

Chapter 136

1971 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 for a reasonable period of time; and all affidavits or papers read on either side upon the application shall be first filed with the clerk.

[Amended by 1959 c.638 §18]

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 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 [Amended by 1963 c.503 §1; repealed by 1971 c.743 §432]

136.160 [Amended by 1965 c.551 §1; repealed by 1971 c.743 §432]

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 or information, to the complainant 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:

(a) Defendant;

(b) Person alleged to be injured by the crime charged in the indictment or information; or

(c) Complainant.

(3) Being a member of the family, a partner in business with or in the employment of any person referred to in paragraph (a), (b) or (c) of subsection (2) of this section or a surety or bail in the action or otherwise for the defendant.

(4) Having served on the grand jury which found the indictment or on a jury of inquest which inquired into the death of a person whose death is the subject of the indictment or information.

(5) 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.

(6) 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.

[Amended by 1961 c.444 §1; 1967 c.372 §1]

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 punishable 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.

SCHEDULING OF TRIAL

136.285 Priority in trial schedule for defendants in custody. The court shall endeavor to schedule trial dates for defendants in custody before defendants who have been released pending trial, subject however to rights of all defendants to be tried without unreasonable delay.

[1971 c.323 §2]

136.290 Limitation on time defendant held prior to trial; release of defendant if limit exceeded. (1) Except as provided in ORS 136.295, a defendant shall not remain in custody pending commencement of his

trial more than 60 days after the time of his arrest unless the trial is continued with his express consent.

(2) If a trial is not commenced within the period required by subsection (1) of this section, the court shall release the defendant on his own recognizance, or in the custody of a third party, or upon such bail as the defendant can afford, or upon whatever additional reasonable terms and conditions the court deems just.

[1971 c.323 §§3, 4]

136.295 Application of ORS 136.290.

(1) ORS 136.290 does not apply to persons charged with crimes which are not bailable offenses under ORS 140.020 or to persons charged with conspiracy to commit murder, or charged with attempted murder in the first degree, or to prisoners serving sentences resulting from prior convictions.

(2) If the defendant is extradited from another jurisdiction, the 60-day period shall not commence until he enters the State of Oregon, provided that law enforcement authorities from the other jurisdiction and this state have conducted the extradition with all practicable speed. The original 60-day period shall not be extended more than an additional 60 days, except where delay has been caused by the defendant in opposing the extradition.

(3) Any reasonable delay resulting from examination or hearing regarding the defendant's mental condition or competency to stand trial, or resulting from other motion or appeal by the defendant, shall not be included in the 60-day period.

(4) If a victim or witness to the crime in question is unable to testify within the original 60-day period because of injuries received at the time the alleged crime was committed, the court may order an extension of not more than 60 additional days. The court, for the same reason, may order a second extension of not more than 60 days, but in no event shall the defendant be held in custody before trial for more than a total of 180 days.

(5) Any period following defendant's arrest in which he is not actually in custody shall not be included in the 60-day computation.

[1971 c.323 §5]

136.300 Time limit on appeals to circuit court. A defendant who is in custody pending an appeal to circuit court from a judgment of a municipal, justice or district court shall have his appeal heard not more than 60

days after the defendant gives notice of appeal.

[1971 c.323 §6]

CONDUCT OF THE TRIAL

136.310 Function of court; effect of 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 apply to and regulate exceptions in criminal actions. [Amended by 1959 c.558 §31]

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 [Repealed by 1961 c.288 §2]

136.370 [Repealed by 1961 c.288 §2]

136.380 [Repealed by 1961 c.288 §2]

136.390 [Amended by 1957 c.380 §1, repealed by 1971 c.743 §432]

136.400 [Repealed by 1971 c.743 §432]

136.410 [Repealed by 1971 c.743 §432]

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]

136.545 Statement by defendant when not advised of rights. Evidence obtained directly or indirectly as a result of failure of a magistrate to comply with ORS 133.610 shall not be admissible before the grand jury or, over the objection of the defendant, in any court.

[1963 c.511 §2]

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 [Amended by 1957 c.551 §1; 1959 c.302 §1; repealed by 1971 c.743 §432]

136.605 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 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 [Repealed by 1971 c.743 §432]

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 [Repealed by 1971 c.565 §17 (136.851 enacted in lieu of 136.850)]

136.851 Timing of proceedings on motion in arrest of judgment and motion for new trial. A motion in arrest of a judgment or a motion for a new trial, with the affidavits, if any, in support thereof shall be filed within seven days after the filing of the judgment sought to be set aside, or such further time as the court may allow. When the state is entitled to oppose the motion by counteraffidavits, such counteraffidavits shall be filed within seven days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 28 days from the time of the entry of the judgment, and not thereafter, and if not so heard and determined within that time, the motion shall conclusively be deemed denied. Except as otherwise provided in this section, ORS 17.605 to 17.630 shall apply to and regulate new trials in criminal actions, except that a new trial shall not be granted on application of state.

[1971 c.565 §18 (136.851 enacted in lieu of 136.850)]

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Robert W. Lundy, 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 1, 1971.

Robert W. Lundy
Legislative Counsel

