CRIMINAL LAW REVISION COMMISSION
311 State Capitol
Salem, Oregon

CRIMINAL PROCEDURE

PART IV. CRIMINAL TRIAL PROVISIONS

ARTICLE 10. CRIMINAL TRIALS

General Provisions

Preliminary Draft No. 1; July 1972

Reporter: Staff

Subcommittee No. 1

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Section 1. Sections 2 and 3 of this Article are added to and made a part of ORS chapter 136.

Section 2. Jury Trial. (1) The defendant in all criminal prosecutions shall have the right to public trial by an impartial jury.

(2) The defendant may elect to waive trial by jury and consent to be tried by the judge of the court alone, provided that the election is in writing and with the consent of the trial judge.

COMMENTARY

Section 2 codifies the requirement in Oregon Constitution, Article I, s. 11 that a waiver of a jury trial be in writing and with the consent of the judge. The Constitution does not allow a waiver in "capital" cases. A capital case is one punishable by death. State v. Charles, 3 Or App 172, 469 P2d 792. It appears that the intent of the Oregon Constitution was to prevent a defendant from waiving a jury trial if he was accused of an offense punishable by death. With the abolition of the death penalty in 1964, the reason for the restriction on jury waivers ceased to exist.

Section 3. Challenge to the jury panel. (1) The district attorney or the defendant in a criminal action may challenge the jury panel on the ground that there has been a material departure from the requirements of the law governing selection of jurors.

(2) A challenge to the panel shall be made before the voir dire examination of the jury.

COMMENTARY

A. Summary

Section 3 provides the district attorney or the defendant the procedural mechanism to challenge the method of selection of the jury panel in criminal cases.

B. Derivation

Subsection (1) is derived from ABA Standards on Trial by Jury s. 2.3 (Approved Draft, 1968).

Subsection (2) is an original draft based in part on NYCLP s. 270.10 (2).

C. Relationship to Existing Law

Historically, the Deady Code s. 179 sets forth the prohibition of challenging the array in civil trials. The Oregon Legislative Assembly on October 17, 1862 passed the General Repealing Acts which, in s. 2, applied the civil procedure to criminal procedure. Section 179 of the Deady Code has survived in the present form of ORS 17.115.

At common law the right to challenge the panel existed; however, the statute passed in Oregon abolished this common law right (Deady Code s. 179). State v. Fitzhugh, 2 Or 227 (1867).

In State v. Ju Nunn, 53 Or 1, 97 P 96 (1908), the court explained that there were two types of challenges; the challenge to the array or panel, and the challenge to the poll of the individual jurors. The court stated that the challenge to the array is less important today and thus has been absolutely abolished in some states and limited in others.

More recently in State v. Howell, 237 Or 382, 388 P2d 282 (1964), the court held that a motion to stay the proceedings "until a new jury panel was chosen" is in the nature of a challenge to the panel which is not allowed in this state.

In 1968 the Supreme Court of the United States held that the federal right to a petit jury was applicable to the states through the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 US 145 (1968). The Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict and due process is denied by circumstances that create the likelihood of the appearance of bias. Peters v. Kiff, 11 Cr L 3157, 3160, ____ US ____ (1972).

The selection procedure for grand and petit juries that systematically excluded Blacks has been prohibited by the United States Supreme Court. In Alexander v. Louisiana, 405 US 625 (1972), the court prohibited such selection with respect to grand jury members. In Avery v. Georgia, 345 US 559 (1953), the court prohibited such selection procedures with respect to petit juries. In Sims v. Georgia, 389 US 404 (1967), the court prohibited such selection procedures with respect to both petit and grand juries.

Recently, the United States Supreme Court in Peters v. Kiff, 11 Cr L 3157, ____ US ____ (1972), stated that a state cannot, consistent with due process, subject a defendant to indictment by a grand jury or trial by a petit jury that has been selected in an arbitrary and discriminatory manner contrary to federal constitutional and statutory requirements. The main holding in Peters is that any person, regardless of any showing of actual bias, has standing to attack the systematic exclusion of Blacks. Peters is a White and the court held that he had standing to assert that he was deprived of a fair trial because of the systematic exclusion of Blacks.

Mr. Justice White in a concurring opinion in Peters quoted from Hill v. Texas, 316 US 400, 404 (1942), the following:

> "No State is at liberty to impose upon one charged with a crime a discrimination in its trial procedure which the Constitution, and an act of Congress passed pursuant to the Constitution, alike forbid . . . it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees." Peters v. Kiff, 11 Cr L 3157, 3161, ____ US ____ (1972).

The present law in Oregon, ORS 17.115,prohibits the defendant in either a civil case or a criminal case from asserting a challenge to the jury panel. The denial of the right to challenge a jury panel in a criminal case appears to be a denial of due process and therefore, ORS 17.115 is most likely unconstitutional when applied to criminal cases.

As the court stated in Hill, the State must " . . . see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees . . . . " ORS 17.115 does not "see to it" that the defendant can enjoy the protection of the Constitution to a trial by fair and impartial jurors because ORS 17.115 prohibits any challenge to the jury panel.

The ABA Standards on Trial by Jury at s. 2.3 (Approved Draft, 1968), adopted a challenge to the panel that must be grounded upon an objection to the method of selection of the jury panel. However, s. 2.3 does not mean that any deviation from the elaborate procedures of selection of a jury list would discharge the particular jury panel. The term "material departure" is used to prevent a rigid application of the rule. Material departure means " . . . the intentional or inadvertent failure to comply with such provisions . . . . " of the statute. (Commentary to s. 2.3 of ABA Standards on Trial by Jury.)

Pinkney v. United States, 380 F2d 882 (5th Cir 1967), stated that a defendant may not complain about the makeup of the panel. The objection of the defendant must be to the manner of selection of the jury panel.

In Anderson v. Gladden, 234 Or 614, 624, 383 P2d 986 (1963), the court held that " . . . upon proper application to the circuit court, mandamus will lie to compel performance by the officers charged with statutory duties in providing juries." Anderson did not mention ORS 17.115 but stated that:

> "If an accused seriously believes that his defense will be prejudiced because of the composition of the jury he, or his counsel, should seek correction before, rather than after, testing the panel by its verdict." 234 Or at 625.

In Garner v. Alexander, 167 Or 670, 120 P2d 238 (1941), the court held that the alleged discrimination in excluding women from the jury panel could not be reached by habeas corpus.

> "Proceedings in habeas corpus are in the nature of a collateral attack, and consequently errors

> or irregularities which might render a judgment voidable cannot be reached by habeas corpus: (citations omitted) . . . . " 167 Or at 674.

The proposed challenge to the panel in criminal cases should clarify the procedural ambiguity concerning the existence of an improperly drawn panel. It appears somewhat inconsistent to require a defendant to assert the existence of prejudice of the panel before trial when there is a specific statute, ORS 17.115, that prohibits the challenge to the jury panel.

Section 4. ORS 136.010 is amended to read:

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] jeopardy.

COMMENTARY

The amendment to subsection (2) conforms the language of ORS 136.010 to the Tentative Drafts of this Commission on Former Jeopardy (February 1972) and Pleadings of Defendant; Plea Discussions and Agreements (May 1972).

(ORS 136.020 through 136.050 are not affected by this draft.)

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.

Section 5. ORS 136.060 is amended to read:

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.]

(1) Jointly charged defendants shall be tried jointly, unless, for good cause shown before trial, the court orders that a defendant be tried separately.

(2) In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

COMMENTARY

A. Summary

Section 5 provides that codefendants will be tried together unless the court orders a severance for good cause shown. Also, any statements or confessions made by the defendants may be examined by the judge to ascertain if the statements will prejudice the defendants if they are tried jointly.

B. Derivation

Subsection (1) is derived from NYCPL s. 200.40 (1). Subsection (2) is derived from the Federal Rules of Criminal Procedure, Rule 14.

C. Relationship to Existing Law

Oregon appears to be one of the very few states that allows the defendant a right to a separate trial if he is jointly charged. Only the following states appear to give the defendant the right to a separate trial: Alabama, Colorado,

Georgia, Kansas, Mississippi, Nebraska, Minnesota and Wyoming. The remaining states have varying provisions that generally make the severance of codefendants a discretionary decision of the court. (See ABA Standards on Joinder and Severance, Approved Draft, 1968, Appendix A for statutory provisions of the various states.)

The change in Oregon's law is desirable because of the improved efficiency and speed that justice can be delivered. Today's ever increasing and costly criminal court docket can be partially eased if jointly charged defendants are jointly tried. However, the speed and efficiency must be tempered so as to assure justice.

Subsection (2) attempts to strike a balance between efficiency and justice. This balance is necessary because it is unrealistic to expect jurors to ignore completely the damaging evidence against the defendant in the codefendant's statement. The ABA Standards on Joinder and Severance adopt the above view in section 2.3.

A recent Oregon case, State v. Tremblay, 91 Adv Sh 1523, ____ Or App ____ (1971), illustrates that the defendant who received a separate trial can indeed be prejudiced. Tremblay involved a woman who was convicted of felony murder. The defendant's husband, the person who actually shot the victim, was convicted of second degree murder in a separate trial. The Court of Appeals held that the defendant may have a separate trial as a matter of right, but the defendant then takes a chance that different juries will draw varying inferences and conclusions from the same evidence.

(ORS 136.070 through 136.140 are not affected by this draft.)

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.

Section 6. ORS 136.210 is amended to read:

136.210. (Formation of Jury.) (1) 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, 17.110, 17.120 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].

(2) When the full number of jurors has been called, they shall thereupon be examined as to their qualifications. The judge shall ask the prospective jurors any questions which he considers necessary, including their qualifications to serve as jurors in the cause on trial. The judge shall permit such additional questions by the defendant or his attorney and the district attorney as the judge considers reasonable and proper.

(3) After the jurors have been passed for cause, peremptory challenges, if any, shall be exercised as provided in ORS 136.230.

COMMENTARY

A. Summary

Section 6 places the questioning during voir dire in the control of the trial judge. Questions may be asked by the respective counsel only if the judge considers them reasonable and proper.

B. Derivation

Subsection (2) is derived from ABA Standards on Trial by Jury s. 2.4 (Approved Draft, 1968).

C. Relationship to Existing Law

The present statute allows the defendant and the state to question the prospective jury members. Section 6 would still allow this questioning subject to the approval of the court. Section 6 places the primary responsibility of voir dire examination on the court.

The voir dire process has been critized because some counsel not only use the voir dire for the established purpose of selecting an impartial jury, but attempt to influence the jurors in favor of the examining counsel.

However, to prevent counsel from an examination would be to prevent him from obtaining information that is necessary for an intelligent exercise of the peremptory challenges. Therefore, the allowance of questions by counsel subject to the discretion of the court would balance the considerations on both sides.

Rule 24 of the Federal Rules of Criminal Procedure provides that a court conducts the examination subject to the submission of questions to the judge by the respective counsel. This rule also allows counsel to examine the prospective jurors, but a number of federal district courts adopted rules that restrict this provision. Under these local rules the counsel may submit questions to the judge who in turn may question the jurors. (See commentary to s. 2.4, ABA Standards on Trial by Jury.)

State v. Dixon, 92 Adv Sh 155, ____ Or App ____ (1971), held that a challenge for cause is addressed to the sound discretion of the court. The right to trial by fair and impartial jurors is a matter jealously guarded by the courts, and juries should consist of impartial men. Walker v. Griffin, 218 Or 613, 346 P2d 110 (1959).

The reference incorporating ORS 17.115 dealing with the challenging of a jury panel is deleted. ORS 17.115 will only deal with challenges to civil trial juries because of the provisions of section 3.

Section 7. ORS 136.220 is amended to read:

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]

(7) Having served as a juror in a criminal action upon substantially the same facts, transaction, or criminal episode.

COMMENTARY

A. Summary

Section 7 sets forth one more ground for implied bias. The additional ground for implied bias is the serving on a jury that heard evidence concerning the same set of facts that is to be heard in the forthcoming case.

B. Derivation

Subsection (7) is derived from ORS 17.140 (3).

C. Relationship to Existing Law

Existing law (ORS 17.140) prevents a juror in a civil case from sitting on another civil case that relates to the same facts and circumstances of the first case. Criminal cases are by their nature more serious and also subject to more conflicting evidence. It appears logical and desirable that the basis of implied bias of criminal jurors be consistent with the implied bias of civil trials.

State v. Stigers, 122 Or 113, 256 P2d 649 (1927), stated that the implied bias statute in criminal cases differs materially from that in civil cases because there is no subdivision in the criminal statute that applies to a juror who has served on the trial of one indicted separately for an offense growing out of the same transaction. In criminal trials where this occurs the challenge should be made on the basis of actual bias.

In Lilley v. Gifford Phillips, 210 Or 278, 310 P2d 337 (1957), the court held that where statutes define implied bias, the statutory grounds alone are controlling.

The ABA makes no recommendation as to the specific grounds for challenge. However, commentary to s. 2.5 of Trial by Jury mentions the ALI Code of Criminal Procedure (1931). The ALI code at s. 277 (f) states: "The juror served on a jury which has tried another person for the offense charged in the indictment or information . . . . " and is a challenge for cause.

Section 8. ORS 136.230 is amended to read:

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.

COMMENTARY

The amendment deletes an obsolete reference to the death penalty.

(ORS 136.240 is not affected by this draft.)

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.

Section 9. ORS 136.250 is amended to read:

136.250. (Taking of challenges; joinder by codefendants.) (1) All peremptory 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 a majority must join therein.

(2) When two or more defendants are tried together, the number of peremptory challenges prescribed in ORS 136.230 shall be doubled, but in no case shall the total number of challenges exceed 12 for the state and 24 for the defense.

COMMENTARY

A. Summary

Section 9 provides the requirement of majority consensus for exercise of the peremptory challenges when there are two or more defendants joined in the same trial. Section 9 further provides for 24 peremptory challenges for the defense and 12 for the state in joint murder cases. In all other joint trials the number of peremptory challenges are doubled for both the defense and the state.

B. Derivation

Amendments to ORS 136.250 are derived from NYCPL s. 270.25 (3).

C. Relationship to Existing Law

The amendment to ORS 136.250 appears necessary because of the abolition of mandatory severance of codefendants (see section 5 of this draft). Presently there are very few, if any, trials of codefendants in Oregon. The general practice appears to be an automatic request by the defense for severance in any case where there are jointly indicted defendants. Therefore, the problem of joint challenges has never arisen in the appellate courts.

With the proposed change to ORS 136.060 making the severance discretionary with the court, the requirement of joinder on the challenges would work a hardship on the defendants. First, the number of challenges would be diluted by the number of defendants joined. Second, the requirement of unanimity would give a dissenting defendant great leverage over the exercise of the peremptory challenges of the other defendants.

Section 9 allows more peremptory challenges for jointly tried defendants but only to the extent of double the normal amount. Were each defendant to receive the same amount of peremptories as if he were separately tried, the trial of three or more defendants could be unduly delayed. However, to limit the number of peremptory challenges as the current statute does, would hinder jointly tried defendants from obtaining sufficient challenges to insure an impartial jury for each defendant.

The requirement that a majority of the codefendants concur in the exercise of any peremptory challenges provides for expeditious challenging and eliminates the possibility of a dissenting codefendant tying up the challenges.

Section 10. ORS 136.310 is amended to read:

136.310. (Function of court; effect of judicial notice of a fact.) (1) 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.

(2) The court, in charging the jury, shall include in such charge, all lesser included offenses that the court considers reasonable and proper from the evidence adduced during trial.

COMMENTARY

A. Summary

Section 10 as amended, would impose the duty on the trial judge to instruct the jury on all lesser included offenses that he considers proper.

B. Derivation

Subsection (2) is an original draft.

C. Relationship to Existing Law

ORS 17.255 (1) is incorporated by reference in ORS 136.330. ORS 17.255 (1) provides that the trial judge, in charging the jury, shall state to them all matters of law which it thinks necessary for their information. In State v. Andrews, 2 Or App 595, 469 P2d 802 (1970), Judge Fort in a specially concurring opinion held that ORS 17.255 (1) requires the court, on its own motion, and whether requested or not, to give instructions on lesser included offenses.

In State v. Olson, 1 Or App 90, 459 P2d 445 (1969), the court held that:

> "When on the evidence the accused might be convicted in a lesser degree of the offense charged or of an included offense it is the duty of the court in its instructions to embrace all the degrees of the particular offense and all included offenses to which the evidence is applicable." 1 Or App at 93, quoting from 5 Anderson, Wharton's Criminal Law and Procedure 268 s. 2099.

Section 10 attempts to clarify the apparent ambiguity in ORS 17.255 in reference to criminal trials. Since ORS 17.255 applies to both criminal and civil trials, the amendment to ORS 136.310 would apply only to criminal trials. In fact, criminal trials are the only type of trial that an instruction on lesser included offenses would be relevant.

The proposed amendment would not prohibit counsel from submitting proposed instructions. It would only place primary responsibility for instructions upon the judge and not the trial counsel.

(ORS 136.320 through 136.545 are not affected by this draft.)

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.

136.510 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.

Section 11. ORS 136.550 is amended to read:

136.550. (Testimony of accomplice; corroboration.) (1) 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.

(2) An "accomplice" means a witness in a criminal action who, according to evidence adduced in the action, is criminally liable for the conduct of the defendant under ORS 161.155 and 161.165.

COMMENTARY

A. Summary

Section 11 proposes an amendment that would define accomplice for the purpose of corroboration at trial.

B. Derivation

The amendment in section 11 is partially derived from NYCPL s. 60.22.

C. Relationship to Existing Law

There presently is some confusion and disagreement as to who is and who is not an accomplice. The generally stated reason for the requirement for corroboration of an accomplice's testimony is that an accomplice is an unreliable witness because a "confessed criminal" might be attempting to gain the conviction of an innocent man through perjured testimony in exchange for his own immunity. State v. Coffey, 157 Or 457, 72 P2d 35 (1937). Also cited in State v. Smith, 1 Or App 583, 465 P2d 247 (1970).

State v. Nice, 240 Or 343, 401 P2d 296 (1965), stated that an accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime. In State v. Carroll, 251 Or 197,

444 P2d 1006 (1968), the Supreme Court stated that before independent evidence of defendant's association with an admitted accomplice will furnish the corroboration necessary, it must appear that the defendant and the accomplice were together at a place and under circumstances not likely to have occurred unless there was criminal concert between them.

The Court of Appeals in State v. Winslow, 3 Or App 140, 472 P2d 852 (1970), explained that there was a broad and narrow definition of "accomplice." The broad definition says an accomplice is one who has participated in the commission of the offense or who, while not being present, nevertheless, in some manner aided, advised or encouraged the defendant to commit the crime. The narrow definition says an accomplice is one who can be indicted and punished under the same statute which has been invoked against the defendant. Oregon follows the narrow rule.

Subsection (2) is proposed to eliminate the confusion and set forth the Oregon position of who is and who is not an accomplice. The new criminal liability statutes appear to be a rational approach to the definition of who is an accomplice because if a person is criminally responsible for the conduct of another, he has participated to some degree in the offense charged and can therefore be charged with the same offense under ORS 161.150. The provisions of ORS 161.155 and 161.165 are as follows:

> **161.155 Criminal liability for conduct of another.** A person is criminally liable for the conduct of another person constituting a crime if:
>
> (1) He is made criminally liable by the statute defining the crime; or
>
> (2) With the intent to promote or facilitate the commission of the crime he:
>
> (a) Solicits or commands such other person to commit the crime; or
>
> (b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or
>
> (c) Having a legal duty to prevent the commission of the crime, fails to make an effort he is legally required to make.
>
> [1971 c.743 §13]

> **161.165 Exemptions to criminal liability for conduct of another.** Except as otherwise provided by the statute defining the crime, a person is not criminally liable for conduct of another constituting a crime if:
>
> ~~(1) He is a victim of that crime; or~~
>
> (2) The crime is so defined that his conduct is necessarily incidental thereto.
>
> [1971 c.743 §15]

Section 12. ORS 136.605 is amended to read:

136.605. (Acquittal before presentation of defense.) In any criminal action the defendant may, [before the presentation of evidence in his defense,] after close of the state's evidence or of all the evidence, 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.]

COMMENTARY

A. Summary

The amendment to ORS 136.605 allows the defense to move for an acquittal after the close of the state's case or after the close of the defense's case.

B. Derivation

The amendment is an original draft.

C. Relationship to Existing Law

Until 1957 it was the rule in Oregon that the defendant in a criminal case could not move for a judgment of acquittal until he rested his case. Presently, the defendant can move for acquittal before he presents his defense. State v. Gardner, 231 Or 193, 372 P2d 783 (1962).

The ABA Standards on Trial by Jury s. 4.5, recommends that the defendant be able to move for acquittal either after the state's case or after the defense's case.

Also, Federal Rule of Criminal Procedure 29 allows the motions for acquittal after the state's case and after the defense's case.

Section 13. ORS 136.610 is amended to read:

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 by concurrence of at least 10 of 12 jurors except in a verdict for murder which shall be unanimous.

COMMENTARY

Section 13 clarifies the verdict necessary in criminal cases as stated in the Oregon Const. Art. I, s. 11. The United States Supreme Court recently upheld the non-unanimous jury verdict in Apodaca v. Oregon, 11 Cr L 3031, ____ US ____ (May 22, 1972). The Sixth Amendment guarantee of a jury trial, made applicable to the states through the Fourteenth Amendment, does not require the jury's vote to be unanimous.

Section 14. ORS 136.620 is amended to read:

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] jeopardy is either "for the state" or "for the defendant."

COMMENTARY

The amendment to subsection (2) conforms the language of ORS 136.620 to the Tentative Drafts of this Commission on Former Jeopardy (February 1972) and Pleadings of Defendant; Plea Discussions and Agreements (May 1972).

(ORS 136.630 through 136.851 are not affected by this draft.)

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.

136.810 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.

136.851 **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)]~~

Section 15. ORS 10.110 is amended to read:

10.110 Preparation of preliminary jury list, jury list and list of rejected prospective jurors in counties other than Multnomah County. **(1) The county court of each county which has a population of less than 300,000 and in which the judicial jurisdiction, authority, powers, functions and duties of the county court have not been transferred to the circuit court shall at its first term of each year, or in case of an omission or neglect so to do then at any following term, make a list of the most competent of the permanent citizens of the county by selecting names by lot from** the latest [tax roll and] voter registration [books, or either,] lists and any other source which will furnish a fair cross-section of the community wherein the court convenes, denominated a preliminary jury list.

From the preliminary jury list the names of those persons known not to be qualified by law to serve as jurors shall be deleted. The remaining names shall constitute the jury list. The names of those persons deleted from the preliminary jury list shall be placed on a separate list, denominated rejected prospective jurors, and opposite each name the reason for removing the name shall be set forth.

(2) The county clerk of each county which has a population of less than 300,000 and in which the judicial jurisdiction, authority, powers, functions and duties of the county court have been transferred to the circuit court shall, at the first term of each year of the circuit court for the county, or in case of an omission or neglect so to do then at any following term, make a list of the most competent of the permanent citizens of the county by selecting names by lot from

the latest [tax roll and] voter registration [books, or either,] lists and any other source which will furnish a fair cross-section of the community wherein the court convenes, denominated a preliminary jury list.

From the preliminary jury list the names of those persons known not to be qualified by law to serve as jurors shall be deleted. The remaining names shall constitute the jury list. The names of those persons deleted from the preliminary jury list shall be placed on a separate list, denominated rejected prospective jurors, and opposite each name the reason for removing the name shall be set forth.
[Amended by 1955 c.717 §1; 1957 c.393 §1]

COMMENTARY

A. Summary

Section 15 eliminates the language in ORS 10.110 that refers to tax rolls as a source of jury members and places in the authority to use voter registration lists and any other list that will furnish a fair cross-section of the community.

B. Derivation

Section 15 is derived from ABA Standards on Trial by Jury s. 2.1.

C. Relationship to Existing Law

The current practice in Oregon appears to be that the court clerk will use the voter registration lists as the source for the preliminary jury list. Currently, ORS 10.110 merely refers to registration books. This is taken to mean voter registration lists. The amendment will clarify this interpretation by specifically allowing the use of voter registration lists.

State v. Anderson, 92 Adv Sh 1290, ____ Or App ____ (1971), upheld the use of voter lists to prepare the preliminary jury list in Multnomah County. The court held that the use of voter lists did not deny the blacks the equal protection of the laws. Those who freely chose not to register to vote, whatever their race, sex, or national background, or for whatever reason they may have for not registering, are not a cognizable group subjected to systematic exclusion.

Section 15 also provides for the use of any other lists that will fulfill the criterion of producing a representative cross-section of the community. This is an ABA recommendation as well as a federal recommendation. The Jury Selection and Service Act of 1968 (28 USC 1862) set as a policy that no person or class of persons be excluded from service on juries because of race, color, religion, sex, national origin, or economic status.

The use of voter lists fulfills the requirement of a fair cross-section of the community. The use of city directories, telephone directories, membership lists of associations and organizations of all kinds are among the sources of federal jury lists. 26 FRD 409 (1961).

ORS 10.130 allows the person preparing the jury list to select those persons known or believed to be qualified to serve as jurors. Since it is possible that a qualified juror is not registered to vote (registration to vote is not a qualification for jury duty), the amendment to ORS 10.110 combined with the authority in ORS 10.130 allows the person making up the jury list to use other lists in addition to voter registration lists. The use of supplemental lists will enable the county to provide the best cross-section of the county citizens for jury duty.

ORS 10.080 places a limitation on the preparation of the jury list. This statute prohibits any person from suggesting or requesting that a person named be placed on the jury list. Therefore, the compilation of the jury list must come from another list prepared for a purpose other than as a source for jurors.

The use of tax lists, in the absence of racial considerations, is not prima facie unconstitutional, even though it necessarily excludes non-property owners. Roach v. Mauldin, 391 F2d 907 (5th Cir 1968). However, if a jury is selected from tax rolls which are maintained on a segregated basis, such procedure is unconstitutional. Jones v. Smith, 420 F2d 774 (5th Cir 1969).

The use of tax rolls are not prohibited by the new language because there is a provision for use of any other source that will give a good cross-section of the community. The reliance on tax lists in areas of the state where there are large numbers of non-property owners may, however, result in exclusion of many potentially qualified jurors. Thus, the statute proposed discourages the use of tax lists as the main source of the jury lists but allows the use of tax lists as a supplemental source.

The United States Supreme Court in Turner v. Fouche, 396 US 346 (1970), held that there was no rational basis for the requirement that school board members be freeholders. The Court further held that non-freeholders have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.

Clark v. Ellenbogen, 319 F Supp 623 (W.D.Pa 1970) aff'd 402 US 935, was a decision of a three judge federal panel that stated that the reasoning of Turner applies to juries. If the Pennsylvania statute limits jurors to taxpayers assessed as owners of real property, the statute is unconstitutional. The panel upheld the Pennsylvania statute because it refers to anyone taxed and that included sales and income taxes. Those who do not pay any taxes at all are too small in number to be considered a class.

Section 16. ORS 10.135 is amended to read:

10.135. (Jurors to be from different portions of county; number of names on list.) The names entered upon the jury list shall be, as far as practicable, selected from the different portions of the county in proportion to the number of names of qualified jurors appearing on the [assessment roll and] latest voter registration [, as far as practicable] list and any other source authorized by ORS 10.110. The jury list shall:

(1) For counties having a population of less than 10,000, contain the names of at least 250 persons, if there is that number of names of qualified jurors on the assessment roll or the registration books, and not more than 1,250 persons.

(2) For counties having a population of 10,000 but less than 25,000, contain the names of at least 500 persons but not more than 1,500 persons.

(3) For counties having a population of 25,000 or more, contain the names of at least 1,500 persons but not more than 5,000 persons.

COMMENTARY

This section amends ORS 10.135 to conform the language to the amendments to ORS 10.110.

Section 17. ORS 10.300 is amended to read:

10.300 Methods of drawing additional jurors to augment panel or jury list. (1) Whenever the number of jurors required does not attend a term of the court, or when jurors have served the full time required of jurors and have been discharged, the court has power to order an additional number of jurors drawn from the jury list to fill up the regular panel, in the same manner as the original panel is required to be drawn. These jurors shall be summoned and required to attend as jurors, in the same manner and with like effect as if drawn on the original panel.

(2) Whenever the regular panel becomes exhausted, or whenever, in the opinion of the court, the regular panel is likely to become exhausted, and except as provided in subsection (4) of this section or except where jurors are to be drawn from the reserve panel authorized by ORS 10.220, the court shall order an additional number of jurors drawn from the jury list by the sheriff in the presence of the court, and the jurors so drawn shall be summoned, unless relieved by the court, and required to attend at such times as the court may order.

(3) Whenever the jury list becomes exhausted, or whenever, in the opinion of the court, such list is likely to become exhausted, the court may by an order stating the reasons, and duly entered, direct the sheriff to summon forthwith from the body of the county persons whose names are upon the

[tax roll or registration books]

latest voter registration list and

any other source authorized by ORS 10.110

and who have the qualifications of jurors, to serve in the court.

(4) In judicial districts having less than 400,000 inhabitants, according to the latest federal decennial census, the trial judge, upon mutual agreement of the attorneys for the parties to the cause and without ordering an additional number of jurors drawn from the jury list to fill up the regular panel as provided in subsection (1) or (2) of this section, shall make the order mentioned in subsection (3) of this section and direct the sheriff to summon forthwith from the body of the county persons whose names are upon

the [tax roll or registration books] latest voter registration list and any other source authorized by ORS 10.110 and who have the qualifications of jurors, to serve in the court.

COMMENTARY

This section amends ORS 10.300 to conform the language to the amendments to ORS 10.110.

Section 18. ORS 17.115 is amended to read:

17.115. (Challenges, definition and kinds.) Except in criminal cases, no challenge shall be made or allowed to the panel. A challenge is an objection to a particular juror, and may be either peremptory or for cause.

COMMENTARY

This section amends ORS 17.115 to make clear the scope of this statute is limited to civil trials. The change in the law in regards to challenging the jury panel is discussed in the commentary to section 3.