a sheriff, constable, marshal, municipal policeman or member of the Oregon State Police.

COMMENTARY

This section proposes a new set of definitions to apply to arrests. ORS 133.010, 133.210 and 133.250 would be repealed. The form and content of an information or complaint are further detailed in section 3.

(1) "Accusatory instrument" is placed here for discussion purposes, inasmuch as it is not essential that this definition be located in the draft, but is proposed with the recommendation that it be placed in the General Definitions section of the Criminal Procedure Code or, in the alternative, in the instant draft. The definition encompasses the three kinds of formal charging documents.

(2) "Arrest" is derived, in part, from the definitions now found in ORS 133.210 and 133.250, but specifically includes "constructive" restraint and deletes any reference to holding a person "to answer for a crime." The criminal bases for an arrest are evident from the provisions of the Article, and the new single definition of arrest should be easier to understand than the double definition that now exists in the statutes.

(3) "Complaint," a type of accusatory instrument, is a new definition and is distinguishable from an "information"

that is fully defined in subsections (4), (5) and (6). This type of accusatory instrument is limited in its use to non-felony offenses and would be the basis not only for the commencement of the action but also for its prosecution in district or justice court. ORS 156.020 provides that in a justice's court a criminal action is commenced by the filing of the "complaint," but does not define the term. ORS 156.030 provides that for purposes of determining the sufficiency of the pleading, a complaint is deemed an indictment. These sections are applicable to district court through ORS 156.610. ORS 484.170 sets out the minimum requirements of a traffic complaint.

(4) "Information" includes a "district attorney's information" and a "complainant's information," terms which are defined in subsections (5) and (6). The use of this kind of accusatory instrument would be limited to crimes punishable as felonies.

(5) "Complainant's information" would be the instrument used to commence a felony action in an inferior court, but would not serve as a basis for prosecution. The basis for prosecution of such a crime in circuit court would be either a grand jury indictment or a district attorney's information. The existing definition of information is as follows:

ORS 133.010. An information is a written statement of the essential facts charging a person with the commission of a crime, made upon oath and filed with a magistrate in a preliminary proceeding.

The present term is frequently used interchangeably with the term, "Complaint," and its precise meaning is unclear. Moreover, this doesn't appear to be a satisfactory definition for an information that a district attorney would file in circuit court in lieu of an indictment.

(6) "District attorney's information" is further defined to distinguish between this type of accusatory instrument and a complaint when used to charge a misdemeanor or violation, and also to indicate that it can be used either to commence a felony action, or, if filed in circuit court, as a basis for prosecution.

(7) "Reasonable cause," the standard to be applied to test the validity of an arrest or the issuance of an arrest warrant, is taken from the Model Code of Pre-Arrest Procedure (MCP) s. 3.01 (2) (Tent. Draft No. 2, 1969). The ALI comments:

"That reasonable cause exists where there is some substantial objective basis for believing a person guilty of crime seems . . . to state the essence of a large body of case law. This standard expresses the demand of the courts that it be possible to explain and justify the arrest to an objective third party, without requiring that at the time of the arrest the guilt of the person arrested be more probable than not." (At 15). See, also State v. Williams, 253 Or 613, 456 P2d 497 (1969).

(8) "Peace officer" is broader than the definition of the term contained in the draft on Search and Seizure (state police, city police and sheriffs). However, it is more restrictive than the definition in the new Criminal Code, ORS 161.015 (4) in that it does not include the phrase, "and such other persons as may be authorized by law." ORS 133.170 would be repealed.

Section 3. Information and complaint; form and content. (1) An information or complaint shall specify the name of the court with which it is filed, the title of the action and be subscribed by a person known as the "complainant." The complainant may be any person having knowledge, whether personal or upon information and belief, of the commission of the offense charged. Each information or complaint shall contain an accusatory part and a factual part. A complainant's verification of the information or complaint shall apply only to the factual part and not to the accusatory part.

(2) The accusatory part of an information or complaint must designate the offense charged. The rules relating to joinder of counts and charges set forth in ORS 132.560 and the rules relating to jointly indicted defendants set forth in ORS 136.060 shall apply.

(3) The factual part of an information or complaint shall contain a statement of the complainant alleging facts supporting or tending to support the charge. Where more than one offense is charged, the factual part may consist of a single factual account applicable to all of the counts of the accusatory part.

COMMENTARY

This section prescribes the general form for an information or complaint, either of which must (1) charge an offense and (2) recite facts, sworn to by the complainant, supporting or tending to support the charge. The section spells out the distinction between the "factual part" and the "accusatory part" of the instruments. Subsection (2) provides for multiple-count and multiple-defendant instruments pursuant to the joinder rules in ORS chapters 132 and 136.

The section is based on New York Criminal Procedure Law s. 100.15 (1971), except that the New York provision regarding the factual part of the instrument refers to alleging

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facts "of an evidentiary character." The quoted phrase was deleted by subcommittee to avoid any apparent conflict with the requirements for indictments set forth in ORS chapter 132.

(ORS 133.020 and 133.030 are not affected by this draft.)

133.020 Magistrate defined. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime.

133.030 Who are magistrates. The following persons are magistrates:

- (1) Judges of the Supreme Court;
- (2) Judges of the Court of Appeals;
- (3) Judges of the circuit court;
- (4) Judges of the district court;
- (5) County judges and justices of the peace; and
- (6) Municipal officers authorized to exercise the powers and perform the duties of a justice of the peace.

[Amended by 1961 c.724 §27; 1969 c.198 §59]

Section 4. ORS 133.037 is amended to read:

133.037. (Detention and interrogation of persons suspected of theft committed in a store; reasonable cause.) (1) Notwithstanding [ORS 133.310, 133.350, 133.550 and subsection (2) of 133.560] any other provision of this Article, a peace officer, merchant or merchant's employe who has reasonable cause for believing that a person has committed theft or attempted theft of property of a store or other mercantile establishment may detain and interrogate the person in regard thereto in a reasonable manner and for a reasonable time.

(2) If a peace officer, merchant or merchant's employe, with reasonable cause for believing that a person has committed theft of property of a store or other mercantile establishment, detains and interrogates the person in regard thereto, and the person thereafter brings against the peace officer, merchant or merchant's employe any civil or criminal action based upon the detention and interrogation, such reasonable cause shall be a defense to the action, if the detention and interrogation were done in a reasonable manner and for a reasonable time.

COMMENTARY

The first amendment in this section is of a house-keeping nature. The second amendment is to allow the detention of suspected persons even though there may be a legal question in a given situation as to whether a completed crime of theft has occurred, or merely attempted theft.

(ORS 133.045 to 133.070 and 133.080 are not affected by this draft.)

CITATION IN LIEU OF ARREST

133.045 Application of ORS 133.055. ORS 133.055 shall apply in any instance when a person is subject to arrest on a misdemeanor charge or on a felony charge which may be deemed a misdemeanor charge after sentence is imposed and:

(1) The arrest is made without a warrant pursuant to ORS 133.310; or

(2) The magistrate before whom an information or complaint is filed authorizes it; or

(3) The person is arrested by a private party pursuant to ORS 133.350 and is delivered to a peace officer pursuant to ORS 133.560.

[1969 c.244 §1]

133.050 [Repealed by 1959 c.426 §1]

133.055 Citation in lieu of arrest. A peace officer in lieu of taking the person into custody may issue and serve a citation to the person to appear at the court of the magistrate before whom the person would be taken pursuant to ORS 133.520.

[1969 c.244 §2]

133.060 Cited person to appear before magistrate; effect of failure to appear. (1) The person cited shall appear before a magistrate of the county in which he was cited at the time, date and court specified in the citation, which shall not be later than two weeks from the date the citation was issued.

(2) If the cited person fails to appear at the time, date and court specified in the citation, and a criminal complaint or information is filed, the magistrate shall issue a warrant of arrest immediately upon the person's failure to appear.

[1969 c.244 §5]

133.065 Service of citation; contents. (1)

If a citation is issued as described in ORS 133.055, the peace officer shall serve one copy to the person arrested and shall, as soon as practicable, file a duplicate copy with the magistrate specified therein along with his proof of service.

(2) Each copy of the citation issued under authority of ORS 133.045 to 133.080, 133.110 and 156.050 shall contain:

(a) The name of the court at which the cited person is to appear.

(b) The name of the person cited.

(c) A brief description of the offense of which the person is charged, the date, the time and place at which the offense occurred, the date on which the citation was issued, and the name of the peace officer who issued the citation.

(d) The time, date and place at which the person cited is to appear in court.

(e) Whether a complaint or information had been filed at the time the citation was issued.

(f) If the arrest was made by a private party, the name of the arresting person.

(g) The following:

READ CAREFULLY

This citation is not a complaint or an information. One may be filed and you will be provided a copy thereof at the time of your first appearance. You **MUST** appear in court at the time set in the citation. **IF YOU FAIL TO APPEAR AND A COMPLAINT OR INFORMATION HAS BEEN FILED, THE COURT WILL IMMEDIATELY ISSUE A WARRANT FOR YOUR ARREST.**

[1969 c.244 §6]

133.070 Citation where arrest without warrant is authorized for ordinance violation.

(1) In any instance in which a person is subject to arrest without a warrant for violation of an ordinance of a county, city or municipal corporation, any peace officer who is authorized to make the arrest may make the arrest but in lieu of taking the person into custody he may issue and serve a citation to the person to appear at any court within the jurisdictional unit by which he is authorized to act.

(2) Any citation issued under this section shall conform to the requirements of ORS 133.065.

(3) The person cited shall appear before the court in which his appearance is required at the time, date and court specified in the citation. If he fails to appear at that time and a criminal complaint is filed, the court immediately shall issue a warrant for his arrest.
[1969 c.244 §8]

133.080 Application to traffic, boating, hunting and fishing violations. Nothing in ORS 133.045 to 133.080, 133.110 and 156.050 applies to violations of law enforceable under ORS 484.010 to 484.320, to violations enforceable under ORS 488.210 to 488.300 or to violations enforceable under ORS 496.905 to 496.950.

[1969 c.244 §7]

Section 5. ORS 133.075 is amended to read:

133.075. (Penalty for failure to appear on citation.) If any person wilfully fails to appear before a court pursuant to a citation issued and served under authority of ORS 133.045 to 133.080, 133.110 and 156.050 and a complaint or information is filed, he is guilty of a Class A misdemeanor.

COMMENTARY

The amendment to ORS 133.075 is to conform the classification of the offense to the new Criminal Code.

Section 6. ORS 133.100 is amended to read:

133.100. (Citations for certain littering violations.) A citation conforming to the requirements of ORS 484.150 to 484.220 and 484.230 shall be used for all violations of ORS [164.440] 164.805 and 390.665 in this state.

COMMENTARY

The amendment removes an obsolete statutory reference and inserts the number of the new section on offensive littering.

Section 7. ORS 133.110 is amended to read:

133.110. (Issuance; citation.) If the magistrate is satisfied that [the crime complained of has been committed and that there is probable cause to believe that the person charged has committed it] there is reasonable cause to believe that the person charged has committed the crime complained of, he shall issue a warrant of arrest. However, on a misdemeanor or violation charge or on a felony charge which [may be deemed] in the discretion of the court may be considered a misdemeanor charge [after sentence is imposed] he may authorize a peace officer to issue and serve a citation as provided in ORS 133.055.

COMMENTARY

The amendment incorporates the "reasonable cause" standard that is defined in section 2 and adds a reference to a "violation" for authorization to serve a citation in lieu of an arrest. The major effect of the amendment is to clearly require a factual foundation to support the issuance of an arrest warrant. This amendment, coupled with the definition of reasonable cause (section 1, supra) and the requirements for form and content of an information or complaint (section 3, supra) are intended to specifically require more than a complainant's mere conclusion that the person charged has committed a crime.

In Giordenello v. United States, 357 US 480 (1958), the Supreme Court stated, "The language of the Fourth Amendment, that ' . . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons or things to be seized, of course applies to arrest as well as search warrants ' " That this was a Fourth Amendment requirement and not merely a federal procedural rule was developed in the subsequent cases of Wong Sun v. United States, 371 US 471 (1963); Aguilar v. Texas, 378 US 108 (1964) (search warrant); Beck v. Ohio, 379 US 89 (1964) and Barnes v. Texas, 380 US 253 (1965).

These cases make it clear that the Fourth Amendment is made applicable to the states through the Fourteenth Amendment

and requires a judicial determination of probable cause as a prerequisite to the issuance of either a search or an arrest warrant. See, Harmon, "Giordenello to Sesslin to Us: Arrest Warrants in Oregon," 6 Will L J 431 (1970).

Oregon Constitution, Art. I, s. 9 also demands a probable cause showing for the issuance of a warrant. In the recent case of State v. Redeman, _____ Or App _____, 92 Adv Sh 1197, 485 P2d 655 (1971), the Court of Appeals held that the mere filing of a criminal complaint or of a petition in the juvenile court charging an act which if committed by an adult would constitute a crime does not alone constitute the probable cause required by the Oregon Constitution and ORS 133.110.

(ORS 133.120 is not affected by this draft.)

133.120 Authority to issue. A judge of the Supreme Court or the Court of Appeals may issue a warrant of arrest for any crime committed or triable within the state, and any other magistrate mentioned in ORS 133.030 may issue such a warrant for any crime committed or triable within his county.

[Amended by 1969 c.198 §60]

Section 8. ORS 133.140 is amended to read:

133.140 Form. A warrant of arrest **is** an order in writing in the name of the State of Oregon, signed by a magistrate with his name of office, commanding the arrest of the defendant. It may be substantially in the following form:

County of _____

IN THE NAME OF THE STATE OF
OREGON

To any peace officer in the State of Oregon,
greeting:

Information upon oath having been given before me that the crime of (designating it) has been committed and accusing C.D. thereof, you are, therefore, hereby commanded forthwith to arrest the above-named C.D. and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at _____ this _____ day of _____,
19____.

E. F., Justice of the Peace
(or as the case may be)

[Amended by 1961 c.443 §1]

shall:

- (1) Be in writing;
- (2) Specify the name of the person to be arrested, or if his name is unknown, shall designate the person by any name or description by which he can be identified with reasonable certainty;
- (3) State the nature of the offense;
- (4) State the date when issued and the county where issued;
- (5) Be in the name of the State of Oregon, be signed by and bear the title of the office of the magistrate having authority to issue a warrant for the crime charged;

(6) Command any peace officer to arrest the person against whom the charge was made and to bring him before the magistrate issuing the warrant, or if the magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county; and

(7) Specify the amount of bail.

COMMENTARY

The amendment deletes the form of warrant now contained in the statute and lists the contents of a warrant of arrest. ORS 133.130 would be repealed.

(ORS 133.220 is not affected by this draft.)

**133.220 Who may make. An arrest may
be effected by:**

- (1) A peace officer under a warrant;
- (2) A peace officer without a warrant;

or

- (3) A private person.

Section 9. Arrest by a peace officer; when and how made. (1)

A peace officer may arrest a person for a crime under the provisions of this Article at any hour of any day or night.

(2) If the arrest is otherwise authorized under this Article, a peace officer who is outside the geographical area of his employment may make an arrest without a warrant for an offense committed within the geographical area where he is present. In so doing, the peace officer shall act with the same rights, privileges and immunities as are otherwise provided by law.

(3) The officer shall inform the person to be arrested of his authority and reason for the arrest, unless he encounters physical resistance, flight or other factors rendering this procedure impracticable, in which case the arresting officer shall inform the arrested person as soon as practicable.

(4) When arresting a person under a warrant, the peace officer, upon request of the arrested person, shall show the warrant.

(5) In order to make an arrest, a peace officer may use physical force as justifiable under ORS 161.235, 161.239 and 161.245.

(6) In order to make an arrest, a peace officer may enter premises in which he reasonably believes the person to be arrested is present. Except as provided in subsection (7) of this section, the arresting officer shall give appropriate notice of his identity, authority and purpose to the person to be arrested or to the person in apparent control of the premises.

(7) If the arresting officer reasonably believes that the notice required by subsection (6) of this section would lead to the destruction of evidence, result in the escape of the suspect or increase the peril to the safety of the officer or another person, the officer may enter the premises without prior notice.

(8) If the officer is authorized to enter premises without giving notice of his authority and purpose or, if after giving notice he is not admitted, he may enter the premises, and by a breaking, if necessary.

COMMENTARY

This section, partly drawn from NYCPL ss 120.80, 140.10 and 140.15, would repeal ORS 133.240, 133.260, 133.270, 133.290, 133.300, 133.320 and 133.330 and combine into one section the provisions covering arrests by peace officers.

Subsection (1) applies to arrests made with or without a warrant. There is no restriction as to the day of the week or the time of day.

Subsection (2) is an effort to remedy the dilemma faced by a peace officer who makes or tries to make a probable cause warrantless arrest outside his own "bailiwick" or geographical area of employment. For example, if a deputy sheriff who is employed by Douglas County, while in Lane County, witnesses or otherwise has probable cause to believe that a crime has been committed in Lane County, can he make an arrest as a peace officer or is he acting as a private citizen. The proposal would give the officer the same authority to make the arrest as a peace officer as if the crime had been committed in Douglas County.

Subsection (3) requires the officer to inform the person to be arrested of the officer's authority and reason for the arrest. Similar provision is found in ORS 133.330.

Subsection (4) would replace ORS 133.270.

Subsection (5) incorporates the justification sections of the new Criminal Code.

Subsection (6) permits the arresting officer to enter premises to make an arrest, and retains the "knock and announce" rules of ORS 133.290 and 133.320.

Subsection (7) permits three "no-knock" exceptions, as does NYCPL ss. 120.80 - 120.84. These same provisions are contained in Search and Seizure, Preliminary Draft No. 3, s. 7 relating to execution of search warrants. The constitutionality of such provisions is upheld in Ker v. California, 374 US 23 (1963), and has been approved by the Oregon Court of Appeals State v. Mitchell, 93 Adv Sh 89, ___ Or App ___, 487 P2d 1156 (1971), State v. Steeves, 2 Or App 163, 465 P2d 905 (1970) and State v. Vance, 93 Adv Sh 1779, ___ Or App ___, ___ P2d ___ (1972).

Subsection (8) replaces the existing provisions in ORS 133.290 and 133.320 and would continue to permit the arresting officer to break into the premises if necessary to make the arrest. The breaking would be authorized in the cases where, under the provisions of subsection (7) the officer is not required to knock and announce, and also in those situations in which after giving notice he is "not admitted." Note that contrary to existing statutes, the language of the proposed provision does not state that the officer must be "refused admittance."

Section 10. ORS 133.310 is amended to read:

133.310. (Authority of officer to arrest without warrant.)

(1) A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that the person has committed:

(1) For a crime committed or attempted in his presence;

(2) When the person arrested has committed a felony, although not in his presence;

(3) When a felony has in fact been committed or a major traffic offense, as defined in subsection (5) of ORS 484.010, has been committed, and he has reasonable cause for believing the person arrested to have committed it; or

(4) When he is notified by telegraph, telephone, radio or other mode of communication by another peace officer of any state that such peace officer holds in his hands a duly issued warrant for the arrest of such person charged with a crime committed within his jurisdiction.

(a) A crime; or

(b) A violation in the officer's presence.

(2) A peace officer may arrest a person without a warrant when he is notified by telegraph, telephone, radio or other mode of communication by another peace officer of any state that there exists a duly issued warrant for the arrest of a person charged with a crime committed within his jurisdiction.

(3) In determining whether reasonable cause exists to justify an arrest under subsection (1) of this section, a peace officer may take into account all information that a prudent officer would judge relevant to the likelihood that an offense has been committed and that

the person to be arrested has committed it. The information may include information derived from any expert knowledge which the officer in fact possesses. The information may also include that received from an informant whom it is reasonable under the circumstances to credit, whether or not at the time of making the arrest the officer knows the informant's identity. An arrest shall not be considered to have been made on insufficient cause under this section solely on the ground that the officer is unable to determine the particular offense which may have been committed.

COMMENTARY

This section amends the existing statute on warrantless arrests by a peace officer and makes significant changes in the law regarding both felony and misdemeanor arrests. The section permits an arrest without a warrant if the officer has reasonable cause to believe that the person has committed a crime, i.e., a felony or misdemeanor. "Reasonable cause" is defined in section 2 (7) of the Article as "a substantial objective basis for believing that the person to be arrested has committed an offense."

The reasonable cause standard would apply to a belief that an offense has been committed as well as to the belief that the person arrested committed it.

A major departure from existing law is proposed to permit a misdemeanor arrest on the same reasonable cause grounds as is proposed for felonies. This change recognizes modern day law enforcement problems encountered in effecting the arrest without a warrant for a misdemeanor committed outside the presence of the officer and takes into account the necessity of allowing such arrests if the law is to be effectively enforced.

Paragraph (b) would limit the "in presence" requirement to "violations" only.

Subsection (3) states that in making the required determination an officer may rely on information if at the time he acts it is reasonable to credit the source of the

information. This could include information from other peace officers or law enforcement agencies or from private citizens. Since such reliance may be reasonable on other grounds than that the source is personally known to the officer to be reliable, the subsection makes explicit that the officer is not required to know the identity of an informant on whom he relies.

The last sentence of subsection (3) provides that as long as the officer has reasonable cause to believe that an offense of the requisite degree of seriousness has been committed, he may arrest even though he cannot determine then and there the precise offense that has been committed.

(ORS 133.340 is not affected by this draft.)

133.340 Magistrate's authority to order arrest for crime in his presence. When a crime is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender and may thereupon proceed as if the offender had been brought before him upon a warrant of arrest.

(ORS 133.360 to 133.440 are not affected by this draft.)

133.360 Arrests on warrant or order transmitted by telegraph. Whenever any person has been indicted or accused on oath of any public offense, or thereof convicted, and a warrant of arrest has been issued, the magistrate issuing the warrant, or any judge of the Supreme Court, or of the Court of Appeals, or of a circuit or county court, may indorse thereon an order signed by him authorizing the service thereof by telegraph. Thereupon the warrant and order may be sent by telegraph to any marshal, sheriff, constable or policeman and, on receipt of the telegraphic copy thereof, as defined in ORS 758.090, by any such officer, he shall have the same authority and be under the same obligations to arrest, take into custody and detain the person as if the original warrant of arrest with the proper direction for its service duly indorsed thereon had been placed in his hands. The telegraphic copy shall be entitled to full faith and credit and shall have the same force and effect in all courts and places as the original. Prior to indictment or conviction, no such order shall be made by any officer unless in his judgment there is probable cause to believe the accused person guilty of the offense charged, but the making of such order by any officer is prima facie evidence of the regularity thereof and of all proceedings prior thereto. The original warrant and order, or a copy thereof certified by the officer making the order, shall be preserved in the telegraph office from which the same is sent and in telegraphing the same, the original or the certified copy may be used.

[Amended by 1969 c.198 §61]

133.370 Authority to retake escaped or rescued arrested person. If a person arrested escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him at any time and in any place in this state.

133.380 Means of retaking escaped or rescued person. To retake the person escaping or rescued, the person pursuing may use all the means and do any act necessary and proper in making an original arrest.

UNIFORM ACT ON FRESH PURSUIT

133.410 Short title. ORS 133.410 to 133.440 may be cited as the Uniform Act on Fresh Pursuit.

133.420 Definitions for ORS 133.410 to 133.440. As used in ORS 133.410 to 133.440:

(1) "Fresh pursuit" includes fresh pursuit as defined by the common law; the pursuit of a person who has committed a felony or who reasonably is suspected of having committed a felony; and the pursuit of a person suspected of having committed a felony, though no felony actually has been committed, if there is reasonable ground for believing that a felony has been committed. It does not necessarily imply instant pursuit, but pursuit without unreasonable delay.

(2) "State" includes the District of Columbia.

133.430 Authority of officers of other states to make arrest. (1) Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in the other state has the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

(2) This section shall not be construed to make unlawful any arrest in this state which otherwise would be lawful.

133.440 Proceedings following arrest by officer of other state. If an arrest is made in this state by an officer of another state in accordance with ORS 133.430, he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the Governor of this state. If the magistrate determines that the arrest was unlawful, he shall discharge the person arrested.

Section 11. Arrest by a private person. (1) A private person may arrest another person for any crime committed in his presence if he has reasonable cause to believe the arrested person committed the crime.

(2) In order to make the arrest a private person may use physical force as is justifiable under ORS 161.255.

COMMENTARY

Sections 11 and 12 are submitted by the subcommittee to the Commission without recommendation. The motion to approve the section failed on a tie vote, but the members believed the policy question should be debated by the full membership.

This section repeals ORS 133.350 and states the standard for "citizen's arrests." The degree of force authorized would continue to be found in the justification statute, ORS 161.255, which is amended by section 12.

Section 12. ORS 161.255 is amended to read:

161.255. (Use of physical force by private person making citizen's arrest.) (1) Except as provided in subsection (2) of this section, a private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to make an arrest or to prevent the escape from custody of an arrested person whom he [reasonably believes has committed a felony and who in fact has committed a felony] has arrested under the provisions of section 10 of this Article.

(2) A private person acting under the circumstances prescribed in subsection (1) of this section is justified in using deadly physical force only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

COMMENTARY

The amendment proposed by this section, combined with section 11, would allow a private citizen to use reasonable physical force to arrest a person for any crime (felony or misdemeanor) committed in his presence if he has reasonable cause to believe the arrested person committed the crime. The suggested changes will allow the citizen to arrest only for crimes committed in his presence, but, on the other hand, would allow him to use force to arrest for a misdemeanor. The use of deadly physical force would continue to be limited to self-defense or defense of third persons.