Chapter 136

1957 REPLACEMENT PART

Trial

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GENERAL PROVISIONS

136.010 When an issue of fact arises. An issue of fact arises:

(1) Upon a plea of not guilty.

(2) Upon a plea of a former conviction or acquittal of the same crime.

136.020 When an issue of law arises. An issue of law arises upon a demurrer to the indictment.

136.030 How issues are tried. An issue of law shall be tried by the court and an issue of fact by a jury of the county in which the action is triable.

136.040 When presence of defendant is necessary. If the indictment is for a misdemeanor, the trial may be had in the absence of the defendant if he appears by counsel; but if it is for a felony, he shall appear in person.

136.050 Degree of crime for which guilty defendant can be convicted when doubt as to degree exists. When it appears that the defendant has committed a crime of which there are two or more degrees and there is a reasonable doubt as to the degree of which he is guilty, he can be convicted of the lowest of those degrees only.

136.060 Jointly-indicted defendants; separate or joint trial. When two or more defendants are jointly indicted for a felony, any defendant requiring it shall be tried separately; but in other cases, defendants jointly indicted may be tried separately or jointly, in the discretion of the court.

136.070 Postponement of trial. When an indictment is at issue upon a question of fact and before the same is called for trial, the court may, upon sufficient cause shown by the affidavit of the defendant or the statement of the district attorney, direct the trial to be postponed to another day in the same term or to another term; and all affidavits or papers read on either side upon the application shall be first filed with the clerk.

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136.080 Deposition of witness as condition of postponement. When an application is made for the postponement of a trial, the court may in its discretion require as a condition precedent to granting the same that the party applying therefor consent that the deposition of a witness may be taken and read on the trial of the case. Unless such consent is given, the court may refuse to allow such postponement for any cause.

136.090 Procedure for taking deposition. When the consent mentioned in ORS 136.080 is given, the court shall make an order appointing some proper time and place for taking the deposition of the witness, either by the judge thereof or before some suitable person to be named therein as commissioner and upon either written or oral interrogatories.

136.100 Filing and use of deposition. Upon the making of the order provided in ORS 136.090, the deposition shall be taken and filed in court and may be read on the trial of the case in like manner and with like effect and subject to the same objections as in civil cases.

136.110 Commitment of defendant on appearance for trial after having given bail. When a defendant who has given bail appears for trial, the court may in its discretion at any time after such appearance order him to be committed to actual custody to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly.

136.120 Discharge of indictment when prosecution is unprepared at time for trial. If, when the indictment is called for trial, the defendant appears for trial and the district attorney is not ready and does not show any sufficient cause for postponing the trial, the court shall order the indictment to be discharged, unless, being of opinion that the public interests require the indictment to be retained for trial, it directs it to be retained.

136.130 When discharge of indictment bars another prosecution for same crime; judgment of acquittal. If the court orders the indictment to be discharged, the order is not a bar to another action for the same crime unless the court so directs; and if the court does so direct, judgment of acquittal shall be entered.

136.140 Proceedings after judgment of acquittal. If, upon the discharge of the indictment, the court gives judgment of acquittal, the same proceedings shall be had thereon in relation to the custody of the defendant, his bail or money deposited in lieu thereof as are prescribed in ORS 135.680.

136.150 Mental condition at time of trial. If before or during the trial in any criminal case the court has reasonable ground to believe that the defendant, against whom an indictment has been found or an information filed, is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint one or more disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

136.160 Proceedings after determination of mental condition. If after the hearing the court decides that the defendant is able to understand the proceedings and to assist in his defense, it shall proceed with the trial. If, however, it decides that the defendant, through insanity or mental deficiency, is not able to understand the proceedings or to assist in his defense, it shall take steps to have the defendant committed to the proper institution. If thereafter the proper officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report this fact to the court that conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is able to understand the proceedings and to assist in his defense. This hearing shall be conducted in all respects like the original hearing to determine defendant's mental condition. If after this hearing the court decides that the defendant is able to understand the proceedings against him and to assist in his defense, it shall proceed with the trial. If, however, it decides that the defendant is still not able to understand the proceedings against him or to assist in his defense, it shall recommit him to the proper institution.

136.170 to 136.200 [Reserved for expansion]

SELECTION OF THE JURY

136.210 Formation of jury. In criminal cases the trial jury shall consist of 12 persons unless the parties consent to a less number. It shall be formed, except as otherwise provided in ORS 136.220 to 136.250, in the same manner provided by ORS 17.105 to 17.135, 17.145, 17.150, and 17.160 to 17.185; provided, however, that when the full number of jurors has been called, they shall thereupon be examined as to their qualifications, first by the defendant and then by the state. After they have been passed for cause, peremptory challenges, if any, shall be exercised as provided in ORS 136.230.

136.220 Challenge of jurors for implied bias. A challenge for implied bias may be taken for any of the following causes and for no other:

(1) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the crime charged in the indictment, to the person indorsed thereon as the prosecutor or to the defendant.

(2) Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, with the defendant or the person alleged to be injured by the crime charged in the indictment or indorsed thereon as prosecutor, or being a member of the family, a partner in business with, or in the employment on wages for, either of such persons, or being surety or bail in the action or otherwise for the defendant.

(3) Having served on the grand jury which found the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment.

(4) Having been one of a jury formerly sworn in the same action, and whose verdict was set aside or which was discharged without a verdict after the cause was submitted to it.

(5) Having served as a juror in a civil action, suit or proceeding brought against the defendant for substantially the same act charged as a crime.

(6) If the offense is punishable with death, the entertaining of such conscientious opinions as would preclude a person from finding the defendant guilty; in which case the person shall neither be permitted nor compelled to serve as a juror.

136.230 Peremptory challenges. If the crime charged in the indictment is punishable with death or imprisonment in the penitentiary for life, the defendant is entitled to 12 and the state to 6 peremptory challenges, and no more. If the crime is punish-

able otherwise, the defendant is entitled to six and the state to three such challenges. Peremptory challenges shall be conducted as follows: The defendant may challenge two jurors and the state may challenge one, and so alternating, the defendant exercising two challenges and the state one until the peremptory challenges are exhausted. After each challenge the panel shall be filled and the additional juror passed for cause before another peremptory challenge is exercised. Neither party shall be required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time. The refusal to challenge by either party in said order of alternation does not prevent the adverse party from exercising his full number of challenges, and such refusal on the part of a party to exercise his challenge in proper turn concludes him as to the jurors once accepted by him. If his right of peremptory challenge is not exhausted, his further challenges shall be confined, in his proper turn, to such additional jurors as may be called.

136.240 Challenge of accepted juror. If the peremptory challenges of the moving party are not already exhausted, the court may for good cause shown permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted.

136.250 Taking of challenges; joinder by codefendants. All challenges, whether peremptory or for cause, may be taken by the state or defendant, but when several defendants are tried together, they can not sever their challenges, but must join therein.

136.260 Selection of alternate jurors. In the trial of a person charged with a felony, the court may in its discretion, after the jury is impaneled and sworn, direct the calling of one or two additional jurors, to be known as "alternate jurors." Such jurors shall be drawn from the same source and in the same manner and shall have the same qualifications as other jurors in the case. They shall be subject to the same examination and be challenged in the same manner as other jurors. The prosecution is entitled to one, and the defendant to two, peremptory challenges in the selection of each alternate juror and, in the drawing of alternate jurors, the names of jurors excused for cause or on peremptory challenges in the selection of the jury to which such jurors shall serve as alternates shall be excluded from the names from which such drawing is made.

136.270 Oath, rules governing conduct and attendance of alternate jurors at trial. Alternate jurors shall take the same oath and shall be subject to the same laws, orders and rules, including any order preventing the separation of the jury during the trial, shall be seated near the other jurors in the case, with equal opportunity and facilities for seeing and hearing the proceedings and shall attend at all times upon the trial of the case in company with the other jurors.

136.280 Substitution of alternate for juror dying or becoming disabled; dismissal. If, before the final submission of the case, any juror dies or is unable to perform his duty because of illness or other cause which the court deems sufficient, he shall be dismissed from the case. The court shall cause to be drawn the name of an alternate juror, who shall then become a member of the jury as though he had been selected as one of the original jurors. Any alternate juror not selected to become a member of the jury shall be dismissed from the case upon its final submission to the jury.

136.290 to 136.300 [Reserved for expansion]

CONDUCT OF THE TRIAL

136.310 Function of court; effect of court's taking judicial notice of a fact. All questions of law, including the admissibility of testimony, the facts preliminary to such admission and the construction of statutes and other writings and other rules of evidence shall be decided by the court. All discussions of law shall be addressed to it. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, which is bound to accept it as conclusive.

136.320 Function of jury; acceptance of charge on law. Although the jury may find a general verdict, which includes questions of law as well as fact, it is bound, nevertheless, to receive as law what is laid down as such by the court; but all questions of fact, other than those mentioned in ORS 136.310, shall be decided by the jury, and all evidence thereon addressed to it.

136.330 Applicability of rules for conduct of civil trial. (1) ORS 17.210, 17.220 to 17.230, 17.255 and 17.305 to 17.360 apply to and regulate the conduct of the trial of criminal actions.

(2) ORS 17.505 to 17.515 and 19.100 apply to and regulate exceptions in criminal actions.

136.340 Attendance of woman officer at trial of a woman or girl charged with crime. Any woman or girl charged with the commission of a crime shall be attended in court by a woman officer.

136.350 Appointment and compensation of woman officer to attend woman or girl charged with crime. The woman officer mentioned in ORS 136.340 shall be appointed and compensated in the same manner as provided in ORS 133.780.

136.360 Discharge of one of several defendants to be witness for state. When two or more persons are charged in the same indictment, the court may at any time before the defendant has gone into his defense, on the application of the district attorney, direct any defendant to be discharged from the indictment so that he may be a witness for the state.

136.370 Discharge of one of several defendants to be witness for other. When two or more persons are charged in the same indictment and the court is of the opinion that, in regard to a particular defendant, there is not sufficient evidence to put him on his defense, it shall, if requested by another defendant then on trial, order him to be discharged from the indictment before the evidence is closed so that he may be a witness for his codefendant.

136.380 Order of discharge; effect as acquittal. The order provided for in ORS 136.360 and 136.370, when made, shall state the reasons for making it. It is an acquittal of the defendant discharged and a bar to another prosecution for the same crime.

136.390 Insanity at time of commission of act as a defense. When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved by the preponderance of the evidence. [Amended by 1957 c.380 §1]

136.400 Intoxication as a defense. No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

136.410 Morbid propensity to commit prohibited act as a defense. A morbid propensity to commit a prohibited act, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of the act, forms no defense to a prosecution for committing the act.

136.420 to 136.500 [Reserved for expansion]

EVIDENCE

136.510 Applicability of law of evidence in civil actions. The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in the statutes relating to crimes and criminal procedure.

136.520 Presumption as to innocence; acquittal in doubtful cases. A defendant in a criminal action is presumed to be innocent until the contrary is proved. In case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to be acquitted.

136.530 Testimony shall be given orally. In a criminal action, the testimony of a witness shall be given orally in the presence of the court and jury, except in the case of a witness whose testimony is taken by deposition by order of the court in pursuance of the consent of the parties, as provided in ORS 136.080 to 136.100.

136.540 Confessions and admissions; corroboration. (1) A confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against him when it was made under the influence of fear produced by threats; nor is a confession only sufficient to warrant his conviction without some other proof that the crime has been committed.

(2) Evidence of a defendant's conduct in relation to a declaration or act of another,

in the presence and within the observation of the defendant, cannot be given when the defendant's conduct occurred while he was in the custody of a peace officer unless the defendant's conduct affirmatively indicated his belief in the truth of the matter stated or implied in the declaration or act of the other person. [Amended by 1957 c.567 §1]

136.550 Testimony of accomplice; corroboration. A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the crime. The corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.

136.560 False pretenses; proof of oral representation. (1) Upon a trial for having by any false pretense obtained the signature of any person to any written instrument or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing; but such pretense, or some note or memorandum thereof, must be in writing and either subscribed by or in the handwriting of the defendant.

(2) This section does not apply to an action for falsely representing or personating another and in such assumed character receiving any such valuable thing, or to an action brought under ORS 164.310 for defrauding any person of money or real or personal property by any false or fraudulent oral representation or pretense. [Amended by 1957 c.551 §1]

136.570 to 136.600 [Reserved for expansion]

136.605 Judgment of acquittal before presentation of defense. In any criminal action the defendant may, before the presentation of evidence in his defense, move the court for a judgment of acquittal. The court shall grant the motion if the evidence introduced theretofore is such as would not support a verdict against the defendant. The acquittal shall be a bar to another prosecution for the same crime. If the court denies the motion, the defendant may thereafter present evidence in his defense. [1957 c.576 §1]

VERDICT AND JUDGMENT

136.610 Jury's power to find general or special verdict; verdict to be unanimous, exceptions. (1) The jury may find either a general verdict or, where it is in doubt as to the legal effect of the facts proved, a special verdict.

(2) Except as otherwise provided, the verdict of a trial jury in a criminal action shall be unanimous.

136.620 General verdict on plea of not guilty; verdict on plea of former conviction or acquittal. (1) A general verdict upon a plea of not guilty is either "guilty," which imports a conviction of the crime charged in the indictment, or "not guilty," which imports an acquittal thereof.

(2) A general verdict upon a plea of former conviction or acquittal of the same crime is either "for the state" or "for the defendant."

136.630 Special verdict. (1) A special verdict is one by which the jury finds the facts only, leaving the judgment to the court. It shall present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and these conclusions of fact must be so presented that nothing remains to the court but to draw conclusions of law upon them.

(2) The special verdict shall be reduced to writing by the jury, or in its presence, under the direction of the court, and agreed to by the jury before it is discharged. Such verdict need not be in any particular form, but is sufficient if it presents intelligibly the facts found by the jury.

136.640 Judgment on special verdict. If the plea is not guilty and the facts prove the defendant guilty of the crime charged in the indictment or of any other crime of which he could be convicted under that indictment, as provided in ORS 136.650 and 136.660, the court shall give judgment on the special verdict accordingly; but if otherwise, judgment of acquittal shall be given.

136.650 Crimes consisting of degrees; verdict of guilt of inferior degree or attempt. Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto or of an attempt to commit the crime or any such inferior degree thereof.

136.660 Crime included in that charged; power of jury to find guilt of such offense

or attempt. In all cases, the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment or of an attempt to commit such crime.

136.670 Conviction or acquittal of one or more of several defendants. Upon an indictment against several defendants, any one or more may be convicted or acquitted.

136.680 Verdict as to some of several defendants; retrial of others. Upon an indictment against several defendants, if the jury cannot agree upon a verdict as to all, it may give a verdict as to those in regard to whom it does agree, on which a judgment shall be given accordingly; and the case as to the rest of the defendants may be tried by another jury.

136.690 Reconsideration of verdict when jury makes mistake as to law. When a verdict is found in which it appears to the court that the jury has mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider its verdict; but if after such reconsideration the jury finds the same verdict, it must be received.

136.700 Reconsideration of verdict when it is neither general nor special. If the jury finds a verdict which is neither a general nor a special verdict, as defined in ORS 136.620 and 136.630, the court may, with proper instructions as to the law, direct the jury to reconsider it; and the verdict cannot be received until it is given in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and leave the judgment to the court.

136.710 Acquittal; discharge of defendant. If judgment of acquittal is given on a general or special verdict and the defendant is not detained for any other legal cause, he shall be discharged as soon as the judgment is given, except that, when the acquittal is for variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention, to the end that a new indictment may be preferred, in the same manner and with like effect, as provided in ORS 135.540 and 135.550.

136.720 Proceedings after special or adverse general verdict. If a general verdict against the defendant or a special verdict is given, he shall be remanded, if in custody; if he has given bail, he may be committed to await the judgment of the court upon the verdict. When committed, his bail is exonerated or, if he has deposited money in lieu of bail, it shall be refunded to him.

136.730 Verdict of not guilty by reason of insanity; commitment of defendant. If the defense is the insanity of the defendant, the jury shall be instructed to state, if it finds him not guilty on that ground, that fact in the verdict, and the court shall thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any hospital or institution, authorized by the state to receive and keep such persons, until he becomes sane or is otherwise discharged therefrom by authority of law.

136.740 to 136.800 [Reserved for expansion]

MOTION IN ARREST OF JUDGMENT; NEW TRIAL

136.810 Motion in arrest; basis and time for making. A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty or on a verdict against the defendant on the plea of a former conviction or acquittal. It may be founded on either or both of the causes specified in subsections (1) and (4) of ORS 135.630, and not otherwise. The motion must be made within the time allowed to file a motion for a new trial, and both such motions may be made together and heard and decided at once or separately, as the court directs.

136.820 Effect of allowance of motion. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before indictment was found.

136.830 Order when evidence shows guilt; new indictment. If, from the evidence given on the trial, there is reasonable ground to believe the defendant guilty and a new indictment can be framed upon which he may be convicted, the court shall order the defendant to be recommitted to custody or admitted to bail and to answer the new indictment, if one is found; and if the evidence shows him to be guilty of another crime than that charged in the indictment, he shall

in like manner be committed or held thereon. In neither case is the verdict a bar to another action for the same crime.

136.840 Order when evidence is insufficient; acquittal. If the evidence appears insufficient to charge the defendant with any crime, he shall, if in custody, be discharged or, if he has given bail or deposited money in lieu thereof, his bail is exonerated or his money shall be refunded to him; and in such case, the arrest of judgment operates as an acquittal of the charge upon which the indictment was founded.

136.850 Law governing new trial; new trial to state denied. ORS 17.605 to 17.630 apply to and regulate new trials in criminal actions, except that a new trial shall not be granted on the application of the state.

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Sam R. Haley, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law.

Done at Salem, Oregon,
on December 2, 1957.

Sam R. Haley
Legislative Counsel