

MASON'S MINNESOTA STATUTES

1927

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EMBRACING THE ORGANIC LAWS, THE CONSTITUTION, AND THE STAT-
UTES CONTAINED IN THE GENERAL STATUTES OF 1923, EXCEPT
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BY THE SUBSEQUENT LEGISLATION OF 1925
AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES
1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE
LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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ment of the prescribed toll, or who refuses to pay such toll when thereto lawfully requested, shall be guilty of a misdemeanor and punished by a fine of five dollars. All fines received under the provisions of this section and §§ 10530, 10531, shall be paid into the treasury of the town where the offense was committed, to be used in repairing the public roads in such town. (5194) [9028]

10533. Armed association—It shall not be lawful for any body of men other than the national guard, troops of the United States and, with the consent of the governor, Sons of Veterans and cadets of educational institutions where military science is taught, to associate themselves together as a military company with arms, but members of social and benevolent organizations are not prohibited from wearing swords. Any violation of this act shall be a misdemeanor. (5195) [9029]

10534. Application of term "vagrancy" and extension of the same so as to include various persons—The following persons are vagrants:

1. A person who, being an habitual drunkard, abandons, neglects or refuses to aid in the support of his family.

2. A person who has contracted an infectious or other disease in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health.

3. Every male person who lives wholly or in part on the earnings of prostitution, or who in any public place solicits for immoral purposes. A male person who lives with or is habitually in the company of a prostitute and has no visible means of support, shall be deemed to be living on the earnings of prostitution.

4. A common prostitute who shall be found wandering about the streets, or loitering in or about any restaurant, lodging house, saloon, or place where intoxicating liquors are sold.

5. Every female who shall be found wandering about the streets and addressing male persons for the purpose of soliciting the commission of any lewd, indecent or unlawful act, or for the purpose of enticing any male person into a house of prostitution or assignation, bedhouse, room, or other place for any unlawful purpose.

6. Fortune tellers, and such other like imposters.

7. A person known to be a pickpocket, thief, burglar, "yeggman" or "confidence man," and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, railroad yard, banking institution, broker's office, place of

public amusement, hotel, auction room, store, shop or crowded thoroughfare, car or omnibus, or at any public gathering or assembly. Provided, however, that this act shall not apply to any such person unless he has been convicted of the offense which would make him known as such person, and shall not apply to any person who has been in prison for such offense, who, after being released from such imprisonment has been engaged in lawful employment, and shall not in any case apply to any such person until more than thirty days have elapsed since being released from such imprisonment.

8. A person engaged in practicing or attempting any trick or device to procure money or other thing of value, if such trick or device is made a public offense by any law of this state, or any person engaged in soliciting, procuring or attempting to solicit or procure money or other thing of value by falsely pretending and representing himself to be blind, deaf, dumb, without arms or legs, or to be otherwise physically deficient or to be suffering from any physical defect or infirmity.

9. A person wandering about and lodging in taverns, groceries, alehouses, outhouses, market places, sheds, stables, barns or other uninhabited buildings or in the open air and not giving a good account of himself.

10. Any person not blind, over sixteen years of age and who has not resided in the county in which he may be at any time for a period of six months prior thereto, and not having visible means to maintain himself, lives without employment or wanders about and begs, or goes from door to door or places himself in the streets, highways or public passages to beg or receive alms.

Every such person shall upon conviction thereof be punished by imprisonment not exceeding ninety (90) days or by a fine not exceeding one hundred dollars (\$100.00). ('09 c. 487, amended '11 c. 257 § 1; '17 c. 292 § 1) [9030]

10535. Selling tickets to theatres, etc., at greater price—No person, firm, or corporation shall sell or offer or expose for sale any tickets of admission to any theatre, opera, concert, athletic contest, or other public entertainment at a greater price than the same are being sold for or offered for sale by the management of the same. ('13 c. 521 § 1) [9031]

10536. Penalty for violation—Violation of this act shall be punishable by a fine of not less than ten (10) dollars or more than one hundred (100) dollars, or imprisonment in the county jail for not less than ten (10) days or more than ninety (90) days. ('13 c. 521 § 2) [9032]

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SEARCH WARRANTS

10537. When issued—Whenever complaint shall be made on oath, to any magistrate authorized to issue warrants in criminal cases, that personal property has been stolen or obtained by false tokens or pretences, and that the complainant believes that it is concealed in any particular house or place, such magistrate, if satisfied that there is reasonable cause for such belief, shall issue his warrant to search for such property. (5196) [9033]

Proceeding may perhaps in some instances be a substantive criminal proceeding, but it is not necessarily so; it may be ancillary to the prosecution for larceny; the facts on which the warrant is issued may be embraced in the original complaint, or in a separate complaint and at a subsequent stage of the proceedings (16-182, 161). Warrant cannot be issued by justice for his own property (22-245). Action for damages will lie for maliciously and without probable cause procuring issuance of warrant (46-225, 48+914).

Admissibility of evidence. 211+463.

10538. Search for counterfeit coin, obscene books, etc.—Every such magistrate, when satisfied that there is reasonable cause, may also, upon like sworn complaint, issue search warrants in the following cases: To search for and seize—

1. Any counterfeit or spurious coin, forged bank notes, and forged instruments, tools, machines, or material prepared or provided for making any of them;

2. Any books, pamphlets, ballads, printed papers, or other things containing obscene language, obscene prints, pictures, figures, or descriptions, manifestly tending to corrupt the morals of youth, and intended to be sold, loaned, circulated, distributed, or introduced into any family, school, or place of education;

3. Any gambling apparatus or implements used, or kept for use, in gambling in any gambling house, or in any building, apartment, or place resorted to for the purpose of gambling. (5197) [9034]

212+169, note under § 10209.

10539. To whom directed—Contents—Every search warrant shall be directed to the sheriff or any constable of the county, commanding him to search the house or place where the stolen property, or other things for which he shall be required to search, are believed to be concealed, the place, property, or things to be searched for being designated and described in the warrant, and to bring such stolen property or other things when found, and the person in whose possession the same shall be found, before the magistrate issuing the warrant, or some other magistrate or court having cognizance of the case. (5198) [9035]

132-260, 156+130.

10540. Property seized—How kept and disposed of—Whenever any officer, in the execution of a search warrant, shall find any stolen property, or seize any other things for which search is allowed by law, the same shall be safely kept by direction of the court or magistrate, so long as may be necessary for the purpose of being produced as evidence on any trial, and then the stolen property shall be returned to the owner thereof, and the other things seized destroyed under the direction of the court or magistrate. (5199) [9036]

22-245.

212+169, note under § 10209.

The use in evidence of intoxicating liquor, taken without a search warrant from defendant's automobile, held, following *State v. Pluth* (Minn.) 195 N. W. 789, to be proper. 157-359, 196+278.

EXTRADITION

10541. Extradition agents—Appointment—Reports, etc.—In every case authorized by the constitution and laws of the United States, the governor may appoint an agent, who shall be the sheriff of the county from which the application for extradition shall come, when he can act, to demand of the executive authority of any state or territory any fugitive from justice or any person charged with a felony or other crime in this state; and whenever an application shall be made to the governor for that purpose, the attorney general, when so required by him, shall forthwith investigate or cause to be investigated by any county attorney the grounds of such application, and report to the governor all material circumstances which shall come to his knowledge, with an abstract of the evidence, and his opinion as to the expediency of the demand. The accounts of agents so appointed shall in each case be audited by the county board of the county wherein the crime upon which extradition proceedings are based shall be alleged to have been committed, and every such agent shall receive from the treasury of such county four dollars for each calendar day, and the necessary expenses incurred by him in the performance of such duties. (5200) [9037]

A person is not given immunity from prosecution for a criminal offense committed in this state merely because he has been brought into the state in violation of his legal rights. 158-447, 197+847.

10542. Warrant of extradition, service, etc.—Whenever a demand shall be made upon the governor by the executive of any state in any case authorized by the constitution and laws of the United States, for the delivery over of any person charged in such state with treason, felony, or other crime, the attorney general, when required by the governor, shall forthwith investigate or cause to be investigated by any county attorney the ground of such demand, and report to the governor all material facts which may come to his knowledge as to the situation and circumstances of the person so demanded, especially whether he is held in custody or under recognizance to answer for any offense against the laws of this state or of the United States, and also whether such demand is made according to law, so that such person ought to be delivered up; and if notified that such demand is conformable to law, and ought to be complied with, the governor shall issue his warrant under the seal of the state, authorizing the sheriff or some other designated person of any county in the state, either forthwith, or at a time designated in such warrant, to take and transport the person so demanded to the line of this state, at the expense of the state in whose name such person has been demanded, and there deliver him to the agent of the state making such demand, and shall also by such warrant require the civil officers in this state to afford all needful assistance in the execution thereof. Upon receipt of such warrant, such officer may arrest and retain in his custody the person whose surrender is demanded; but no person arrested on such warrant shall be delivered to the agent designated therein, or to any other person, until he shall have been notified of the demand made for his surrender, and of the nature of the criminal charge made against him, nor until he has had an opportunity to apply for a writ of

habeas corpus, if he shall claim such right of the officer making the arrest. Whenever such writ shall be applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the attorney general or the county attorney of the county in which the arrest is made. Every sheriff or other officer making such arrest, who shall deliver over to the agent, named in such warrant, or to any other person for extradition, the person so in his custody under such warrant, without having complied with the provisions of this subdivision, shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than one thousand dollars, or by both. (5201) [9038]

1. Jurisdictional prerequisites—To justify the issuance of a warrant three things are necessary: first, there must be a demand from the governor of the state where the crime was committed for the surrender of the fugitive who has fled from its jurisdiction; second, the requisition must be accompanied by a copy of an indictment or affidavit charging the fugitive with the commission of the offence specified; third, such copy must be authenticated by the certificate of the governor making the requisition (34-115, 24+354; 38-243, 36+462).

2. Duty and discretion of governor—When a case is presented which is clearly one contemplated by the federal constitution the governor has no discretion but it is his imperative duty to issue the warrant. This duty, however, is one of imperfect obligation, for, if the governor refuses to perform it, there is no power, state or federal, to compel him to do so. In determining whether a case is one contemplated by the constitution the governor may exercise a discretion and if he is satisfied that the demand is made for some ulterior and improper purpose—as, for example, the collection of a private debt—he may refuse to issue a warrant (69-104, 72+53). Governor acts in executive not judicial capacity (66-291, 68+1089).

3. Who is a fugitive from justice—To be a fugitive from justice it is not necessary that the party charged shall have left the state in which the crime is alleged to have been committed for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against its laws, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction, and is found within the territory of another state. His motives for leaving are immaterial. The fact that he is not within the state to answer the charge when required, renders him, in legal intentment, a fugitive from justice, regardless of his purpose in leaving (37-436, 35+9).

4. Proof that party demanded is a fugitive—Governor must be furnished with proof that party demanded is a fugitive from justice but the law does not prescribe the nature of the evidence to be furnished. When the governor issues a warrant it is presumed that it was granted on competent proof that the prisoner was a fugitive from justice, charged with a crime, at a time when he was within the state from which he had fled. The question whether a person is a fugitive involves the question whether he was in the demanding state at the time the crime was committed—a prerequisite to the granting of requisition (84-237, 87+770).

5. The crime charged—Indictment or affidavit must state facts which constitute an offence in the state from which the requisition comes (38-243, 36+462). Immaterial whether facts charged constitute an offence in this state (66-291, 68+1089). Abandonment and neglect to support wife and child under 1903 c. 222 not an extraditable offence (Ops. Atty. Gen. 1904 No. 63).

6. Requisition papers—Governor required to disregard mere formal defects in papers (66-291, 68+1089). Where requisition certifies that all papers returned are true and correct copies, and one of them contains a criminal accusation, indorsed "an indictment," signed by a foreman as "a true bill," authentication sufficient (84-237, 87+770). Affidavit duly certified and authenticated by governor of state making demand held sufficient (66-291, 68+1089). Implied from executive authentication that certifying officer a magistrate (34-115, 24+354; 101-303, 112+260). Indictment or affidavit sufficient if substantially charges commission of crime against state from whose justice accused alleged to have fled. With its sufficiency as a pleading in other respects courts of this state have no concern (38-243, 36+462; 66-291, 68+1089). Requirement that requisition papers contain copy of indictment or affidavit imperative (34-115, 24+354; 84-237, 87+770). Requisition signed by "acting governor" held sufficient (84-237, 87+770).

7. The warrant—Not necessary that copies of indictment, affidavit, or other records, be annexed to warrant. Sufficient if they are produced when called in question or that jurisdictional facts are recited on face of warrant. Probably sufficient if warrant recites generally that

governor is satisfied that demand is conformable to law and ought to be complied with, but if warrant attempts to set out all jurisdictional facts they must be fully set out (34-115, 24+354). Need not set forth facts or grounds on which issued with certainty required in criminal proceedings. If it appears that under federal constitution and act of Congress prisoner is demanded as a fugitive it is sufficient (84-237, 87+770). Warrant and requisition papers on which it was based, and which were part of return, were sufficient though warrant recited that relator was charged upon complaint with crime of forgery (101-303, 112+260).

8. **Revocation of warrant**—Governor may revoke his warrant at any time before fugitive is taken out of state (69-104, 72+53).

9. **Trial for other offense**—Person extradited may be tried for crime other than one for which he was extradited (54-305, 56+35).

10. **Exemption from civil process**—Person extradited not exempt from civil process (54-305, 56+35).

11. **Review by courts**—Court on habeas corpus having before it copies on which governor's warrant issued will decide on their sufficiency. In passing on sufficiency of indictment or affidavit court will only determine whether it states offense under laws of demanding state and will not determine its sufficiency as a criminal pleading in other respects (38-243, 36+462; 66-291, 68+1089). In habeas corpus proceedings if it appears that warrant has been revoked prisoner must be discharged and grounds of such revocation cannot be inquired into by court (69-104, 72+53). On habeas corpus in supreme court under 1895 c. 327 court will not extend its inquisition beyond rendition warrant to ascertain whether prisoner had been previously unlawfully arrested or was in unlawful custody at time warrant was served on him (84-27, 87+770). Every presumption will be entertained by courts in favor of regularity of governor's action (84-237, 87+770). See 126-38, 147+708; 148-484, 181+640; 150-252, 184+956.

10543. **Fugitive from another state arrested, when**—Whenever any person shall be found in this state charged with any offence committed in any state, and liable under the constitution and laws of the United States to be delivered over upon the demand of the executive of such state, any court or magistrate authorized to issue warrants in criminal cases may, upon complaint under oath, setting forth the offence and such other matters as shall be necessary to bring the case within the provisions of law, issue a warrant to bring such person before him or some other court or magistrate in the county where he is found. (5202) [9039]

14-385, 293.

10544. **May give recognizance, when**—If, upon examination of the person charged, it shall appear to the court or magistrate that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the governor, if the offence is bailable he shall be required to recognize, with sufficient sureties in a reasonable sum, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain the warrant of the executive, and to abide the order of the court or magistrate; and if such person shall not so recognize he shall be committed to prison, and there detained until such day, in like manner as if the offence charged had been committed within this state. If he shall fail to appear according to the condition of his recognizance, he shall be defaulted, and like proceedings had as in case of default in other recognizances; but if the offence be not bailable, he shall be committed to prison, and there detained until the day so appointed for his appearance. (5203) [9040]

10545. **Discharged, when**—If the person so recognized or committed shall appear before the court or magistrate upon the day ordered, he shall be discharged unless he shall be demanded by some person authorized by the warrant of the executive to receive him, or unless the court or magistrate shall see cause to commit him, or to require him to recognize anew for his appearance on some other day, and if when so ordered

he shall not so recognize he shall be committed and detained as provided in § 10544. Whenever the person so discharged shall be recognized, committed, or discharged, any person authorized by the warrant of the executive may at any time take him into custody, and the same shall be a discharge of the recognizance, if any, and not an escape. (5204) [9041]

10546. **Complainant liable for expenses**—The complainant in every such case shall be answerable for the actual costs and charges, and for the support in prison of any person so committed, and at the time of commitment shall advance to the jailer one week's board, and so from week or week, so long as he shall remain in jail, and on failure so to do the jailer may forthwith discharge any such person from custody. (5205) [9042]

10547. **Conveying prisoners through state**—Any person who has been or shall be convicted of or charged with a crime in any other state, and who shall be lawfully in the custody of any officer of the state where such offence is claimed to have been committed, may be by said officer conveyed through or from this state, for which purpose such officer shall have all the powers in regard to his control or custody that an officer of this state has over a prisoner in his charge. (5206) [9043]

PROCEEDINGS TO PREVENT CRIME

10548. **Conservators of the peace**—The judges of the several courts of record, in vacation, within their respective districts, as well as in open court, and all justices of the peace, within their respective counties, shall have power to cause all laws made for the preservation of the public peace to be kept, and, in the execution of that power, may require persons to give security to keep the peace, or for their good behavior, or both, in the manner provided in this subdivision. (5207) [9044]

Jurisdiction of justices of the peace under this chapter not in conflict with Const. art. 6 § 8 (74-242, 76+1129).

10549. **Complaint to magistrate**—Whenever complaint shall be made to any such magistrate that any person has threatened to commit an offence against the person or property of another, the magistrate shall examine the complainant, and any witness who may be produced, on oath, and reduce such complaint to writing, and cause the same to be subscribed by the complainant. (5208) [9045]

10550. **Warrant shall issue, when**—If, upon examination, it shall appear that there is just cause to fear that any such offence may be committed, the magistrate shall issue a warrant under his hand, reciting the substance of the complaint, and requiring the officer to whom it is directed forthwith to apprehend the person complained of, and bring him before such magistrate, or some other magistrate or court having jurisdiction of the cause. (5209) [9046]

10551. **Examination**—The magistrate before whom any person shall be brought upon charge of having made threats as aforesaid shall, as soon as may be, examine the complainant and witnesses in support of the prosecution, on oath, in the presence of the party charged, in relation to any matters connected with such charge which are deemed pertinent, after which witnesses for the prisoner, if he has any, shall be sworn and examined, and he may be assisted by counsel in such examination, and also in the cross-examination of the witnesses in support of the prosecution. (5210) [9047]

No trial by jury (74-242, 76+1129).

10552. Recognizance to keep the peace—If, upon examination, it shall appear that there is just cause to fear that any such offence will be committed by the party complained of, he shall be required to enter into a recognizance, with sufficient sureties, in such sum as the magistrate directs, to keep the peace toward all the people of this state, and especially toward the persons requiring such security, for such term as the magistrate orders, not exceeding six months; but he shall not be ordered to recognize for his appearance at the district court, unless he is charged with some offence for which he ought to be held to answer to said court. Upon complying with the order of the magistrate, the party complained of shall be discharged. (5211) [9048]

74-242, 76+1129.

10553. Party committed, when—If the person so ordered to recognize refuses or neglects to comply with such order, the magistrate shall commit him to the county jail during the period for which he was required to give security, or until he so recognizes, stating in the warrant the cause of commitment, with the sum and time for which security was required. (5212) [9049]

10554. Discharge—Complainant liable for costs, when—If, upon examination, it shall not appear that there is just cause to fear that any such offense will be committed by the party complained of, he shall be forthwith discharged; and if the magistrate deems the complaint malicious, or without probable cause, he shall order the complainant to pay the costs of prosecution, who shall thereupon be answerable to the magistrate and the officer for their fees as for his own debt. (5213) [9050]

10555. Costs—Whenever no order respecting the costs is made by the magistrate, they shall be allowed and paid in the same manner as costs before justices in criminal prosecutions; but in all cases where a person shall be required to give security to keep the peace, or for his good behavior, the magistrate may further order the costs of prosecution, or any part thereof, to be paid by such person, who shall stand committed until such costs are paid or he is otherwise legally discharged. (5214) [9051]

74-242, 76+1129.

10556. Appeal—Any person aggrieved by the order of any justice of the peace requiring him to recognize as aforesaid may, on giving the security required, appeal to the district court next to be holden in the same county, or that county to which said county is attached for judicial purposes. (5215) [9052]

10557. Witnesses to recognize—The magistrate from whose order an appeal is so taken shall require such witnesses as he may think necessary to support the complaint to recognize for their appearance at the court to which appeal is made. (5216) [9053]

10558. Proceedings on appeal—The court before which such appeal is prosecuted may affirm the order of the justice, or discharge the appellant, or may require the appellant to enter into a new recognizance, with sufficient sureties, in such sum and for such time as the court thinks proper, and may also make such order in relation to the costs of prosecution as it deems just and reasonable. (5217) [9054]

10559. Failure to prosecute appeal—If any party appealing shall fail to prosecute his appeal, his recognizance shall remain in full force and effect as to any breach of the condition, without an affirmation of the judgment or order of the magistrate, and shall also stand as a security for any costs which shall be ordered

by the court appealed to, to be paid by the appellant. (5218) [9055]

10560. Discharge on giving security—Any person committed for not finding sureties, or refusing to recognize as required by the court or magistrate, may be discharged by any judge or justice of the peace, on giving such security as was required. (5219) [9056]

10561. Recognizances transmitted to district court—Every recognizance taken in pursuance of § 10560 shall be transmitted by the magistrate to the district court for the county on or before the first day of the next term, and shall be there filed and recorded by the clerk. (5220) [9057]

10562. Recognizance without process, when—Every person who, in the presence of any court or magistrate, shall make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property, or who, in the presence of such court or magistrate, shall contend with hot and angry words, to the disturbance of the peace, may be ordered, without process or any other proof, to recognize for keeping the peace, and being of good behavior for a term not exceeding six months, and, in case of a refusal, may be committed as before directed. (5221) [9058]

10563. Carrying dangerous weapons—Whoever shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person, or to his family or property, may, on complaint of any other person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided. (5222) [9059]

10564. Judgment on recognizance remitted, when—Whenever, upon an action brought on any such recognizance, the penalty thereof shall be adjudged forfeited, the court may remit such portion of the penalty, on the petition of any defendant, as the circumstances of the case render just and reasonable. (5223) [9060]

10565. Surrender of principal—New recognizance—Any surety in a recognizance to keep the peace, or for good behavior, or both, shall have authority and right to take and surrender his principal, and, upon such surrender, shall be discharged and exempted from all liability for any act of the principal, subsequent to such surrender, which would be a breach of the condition of the recognizance; and the person so surrendered may recognize anew, with sufficient sureties, before any justice of the peace, for the residue of the term, and thereupon shall be discharged. (5224) [9061]

ARRESTS

10566. Defined—By whom made—Aiding officer—Arrest is the taking of a person into custody that he may be held to answer for a public offence, and may be made—

1. By a peace officer under a warrant;
2. By a peace officer without a warrant;
3. By a private person.

Every person shall aid an officer in the execution of a warrant whenever requested so to do by such officer, who is himself present and acting in its execution. (5225) [9062]

Statutory definition of arrest cited (68-509, 71+687).

10567. When made—If the offence charged be a felony, arrest may be made on any day and at any time of the day or night; if it be a misdemeanor, arrest

shall not be made on Sunday or at night, unless upon the direction of the magistrate indorsed upon the warrant. (5226) [9063]

10568. How made—Restraint—Show warrant—An arrest is made by the actual restraint of the person of the defendant or by his submission to the custody of the officer; but he shall not be subjected to any more restraint than shall be necessary for his arrest and detention, and the officer shall inform the defendant that he is acting under the authority of a warrant, and shall show him the warrant if so required. (5227) [9064]

Party whose arrest is attempted should first be notified of the purpose of the officer. No particular form of words is necessary. Enough that the officer and his business is known. Where an officer, in the first instance, used the words, "You are my prisoner," held competent evidence of the notification by him of his business. Not necessary that he should exhibit his warrant before arrest (34-361, 25+793). Generally the official character of the officer is presumed to be known by party arrested, but, whether known or unknown, the officer must disclose his authority, if required by the person arrested (68-509, 71+687).

A person lawfully arrested may, as an incident thereto, be searched, and incriminating articles found in his possession may be seized 157-145, 195+789.

The use in evidence of intoxicating liquor, taken without a search warrant from defendant's automobile, held, following State v. Pluth (Minn.) 195 N. W. 739, to be proper. 157-359, 196+278.

10569. Means used—If, after notice of intention to arrest defendant, he shall flee or forcibly resist, the officer may use all necessary means to effect his arrest. He may break open an inner or outer door or window of a dwelling house to execute the warrant, if, after notice of his authority and purpose, he shall be refused admittance, or when necessary for his own liberation, or for the purpose of liberating another person who, having entered to make an arrest, shall be detained therein. (5228) [9065]

10570. Without warrant, when—Break door, etc., when—A peace officer may, without warrant, arrest a person:

1. For a public offence committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; or
4. Upon a charge made upon reasonable cause of the commission of a felony by the person arrested.

To make such arrest the officer may break open an outer or inner door or window of a dwelling house, if, after notice of his office and purpose, he shall be refused admittance. (5229) [9066]

Term "public offence" in subd. 1 includes all criminal offences, whether felonies, misdemeanors or infractions of municipal ordinances (30-506, 16+397; 34-1, 24+458; 91-277, 97+972). To authorize arrest under subd. 1 without a warrant for an offence not a felony it must be made at the time; that is, the officer must at once set about the arrest and follow up the effort until it is made. Where five hours intervened during which the officer made no attempt to effect an arrest it was held that authority to arrest ceased (30-506, 16+397). In making an arrest without a warrant the officer acts in his official capacity and for an illegal arrest his sureties are liable (14-487, 364; 89-407, 95+219). Where a party pleads to an indictment or complaint without objecting to his arrest without a warrant he waives any objection on that ground (51-534, 53+799). Power to arrest without a warrant is not to be enlarged (30-506, 16+397; 131-71, 154+662; 134-58, 153+721; 149-58, 182+902; 195+789). Where a felony has been committed although not in the presence of an officer he may arrest without a warrant (68-509, 71+687). Mistaken belief of officer that he had warrant does not preclude defense that he had probable grounds for believing person arrested guilty of felony (117-255, 135+818).

Where the offense is not a felony, an officer cannot

arrest without a warrant, unless the offense was committed or attempted in his presence. 157-145, 195+789.

Where the officer does not know of the act constituting the offense, it is not committed in his "presence." 157-145, 195+789.

10571. Arrest at night, when—Disclose authority—Exception—He may at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and shall be justified in making such arrest, though it shall afterwards appear that no felony has been committed; but when so arresting a person without a warrant, the officer shall inform him of his authority and the cause of the arrest, except when he shall be in the actual commission of a public offense, or shall be pursued immediately after an escape. (5230) [9067]

Disclosing authority (34-361, 25+793; 68-509, 71+687). 149-58, 182+902.

10572. Arrest by bystander—Magistrate may command arrest, when—He may take before a magistrate a person who, being engaged in a breach of the peace, shall be arrested by a bystander and delivered to him; and, whenever a public offence shall be committed in the presence of a magistrate, he may, by written or verbal order, command any person to arrest the offender, and thereupon proceed as if the offender had been brought before him on a warrant of arrest. (5231) [9068]

10573. Private person may arrest, when—A private person may arrest another:

1. For a public offence committed or attempted in his presence;
2. When such person has committed a felony, although not in his presence; or
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. (5232) [9069]

16-431, 387; 117-255, 135+818.

10574. Disclosure of cause—Means used—Before making an arrest he shall inform the person to be arrested of the cause thereof and require him to submit, except when he is in the actual commission of the offence or when he shall be arrested on pursuit immediately after its commission. If such person has committed a felony, such private person, after notice of his intention to make the arrest, if he shall be refused admittance, may break open an outer or inner door or window of a dwelling house for the purpose of making the same. (5233) [9070]

10575. Proceedings by private person making arrest—Every private person who shall have arrested another for the commission of a public offence shall, without unnecessary delay, take him before a magistrate or deliver him to a peace officer. If a person arrested shall escape or be rescued, the person from whose custody he has escaped may immediately pursue and retake him, at any time and in any place in the state, and for that purpose, after notice of his intention and refusal of admittance, may break open an outer or inner door or window of a dwelling house. (5234) [9071]

16-431, 387.

10575-1. Arrests any place in state—When allowed—In any case wherein any sheriff, deputy sheriff, police officer, marshal, constable, or other peace officer, shall have authority by law, either with or without a warrant, to arrest any person for or upon a charge of any criminal offense committed within the local jurisdiction of such peace officer, and the person to be arrested shall escape from or be out of the county, city, town,

or village in which such authority originated, the officer having such authority shall have power to pursue and apprehend the person to be arrested anywhere in this state. ('27, c. 256)

EXAMINATION OF OFFENDERS—COMMITMENT —BAIL

10576. Process, by whom issued—The judges of the several courts of record, in vacation as well as in term time, court commissioners, and all justices of the peace, are authorized to issue process to carry into effect the provisions of law for the apprehension of persons charged with offences. (5235) [9072]

Court commissioners are committing magistrates under this chapter (23-455, 10+778; 64-226, 66+969). See 124-456, 145+167.

10577. Proceedings on complaint—Warrant—Upon complaint made to any such magistrate that a criminal offence has been committed, he shall examine, on oath, the complainant and any witnesses who shall appear before him, reduce the complaint to writing, and cause it to be subscribed by the complainant; and, if it shall appear that such offence has been committed, he shall issue a warrant, reciting the substance of the complaint, and requiring the officer to whom it is directed to forthwith bring the accused before him, or some other court or magistrate of the county, to be dealt with according to law, and in such warrant require him to summon the witnesses therein named to appear and give evidence on the examination. (5236) [9073]

164-499, 205+450.

1. Nature of proceeding—Preliminary examination a judicial proceeding but not an action or trial. A mere preliminary inquiry to ascertain if the evidence is such that the accused ought to be put on trial for the offence charged. If he is discharged, new proceedings may be at once commenced against him for the same offence; if he is held, that fact can have no influence on his guilt when he is put on his trial to have it determined (37-407, 34+737; 76-368, 79+166).

2. To what offence applicable—Applicable to all criminal offences whether felonies or misdemeanors (33-23, 21+847; 71-28, 73+626).

3. When necessary—Although not necessary an examination may be had for offences punishable by a justice of the peace (71-28, 73+626).

4. Waiver—Accused person may waive preliminary examination (10-39, 22).

5. The complaint—Complaint is initial proceeding in examination and must be on oath (34-115, 24+354). A complaint which contains a substantial statement of the offence in positive terms is sufficient (see 74-165, 77+29). Complaint and warrant for the arrest of a person who has been released from a commitment by habeas corpus need not be any different from what they would be if there had been no prior arrest and discharge (37-405, 34+748).

6. The examination—Criminal complaint subscribed and sworn to before a magistrate and purporting to have been made after complainant had been duly sworn is a sufficient "examination" of complainant under this section (33-480, 24+321; 34-115, 24+354).

7. Sheriff's fees—Sheriff or constable is entitled to mileage for traveling to serve a criminal warrant although, if by no fault of his, he fails to serve it (37-491, 35+364).

10578. Warrant executed, where—If any person against whom a warrant is issued for an alleged offence committed in any county, either before or after the issuing of such warrant, shall escape from or be out of the county, the sheriff or other officer to whom such warrant is directed may pursue and apprehend the party charged, in any county in this state, and for that purpose may command aid, and exercise the same authority, as in his own county. (5237) [9074]

10579. Offender may give recognizance, when—Duty of magistrate—In every case where the offence charged in the warrant shall not be punishable by death or

imprisonment in the state prison, upon request of the person arrested the officer making the arrest shall take him before a magistrate of the county in which the arrest shall be made, for the purpose of entering into a recognizance without trial or examination, and such magistrate may take from him a recognizance with sufficient sureties for his appearance before the court having cognizance of the offence and next holden in such county, and thereupon he shall be liberated. The magistrate taking bail shall certify that fact upon the warrant, and deliver the same, with the recognizance so taken, to the person making the arrest, who shall cause the same to be delivered without unnecessary delay to the clerk of the court before which the accused was recognized to appear; and, on application of the complainant, the magistrate who issued the warrant, or the county attorney, shall cause such witnesses to be summoned as he deems necessary. (5238) [9075]

Not applicable to state prison offences (70-199, 72+1067).

156-506, 194+460.

10580. Bail refused—Proceedings—If the magistrate in the county where the arrest was made shall refuse to bail the person so arrested and brought before him, or if no sufficient bail shall be offered, the person having him in charge shall take him before the magistrate who issued the warrant, or, in his absence, before some other magistrate of the county in which the warrant was issued, to be proceeded with as herein-after directed. (5239) [9076]

On application for admission to bail, after denial of application by the trial court, notice must be given to the Attorney General and to the prosecuting attorney; the application must be accompanied by settled case or bill of exceptions, unless the applicant, in the exercise of due diligence, has been unable to procure a transcript when the application may be based upon a verified petition; and there must be a fair showing of apparent prejudicial error or irregularity. 159-290, 199+750.

10581. Procedure in case of felony—Whenever the offence charged in any warrant is punishable by death or imprisonment in the state prison, the officer making the arrest in some other county shall convey the prisoner to the county where the warrant issued, and take him before the magistrate who issued the same, or, in case of his inability to attend, before some other magistrate of the same county, and also deliver to such magistrate the warrant, with the proper return thereon signed by him. (5240) [9077]

10582. Examination adjourned — Recognizance — Every magistrate may adjourn an examination or trial pending before himself from time to time as occasion shall require, not exceeding ten days at one time, without consent of the accused, and at the same or a different place in the county as he shall think proper; and in such case, if the person is charged with an offence not bailable, he shall be committed in the meantime, otherwise he may be recognized in a sum and with sureties satisfactory to the magistrate for his appearance for further examination, and for want of such recognizance he shall be committed; but in a case where a person shall be brought before the judge of a municipal court charged with a misdemeanor, such court may receive cash bail for his appearance in an amount not more than double the highest cash fine which can be imposed for the offence, and within said limit he may from time to time thereafter increase or reduce such sum. (5241) [9078]

Justice of peace cannot receive deposit of money in lieu of recognizance (7-398, 316). No authority to admit the accused to bail pending adjournment of hearing when he is charged with an offence punishable with death or imprisonment in state prison for a term exceeding seven years (70-199, 72+1067).

10583. Proceedings on failure to appear—If the person so recognized shall not appear before the magistrate at the time appointed for such further examination, according to the conditions of such recognizance, the magistrate shall record the default and certify the recognizance, with the record of such default, to the district court, and like proceedings shall be had thereon as upon the breach of the condition of a recognizance for appearance before that court. (5242) [9079]
Surety may pay and be discharged (36-406, 31+359). Cited (117-173, 134+509).

10584. Failing to recognize, committed—When such person shall fail to recognize, he shall be committed to prison by an order under the hand of the magistrate, stating concisely that he is committed for further examination on a future day, to be named in the order; and on the day appointed he may be brought before the magistrate, by his verbal order to the same officer by whom he was committed, or by an order in writing to a different person. (5243) [9080]

10585. Examination—Rights of accused—The magistrate before whom any person shall be brought upon a charge of having committed an offence shall, as soon as may be, examine the complainant and the witnesses in support of the prosecution, on oath, in the presence of the party charged, in relation to any pertinent matter connected with such charge, after which the witnesses for the prisoner, if he has any, shall be sworn and examined, and he may be assisted by counsel in such examination, and also in the cross-examination of the witnesses in support of the prosecution. (5244) [9081]

10586. Witnesses kept separate—Testimony, how taken—While examining any witness, the magistrate may in his discretion exclude all other witnesses from the place of examination, and upon request, or if he sees cause, he may direct the witnesses for and against the prisoner to be kept separate, so that they cannot converse with each other until they have been examined. He shall reduce the testimony to writing, or cause it to be done, and, when he shall so require, have it signed by the witnesses. (5245) [9082]

10587. Prisoner discharged, when—Offences not bailable—If upon the whole examination it shall appear that no offence has been committed, or that there is not probable cause for charging the prisoner with it, he shall be discharged. A person charged with an offence punishable with death shall not be admitted to bail if the proof is evident or the presumption great, nor shall any person charged with an offence punishable with death, or imprisonment in the state prison for more than seven years, be admitted to bail by a justice of the peace; in all other cases bail may be taken in such sum as in the opinion of the judge or magistrate will secure the appearance of the accused at the court where he is to be tried. (5246) [9083]

1. Discharge—Discharge not a bar to a subsequent prosecution for same offence (37-405, 34+748; 37-407, 34+737; 42-32, 43+571). If evidence shows accused probably not guilty of the offence charged but probably guilty of a different offence the magistrate may hold him a reasonable time until a new warrant may be issued (71-28, 73+626).

2. Bail—70-199, 72+1067. See 129-97, 151+895.

10588. Bail—Commitment—Whenever at the close of an examination it shall appear that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty, if the offence be bailable by the magistrate, and the prisoner shall offer sufficient bail or money in lieu thereof, it shall be taken, and he shall be discharged; but if no sufficient bail be offered, or the offence shall not be bailable by the magistrate, he shall be committed for trial. When-

ever cash bail shall be deposited in lieu of other bail, such cash shall be the property of the accused, whether deposited by him personally or by any third person in his behalf. Whenever cash bail shall be accepted by a judge of a court of record, he shall order the same to be deposited with the clerk, there to remain until the final disposition of the case and the further order of the court relative thereto. Upon release in whole or in part, the amount so released shall be paid to the accused personally or upon his written order. In case of conviction the magistrate may order such deposit to be applied upon any fine imposed, and, if such fine be less than the deposit, the balance shall be paid to the defendant. If the fine exceeds the deposit, the deposit shall be applied thereon and the defendant committed until the balance is paid, but such commitment shall not exceed one day's time for each dollar of such unpaid balance. Cash bail in the hands of the court or any officer thereof shall be exempt from garnishment or levy under attachment or execution. (5247) [9084]

1. Commitment—If the magistrate is a justice of the peace and the offence is within his jurisdiction he is not bound to turn the case over to the district court but may set it down for immediate trial in his own court (71-28, 73+626). If he does so the accused should be informed that he is to be subjected to trial, rather than to a mere preliminary examination, for he may wish to demand a jury trial (71-28, 73+626). If the offence charged is not within the jurisdiction of the justice the accused cannot be placed on trial without indictment and hence must necessarily be bound over or committed to await the action of the grand jury. If the grand jury is not in session or is not to be impaneled within a short time a person charged with an offence cognizable by a justice of the peace cannot be bound over to await the action of the grand jury (71-28, 73+626). Not necessary that warrant of commitment under which one is confined in jail to await the action of the grand jury set forth, as in an indictment, all the facts essential to constitute a crime. Sufficient if it clearly designates the offence of which the prisoner is accused and shows that, on examination before the committing magistrate, it appeared that such offence had been committed and that there was probable cause to believe the accused to be guilty thereof (34-339, 25+708). Sufficiency of evidence to justify commitment may be questioned on habeas corpus (31-110, 16+692; 35-283, 28+659; 37-405, 34+748). When one is held by an examining magistrate to answer in the district court for a felony a prosecution for felony is pending in that court (18-398, 359). When a person has been held to answer for a public offence, if an indictment is not found against him at the next term of the court at which he is held to answer, the court must order the prosecution to be dismissed unless good cause to the contrary be shown (18-398, 359).

2. Bail—Money accepted by a magistrate in lieu of recognizance must be delivered to the clerk of the district court (86-188, 195, 90+371; 151-517, 187+710). Application of statute defined (70-199, 72+1067). Whether clerk may turn over to county treasurer bail money before final disposition of case and until order of court doubtful, but payment does not deprive court of jurisdiction to vacate forfeiture (116-101, 133+469).

10589. Witnesses to recognize, when—Commitment—When a prisoner shall be admitted to bail, or committed by the magistrate, he shall also bind by recognizance such witnesses against the prisoner as he shall deem material, to appear and testify at the court to which the prisoner is held to answer. If the magistrate shall be satisfied that there is good reason to believe that any witness will not perform the conditions of his recognizance unless other security shall be given, he may order him to enter into a recognizance for his appearance, with such sureties as he shall deem necessary; but, except in case of murder in the first degree, arson where human life is destroyed, and cruel abuse of children, he shall not commit any witness who shall offer to recognize, without sureties, for his appearance as aforesaid. (5248) [9085]

18-398, 359.

10590. Refusal—Married woman or minor—Every witness required to recognize, with or without sureties,

who shall refuse so to do, shall be committed by the magistrate until he shall comply with such order, or be otherwise discharged according to law. Every person held as a witness shall receive such compensation during confinement as the court before whom the case is pending shall direct, not exceeding regular witness fees. Whenever a married woman or a minor shall be a material witness, any other person may recognize for the appearance of such witness, or the magistrate may take recognizance of such witness in a sum of not more than fifty dollars, which shall be valid and binding in law, notwithstanding such disability. (5249) [9086]

10591. Magistrate may act with another—Any magistrate to whom a complaint shall be made, or before whom any prisoner shall be brought, may associate with himself one or more magistrates of the same county, and they may together execute the powers and duties before mentioned; but no fees shall be taxed for such associates. (5250) [9087]

10592. Certifying testimony—All examinations and recognizances, taken by any magistrate in pursuance of the provisions of this chapter, shall be certified and returned by him to the clerk of the court, before which the party charged is bound to appear, within ten days after such examination has been had or said recognizance taken, and shall be filed in said court; and if such magistrate neglects or refuses to return the same he may be compelled forthwith by rule of court, and, in case of disobedience, may be proceeded against by attachment as for contempt. (G. S. 1894 § 7156, amended '05 c. 179 § 1) [9088]

Money accepted by a magistrate in lieu of a recognizance must be delivered to the clerk of the district court (86-188, 90+371). If a recognizance is of record in the proper court at the time when the parties who entered into it are called on to perform its conditions it is in time as respects filing. Statute merely directory as to time of filing (28-455, 10+778). When one is held by an examining magistrate to answer in the district court for a felony a prosecution for felony is pending in that court although the return has not been filed (18-398, 359; 123-392, 143+971). Depositions of witnesses on an examination are not generally competent evidence in an action for malicious prosecution (10-350, 277).

10593. Proceedings on default—Whenever any person, in any criminal prosecution, under recognizance either to appear and answer, to prosecute an appeal, or to testify in any court, shall fail to perform the conditions of such recognizance, his default shall be recorded, and process issued against the persons bound thereby, or such of them as the prosecuting officer shall direct; and any surety may, by leave of court, after default, and either before or after process shall be issued against him, pay to the county treasurer or clerk of court the amount for which he was bound as surety, with such costs as the court shall direct, and be thereupon forever discharged. (5252) [9089]

Payment by surety and discharge (36-406, 31+359; 86-188, 195, 90+371).

10594. Penalty of recognizance remitted, when—Whenever any action shall be brought in the name of the state against a principal or surety in any recognizance entered into by a party or witness in any criminal prosecution, and the penalty thereof shall be adjudged forfeited, the court may, upon application of any party defendant, remit the whole or any part of such penalty, and may render judgment thereon for the state, according to the circumstances of the case and the situation of the party, and upon such terms and conditions as it may deem just and reasonable. (5253) [9090]

89-426, 430, 94+1093.

10595. Action on recognizance—Not barred, when—No action brought on any recognizance shall be barred or defeated, nor judgment thereon arrested, by reason of any neglect or omission to note or record the default of any principal or surety at the term when it occurs, or by reason of any defect in the form of the recognizance, if it shall sufficiently appear from the tenor thereof at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take it; and whenever upon action brought upon any recognizance to prosecute an appeal the penalty thereof shall be adjudged to be forfeited, or when by leave of court such penalty has been paid to the county treasurer or clerk of court without suit or before judgment in a manner provided by law, if by law any forfeiture accrues to any person by reason of the offense of which appellant was convicted, the court may award him such sum as he may be entitled to out of such forfeiture. (5254) [9091]

10596. Venue of actions—Actions and proceedings prosecuted upon forfeited bail bonds or recognizances shall be heard and tried in the county in which the forfeiture was adjudged. ('23 c. 100 § 1)

147-272, 180+99.

10597. Defaulter arrested, when—Whenever a defendant in any indictment has been admitted to bail after verdict or trial, and shall neglect to appear before any court or officer at any time or place at which he is bound to appear and submit to the jurisdiction of the proper court or officer, such court or officer may cause him to be arrested in the same manner as upon the finding of an indictment, and may forfeit his recognizance and direct the same to be prosecuted. (5255) [9092]

10598. Application for bail—Justification—Whenever a party in custody shall desire to give bail, the offense being bailable, and the district court shall not be in session in the county, he may apply to a judge thereof, or a judge of the supreme court, upon his affidavit showing the nature of the application and the names of the persons to be offered as bail, with a copy of the mittimus or papers upon which he is held in custody. Such judge may thereupon, by order, direct the sheriff to bring up said party, at a time and place named, for the purpose of giving bail. Notice of such application shall be given to the county attorney, if within the county, and no matters shall be inquired into except such as relate to the amount of bail and the sufficiency of the sureties. Sureties shall in all cases justify by affidavit, or upon oral examination before the court, judge, or magistrate, as the case may be. (5256) [9093]

28-455, 10+778; 70-199, 72+1067.

10599. Surrender of principal—Notice to sheriff—Whenever a surety for any person held to answer, upon any charge or otherwise, shall believe that his principal is about to abscond, or that he will not appear as required by his recognizance, or not otherwise perform the conditions thereof, he may arrest and take such principal, or cause him to be arrested and taken, before the officer who admitted him to bail, or the judge of the court before which such principal was by his recognizance required to appear, and surrender him up to such officer or judge; or any such surety may have such person arrested by the sheriff of the county by delivering to him a certified copy of the recognizance or instrument of bail under which he is held as surety, with a direction to such sheriff, indorsed thereon, requiring him to arrest such principal and bring him

before such officer or judge to be so surrendered, and on the receipt thereof, and a tender or payment to him of his fees therefor, such sheriff shall arrest such principal and bring him before such officer or judge, to be so surrendered. Before any surety shall personally surrender such person, the sheriff shall be notified, and he or one of his deputies be present to take him into custody if he shall fail to give new bail as herein provided. (5257) [9094]

147-272, 180+99.

10600. Commitment of principal—When any such principal shall be so surrendered, the officer or judge to whom he is surrendered shall, by a new commitment, commit him to jail, unless he shall give sufficient bail, with new sureties, as he was required by law to do in the first instance. (5258) [9095]

10601. Fees of sheriff—The sheriff shall be allowed the same fees and mileage for making an arrest or attending before said officer or judge as for arresting a person under a bench warrant, and in all cases his fees shall be paid by the surety or sureties surrendering any principal as herein provided. (5259) [9096]

10602. Examination before justice—Removal—Whenever any person charged with a criminal offense shall be brought before a justice of the peace or court commissioner for examination under the provisions of this chapter, if, before the commencement of such examination, he shall make oath that, from prejudice or other cause, he believes that such magistrate will not decide impartially in the matter, then such magistrate shall immediately transmit all the papers in the case to a justice of the peace of the same or an adjoining election district in the same county, who is qualified by law to conduct such examination, and he shall proceed with the same as though it had been first brought before him; but no case shall be so removed after a second adjournment, and only one removal shall be had in the same case. (5260) [9097]

General statute as to change of venue not applicable (37-407, 34+737). Cited (117-173, 134+509).

10602-1. Sureties on bond, recognizance or undertaking—Affidavits of—Every personal surety upon any bond, recognizance, or undertaking given to secure the appearance of a defendant in any criminal case in any court of record shall make an affidavit, to be attached to such bond, recognizance or undertaking, stating his full name, residence and postoffice address, whether or not he is surety upon any other bond, recognizance, or undertaking in any criminal case, and if so stating the name of the principal, the amount of each obligation, and the court in which the same was given; also setting forth the legal description of all real property owned by such surety and specifying as to each parcel thereof its fair market value, what liens or encumbrances, if any, exist thereon, and whether or not the same is his homestead or is otherwise exempt from execution. He may also be required by the court to make a like statement of his personal property or so much thereof as the court shall deem necessary.

Provided, that the court may, in its discretion, by written order endorsed on the bond, recognizance or undertaking, dispense with such affidavit or any part thereof as to any surety if satisfied that the surety is worth the amount in which he justifies and is not a professional or habitual bondsman in criminal cases. ('27, c. 233, § 1)

10602-2. Same—False statements in affidavits—Punishment—Every person who shall willfully and knowingly make any false statement in any affidavit made by him as provided by this act shall be guilty

of perjury and shall be punished therefor as provided by law. ('27, c. 233, § 2)

10602-3. Same—Record of kept—The clerk of every court of record shall keep a permanent book of record, in which he shall record the names, indexed or arranged alphabetically, of all the sureties, whether personal or corporate, upon bonds, recognizances, or undertakings, filed in such court, stating as to each surety his or its name and postoffice address, the name of the principal and the amount of the obligation, and where the original obligation is filed. ('27, c. 233, § 3)

GRAND JURIES

10603. Members—Quorum—A grand jury is a body of men or women, or both, returned at stated periods from the citizens of the county before a court of competent jurisdiction, chosen by lot, and sworn to inquire as to public offenses committed or triable in the county. It shall consist of not more than twenty-three nor less than sixteen persons, and shall not proceed to any business unless at least sixteen members are present. (R. L. '05 § 5261, G. S. '13 § 9098, amended '21 c. 365 § 2)

1. Number of jurors requisite—Where the number of grand jurors is less than twenty-three but not less than sixteen the accused cannot complain, because the smaller the number the more secure he is against indictment. A grand jury is sufficiently large if there are sixteen jurors present and voting on an indictment. Indictment cannot be found without concurrence of at least twelve jurors. Accused cannot insist on attendance of full panel summoned (72-476, 75+729).

2. Attendance of petit jury—Grand jury may find an indictment although there is no petit jury in attendance on the court (22-423).

3. Reconsideration of criminal charge—Except as required by statute, an order of resubmission is not a condition precedent to the reconsideration of a criminal charge by a grand jury and the finding of a second indictment thereon, even though the first is still pending. 167-25, 208+177.

The second indictment may be found without re-examination of the witnesses originally heard, and without consideration of any new or additional evidence. 167-25, 208+177.

10604. Grand juries—When to be drawn—Who liable—A grand jury shall be drawn and summoned for any general term of the district court, whenever the judge of such court shall so direct by an order made and filed with the clerk of court fifteen days before the term begins. If such order is not made the judge, in his discretion, by an order filed with the clerk may cause a grand jury to be summoned and convened at any time during the term. In districts composed of but one county, with a population exceeding 100,000 inhabitants, wherein but one term is held annually, the court may prescribe by written order that a grand jury shall be drawn to attend at any specified time and for any designated period. (R. L. § 5262, amended '09 c. 221 § 2; '23 c. 257 § 1) [9099]

Special venire—Adjourned term—Court may discharge grand jury impaneled at regular general term, adjourn the term to future day, and order a new venire of grand jurors to be drawn and summoned for such adjourned term. Such new venire may be drawn from the regular jury list selected by the county board and certified and filed with the clerk of the court (61-73, 63+171; 192+194).

10605. Exemption from service—In addition to the persons otherwise exempted therefrom by law, the following persons shall be exempt from service as grand jurors: United States officers, judges of courts of record, commissioners of public buildings, the state auditor, treasurer, and librarian, all county and city officers, including members of school boards in cities of the first class, constables, attorneys at law, ministers of the gospel, preceptors and teachers of high and graded schools and academies, one teacher in each

common school, practicing physicians and surgeons, duly licensed embalmers, one miller to each grist mill, one ferryman to each licensed ferry, all acting telegraph operators, all members of fire companies organized according to law, all engineers actively engaged as locomotive or stationery engineers, all persons more than sixty years of age, all persons not of sound mind or discretion, and all persons subject to any bodily infirmity amounting to disability. All persons unable to speak and understand the English language, all persons whose names have been placed on any jury list at the request or suggestion, direct or indirect, of any person other than the officer charged with preparing such list, and all persons who shall have been convicted of any infamous crime, shall be disqualified from serving as grand jurors. (R. L. '05 § 5263, G. S. '13 § 9100, amended '15 c. 15 § 1)

Effect of disqualified person on jury—Where a grand jury is composed of not less than sixteen and not more than twenty-three its action is not vitiated by reason of there being drawn as one member thereof a disqualified person, he being excused before the charge in the indictment is considered (72-476, 75+729). Leave to withdraw a plea of not guilty for the purpose of enabling the accused to move to quash the indictment on the ground that two members of the grand jury were aliens held properly denied (70-462, 73+403). Objection that the certificate to the jury list does not show that the jurors are qualified cannot be raised after demurrer (19-484, 418).

10605-1. Exemption from service—Commissioner of forestry and fire prevention and employees—The commissioner of forestry and fire prevention under Chapter 426, Laws 1925, and all persons at any time employed by him, or under his direction, are hereby exempted from jury service during the period of such service or employment. No person hereby exempted shall be drawn on, or have his name placed in any list of persons eligible to jury service in any court. ('27, c. 279, § 1)

Explanatory note—For Laws 1925, c. 426 see § 53-20, herein.

10606. Names, how prepared and drawn—On receiving from the county auditor the list of grand jurors selected by the county board, the clerk shall write the names in said list on separate pieces of paper, and fold each as nearly as possible in the same manner, so that the name written shall not be visible, and deposit them in a box. At least fifteen days before the sitting of any district court, the clerk thereof, in the presence of the sheriff and a justice of the peace or district judge, shall draw from the box the names of twenty-three persons to serve as grand jurors at said term of court. (5264) [9101]

1. Preparation of jury list by county board—County board does not draw the jury. It simply selects a larger list of names from which the jury is subsequently drawn (69-502, 72+832). Clerk has no authority to draw a jury from any list except such as is made out and certified to him as required by statute (23-209; 47-373, 50+362). Statutes regulating the preparation of the list by the board are merely directory. Fact that a person acted as a member of the board without authority is not a ground for setting aside the indictment (69-502, 72+832; 139-144, 165+962). Provision against person being included in two successive annual lists (72-476, 75+729). List of grand jurors held sufficient although under same heading as petit jury list and there was but one certificate for the two lists. Informal certificate held sufficient (61-73, 63+171). Objection that the list was not properly signed and certified by the chairman of the board cannot be raised after the arraignment without leave of court (47-373, 50+362; 47-375, 50+362), and if the accused was held on a charge for a public offence at the time the jury was impaneled the objection must be made by challenge to the panel and cannot be made by a motion to quash (23-209). If the accused was not so held the objection may be made by motion to quash at the time of the arraignment (69-502, 72+832; 90-183, 96+330). Too late to raise objection after demurrer (19-484, 418). Cannot be raised by motion in arrest of judgment (23-291).

2. Effect of qualified person illegally on jury—The general rule is that mere irregularity in the proceedings by which a grand juror gets on a panel does not affect the legality of its proceedings if such grand juror is not personally disqualified (72-476, 75+729).

10607. Venire—Service—Return—At least twelve days before the first day of the court, said clerk shall issue and deliver to the sheriff a venire under the seal of the court, commanding him to summon the persons so drawn to appear before said court at or before the hour of eleven o'clock a. m. on the first day of the term thereof, to serve as grand jurors, except that when said day shall fall on a legal holiday the venire shall be made returnable on the succeeding day. The sheriff, at least ten days before the sitting thereof, shall summon the persons named in such venire to attend such court as grand jurors, by mailing a notice to each person named therein by registered mail at his last known address, and at least three days before the sitting thereof he shall give personal notice to each person whose registry receipt has not been received by said sheriff or leave written notice at the place of residence of such person with some person of proper age. He shall return such venire to the court at the opening thereof, specifying who were summoned, and the manner in which each was notified. (R. L. § 5265, amended '13 c. 451 § 1) [9102]

10608. Neglect to attend—How punished—Whenever any person duly drawn and summoned to attend as a grand juror shall, without sufficient excuse, neglect to attend, the court to which he was summoned shall impose a fine upon him of not more than thirty dollars, which shall be paid into the county treasury. (5266) [9103]

10609. Failure to report—Attachment—Every grand and petit juror drawn and summoned to attend and serve at any term of a district court shall report to such court at the time and place designated in such summons. A failure to so report shall constitute contempt of court. On the first day of the term fixed for the attendance of either the grand or petit jurors, or as soon thereafter as may be, the court shall ascertain whether the persons summoned to attend at said term as grand or petit jurors, as the case may be, have reported for duty as required by law; and, if it shall find a failure on the part of any person so summoned to report, it shall at once cause an attachment to issue against him, which shall be served by the sheriff or his deputy, and he shall be forthwith arrested and brought before the court to be dealt with according to law. But nothing in this section contained shall render liable to jury duty any person who is exempt by law. (5267) [9104]

10610. Grounds of excuse—Record—The court shall not excuse from service upon either grand or petit jury any person duly drawn and summoned, except upon the ground that he is either physically or mentally unable or unfit, in the opinion of the court, to attend or serve as a juror, or by reason of serious sickness of some immediate member of his family, provided, that in counties having more than two terms of court a year the court may, for other sufficient causes, excuse a juror from service at the term of court or period of service for which he was so drawn and summoned until a later term or period during the same year, and in such case such juror shall report for service and serve at such later term or period with the same force and effect as though he had been regularly drawn and summoned for such later term or period. The name of each person excused with the ground thereof, shall be entered by the clerk among the proceedings of the court, preserved, and open to inspection.

tion by all parties; provided further that any woman drawn upon either a grand or petit jury may, in the discretion of the court, be excused from such jury service upon request. (R. L. '05 § 5268, amended '09 c. 407 § 1; '21 c. 370 § 1) [9105]

Court may excuse a juror for over age without the consent of the accused (12-538, 448). Court may on its own motion and independently of the statute excuse a juror who appears disqualified for any reason (29-78, 11+233; 94-384, 102+913). Where the court excuses a juror without challenge it will be presumed on appeal that it acted under this section and in the exercise of a sound discretion (73-80, 75+1030).

10611. Contempt—How punished—Every law in reference to contempts shall apply equally to those committed under the provisions of this chapter, and the cases of persons charged with contempt thereunder shall be summarily disposed of by the court. Every person guilty of contempt under the provisions hereof shall be punished by imprisonment in the county jail for not more than ninety days, or by fine of not more than five hundred dollars, or by both. (5269) [9106]

10612. Special venire—In case of a deficiency of grand jurors, a special venire may be issued to the proper officer to return forthwith such further number of grand jurors as shall be required, and he shall summon such persons, who shall be bound forthwith to attend and serve, unless excused by the court in the same manner and subject to the same penalties for neglect as those duly drawn by the clerk and summoned as provided by law. (5270) [9107]

Failure of a sufficient number of grand jurors selected and summoned on the regular panel to appear when called in court is a "deficiency of grand jurors" within this section (17-76, 54). Deficiency authorizing a special venire may occur either at the time of the organization of the grand jury by a failure of a sufficient number to appear, or at any subsequent period of their services, by death, sickness, challenges to individual jurors or to the panel, or other unavoidable causes (16-313, 277; 50-123, 52+275; 69-502, 72+832). Where a disqualified juror is excused the accused cannot complain that a new juror is not summoned in his place, provided not less than sixteen remain (72-476, 75+729). Objection that additional jurors are improperly summoned by a special venire cannot be raised after arraignment (47-373, 50+362; 47-375, 50+362).

10613. Challenge—Any person held to answer a charge for a public offense may challenge the panel of the grand jury or any individual grand juror before they retire, after having been sworn and charged by the court. (5271) [9108]

1. Challenge to individual jurors—Challenge to individual juror must in all cases be made before the jury retires (23-209; 90-183, 96+330; 139-144, 165+362). This rule applies to persons who are imprisoned at the time the jury is impaneled (3-444, 329). Right to challenge a juror is limited to those who are held to answer a charge for a public offence (22-423; 90-183, 96+330). While an objection in the nature of a challenge to the panel may be made by motion to quash by a person who is not held on a charge of public offence at the time the jury was impaneled (69-502, 72+832), such a person cannot move to quash on any of the statutory grounds of challenge to individual jurors—at least, on the ground of bias or prejudice (90-183, 96+330. See 23-209).

2. Challenge to the panel—Challenge to the panel can be interposed only for some one or more of the statutory causes, whether the jury is summoned by a general or special venire (13-341, 315; 69-502, 72+832; 90-183, 96+330). Will lie on the ground that the list was not properly signed and certified by the chairman of the county board (23-209. See 47-373, 50+362). Where, at the time of the impanelling of the grand jury, a person is held to answer a charge for a public offence, the only way in which he may object to the panel is by challenge. He cannot object by motion to quash the indictment (23-209). But where he is not so held he may object to the panel on the grounds stated in the next section and on those grounds only, by a motion to quash the indictment (69-502, 72+832; 90-183, 96+330). Right to challenge panel is restricted to those who are held to answer a charge for a public offence (22-423). Right to challenge must be exercised before the jury retires and this is so although the accused is in prison at the time (3-444, 329; 4-345, 261; 13-132, 125).

3. When objections must be made generally—Objections to the grand jury are too late after a demurrer to the indictment (19-434, 418), or after a plea of not guilty (70-462, 73+403). Motion to set aside an indictment for defects in the organization of a grand jury must be made at the time of the arraignment, unless for good cause the court allows it to be made subsequently (47-373, 50+362; 47-375, 50+362). Discretion of the court in denying the accused leave to withdraw his plea of not guilty for the purpose of enabling him to move to quash the indictment on the ground that two of the members of the grand jury were aliens held properly exercised (70-462, 73+403). Objection to the authentication of the jury list cannot be made on a motion in arrest of judgment (23-291).

10614. Causes of challenge to panel—A challenge to the panel may be interposed for one or more only of the following causes:

1. That the requisite number of ballots was not drawn from the grand jury box of the county.

2. That the drawing was not had in the presence of the officers designated by law.

3. That the drawing was not had at least fifteen days before the court. (5272) [9109]

10615. Causes of challenge to juror—How tried—Decision entered—A challenge to an individual grand juror may be interposed for one or more, only, of the following causes:

1. That he is a minor.

2. That he is not a citizen of the United States.

3. That he has not resided in this state six months.

4. That he is insane.

5. That he is a prosecutor upon a charge against the defendant.

6. That he is a witness on the part of the prosecution, and has been served with process or bound by recognizance as such.

7. That a state of mind exists on his part in reference to the case or to either party which shall satisfy the court, in the exercise of a sound discretion, that he cannot act impartially and without prejudice to the substantial rights of the party challenging.

All challenges shall be entered upon the minutes and tried by the court, and the clerk shall enter its decision allowing or disallowing the challenge upon the minutes. (5273) [9110]

Decision of trial court on a challenge for bias is final; or at least will not be disturbed except for manifest error (13-341, 315). 139-165, 164+590.

10616. Effect of allowance of challenge—If a challenge to the panel is allowed, the grand jury are prohibited from inquiring into the charges against the defendant by whom the challenge was interposed; if they should, notwithstanding, do so, and find an indictment against him, the court shall direct it to be set aside. If a challenge to an individual grand juror is allowed, he shall not be present at or take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, but his place may be filled as provided in case of a deficiency of grand jurors. The grand jury shall inform the court of any violation of the provisions of this section, which shall be punished as a contempt. (5274) [9111]

10617. Foreman—Jury sworn—Charge of court—From the persons summoned to serve as grand jurors and appearing, the court shall appoint a foreman, and it shall also appoint a foreman whenever one already appointed shall be discharged or excused before such jury are dismissed. The grand jury shall then be sworn according to law, and the same oath shall be administered to any grand juror afterwards appearing and admitted as such. The grand jury shall then be charged by the court, who, in doing so, shall read to them the provisions of §§ 10620-10630, and may give

them such other information as it may deem proper as to the nature of their duties, and any charges for public offences returned to the court, or likely to come before the grand jury; but it need not charge them respecting the violation of any particular statute unless expressly made its duty by the provisions of such statute. (5275) [9112]

Charge should be repeated when new juror added (16-313, 277).

In the absence of the foreman of a grand jury, the district court has the power to appoint a foreman pro tempore, and indictments properly indorsed by a duly appointed acting foreman are not open to attack on that ground. 167-25, 208-177.

10618. Jury to retire—Clerk—Duties—The grand jury shall then retire to a private room and inquire into the offenses cognizable by them. They shall appoint one of their number clerk, who shall preserve the minutes of their proceedings, but not of the votes of the individual members on a presentment or indictment, or of the evidence given before them. (5276) [9113]

147-81, 179+640.

10619. Discharge and adjournment—On the completion of the business before them, the court may discharge a grand jury or adjourn their session from time to time during the same term; but, whether the business shall be completed or not, they shall be discharged by the final adjournment of the court. But in counties where six or more regular terms of court are provided for by law in a year, and where a grand jury is not required to be returned to every term of court, the court may, by an order entered upon the minutes, continue the grand jury to another subsequent term to which no grand jury is required to be returned, and at such subsequent term may again continue said grand jury to another subsequent term to which no grand jury is required; and the court, in its order of continuance, shall fix the time in such subsequent term for its meeting. A grand jury so continued shall have the same power at such subsequent term as if returned to the same term, and if, for any reason, less than a quorum be then present, additional jurors may be returned forthwith to supply the deficiency. (5277) [9114]

Court may adjourn sessions of grand jury from time to time during term (22-423; 67-176, 69+815), and until finally discharged by the court at the expiration of the term the jury retains all its powers and functions (22-423).

10620. Indictment and presentment defined—An indictment is an accusation in writing presented by a grand jury to a competent court, charging a person with a public offence. A presentment is an informal statement in writing by a grand jury, representing to the court that a public offence has been committed, and that there is reasonable ground for believing that a particular individual, named or described, has committed it. (5278) [9115]

10621. Powers of grand jury—The grand jury shall inquire into all public offenses committed or triable in the county, and report them to the court by presentment or indictment. Upon such inquiry, if, from the evidence, the grand jury believe the person charged to be guilty of that or any other public offense, they shall find an indictment against him; but, if they only believe that he is probably guilty, they shall proceed by presentment. (5279) [9116]

Jury may inquire of any indictable offence alleged to have been committed in the county. If it finds an indictment for such an offence in the county where, by reason of some statutory, preliminary requisite, it ought not to have found it, it is, at most, error or irregularity,

but does not affect the jurisdiction of the jury (41-50, 42+602).

10622. Evidence—For defendant—In the investigation of a charge for the purpose of indictment or presentment, the grand jury shall receive no other evidence than—

1. Such as is given by witnesses produced and sworn before them; and

2. Legal, documentary, or written evidence.

They shall receive none but legal evidence, and the best in degree to the exclusion of hearsay or secondary evidence, except when such evidence would be admissible on the trial of the accused for the offence charged. They are not bound to hear evidence for the defendant; but if, in weighing the evidence submitted to them, they have reason to believe that other evidence within their reach will explain away the charge, they shall order such evidence produced, and for that purpose may require the prosecuting attorney to issue process for the necessary witnesses. The oath to witnesses may be administered by the foreman. (5280) [9117]

1. **In general—**Statute provides that only legal evidence shall be admitted, but the illegality of the evidence cannot be shown by the affidavit of a juror (17-241, 218). If the evidence before a grand jury on a charge against one person shows that another ought also to be indicted, it is the duty of the jury to indict such other (17-241, 218. See 56-129, 57+455). When an indictment is set aside the grand jury may find a second indictment for the same offence on the same evidence on which the first indictment was found (61-73, 63+171; 138-165, 164+590; 140-363, 168+174).

209+633.

2. **Accused as witness—**If the accused is required to appear before the jury and give testimony against himself the indictment may be quashed on motion, although his name is not indorsed thereon as a witness (16-296, 260; 88-130, 92+529). Affidavit on a motion to quash for such a cause held sufficient to require the state to traverse it and the court to determine the motion on the merits (88-130, 92+529). Fact that a person may, in the investigation of some other charge by the grand jury, have been required to give evidence which would have been material on the particular charge for which he is indicted, is no cause for setting aside the indictment on the ground that he was required to testify against himself, unless it appears from indorsement or entry of his name on the indictment as a witness that the grand jury found the bill, in whole or in part, on his evidence (56-129, 57+455).

10623. Indictment found, when—The grand jury shall find an indictment when all the evidence taken together is such as, in their judgment, would, if unexplained or uncontradicted, warrant a conviction by the trial jury. (5281) [9118]

10624. Juror complainant, when—If a member of the grand jury shall know or have reason to believe that a public offence has been committed which is triable in the county, he shall declare the same to his fellow jurors, who shall thereupon investigate the same. (5282) [9119]

10625. Matters inquired into—The grand jury shall inquire:

1. Into the condition of every person imprisoned on a criminal charge triable in the county, and not indicted;

2. Into the condition and management of the public prisons in the county; and

3. Into the wilful and corrupt misconduct in office of all public officers in the county. (5283) [9120]

10626. Access to prisons and records—The grand jury shall be entitled to free access at all reasonable times to the public prisons, and to the examination, without charge, of all public records in the county. (5284) [9121]

10627. County attorney to attend—Duties—The grand jury may at all reasonable times ask the advice of the court, or of the county attorney, and whenever

required by the grand jury, the county attorney shall attend them for the purpose of framing indictments or examining witnesses in their presence; but no county attorney, sheriff, or other person, except the grand jurors, shall be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them. (5285) [9122]

Publication of facts concerning indictment prior to time of framing it, and exclusion by jurors of county attorney from grand jury, as grounds for quashing indictment (111-328, 126+1096). See 147-81, 179+640.

10628. To observe secrecy—Every grand juror shall keep secret whatever he himself or any other grand juror said, or in what manner he or any other grand juror voted, on a matter before them. (5286) [9123]

17-241, 218; 27-280, 6+791, 7+144; 56-129, 57+455; 59-259, 61+138; 111-328, 126+1096; 138-165, 164+590.

10629. To make disclosure, when—Any grand juror may, however, be required by any court to disclose the testimony of any witnesses examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witnesses before the court, or to disclose the testimony given before them by any other person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor. (5287) [9124]

27-280, 6+791, 7+144.

Upon a motion to quash an indictment based on affidavits made on information and belief, the district court may not compel a witness, who testified before the grand jury, to submit to an examination concerning the testimony he gave or the proceedings had before the grand jury. 162-351, 202+737.

10630. Action not to be questioned—Exception—A grand juror shall not be questioned for anything he may say or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may be guilty in making an accusation, or giving testimony to his fellow jurors. (5288) [9125]

10631. Presentment, how found—Procedure—Violation, how punished—No presentment shall be found without the concurrence of at least twelve grand jurors. When so found it shall be signed by the foreman, whether he be one of the twelve concurring or not, and by him, in the presence of the grand jury, presented to the court and filed with the clerk. When the grand jury shall make a presentment, they shall return to the court therewith the testimony, or a copy thereof, of each witness examined before them upon which such presentment is made, which shall be filed with the clerk of the court, and shall not be inspected by any person except the court, the clerk of the court, and his deputies and assistants, the attorney general, and the county attorney, until after the arrest of defendant. Every person who shall violate any provision hereof shall be guilty of contempt and of a misdemeanor, and be punished therefor as provided by law. (5289) [9126]

This and the following section not applicable to indictments (117-384, 135+1128).

10632. Defendant may have copy of testimony—After the arrest of the defendant, the clerk, on payment of his fees within two days after demand, shall furnish a copy of the testimony so filed with him to the defendant or his counsel. (5290) [9127]

10633. Indictment or presentment kept secret—No grand juror, county attorney, clerk, judge, or other officer shall disclose the fact that a presentment has been made, or an indictment found, until the defendant shall have been arrested; but this shall not extend to a disclosure by the issuance or in the execution of a

warrant of arrest. Every person violating the foregoing provision shall be guilty of a contempt and a misdemeanor, and punished therefor according to law. (5291) [9128]

10634. Bench warrant—Issuance—If the court shall think that the facts stated in the presentment constitute a public offense triable in the county, it shall direct the clerk to issue a bench warrant for the arrest of the defendant; and the clerk, on application of the county attorney, may accordingly, at any time after such order, whether the court is in session or not, issue a bench warrant under his signature and the seal of the court, in substantially the following form: (5292) [9129]

Cited (117-384, 135+1128).

10635. Form of warrant—How served—The bench warrant upon a presentment shall be substantially in the following form:

State of Minnesota,)

County of) ss.

The State of Minnesota, to any Sheriff or Constable in the Said State, Greeting:

A presentment having been made on the day of, 19...., to the district court for the county of, in the state aforesaid, charging C. D. with the crime of (here designate the charge generally): Therefore, you are commanded forthwith to arrest the above named C. D. and take him before E. F., a magistrate of this county, or, in case of his absence or inability to act, before the nearest and most accessible magistrate in this county, there to be dealt with according to law.

Witness the Honorable

At the day of 19....

By order of the court. C. H., Clerk.

It may be served in any county in the state, and the officers serving it shall proceed therein in all respects as upon a warrant of arrest on complaint. (5293) [9130]

10636. Proceedings on arrest—Upon arrest of defendant, the clerk with whom the presentment and testimony are filed shall, without delay, furnish to the magistrate before whom the defendant is taken a certified copy thereof. The magistrate shall proceed upon the charge contained in the presentment in the same manner in all respects as upon a warrant of arrest upon complaint. (5294) [9131]

Cited (117-384, 135+1128).

10637. Indictment—How found and indorsed—Names of witnesses—No indictment shall be found without the concurrence of at least twelve grand jurors. When so found, it shall be indorsed, "A true bill," and the indorsement signed by the foreman, whether he be one of the twelve concurring or not. If twelve grand jurors shall not concur in finding an indictment or presentment, the charge shall be dismissed, but such dismissal shall not prevent its being again submitted to a grand jury as often as the court shall direct. When an indictment is found, the names of the witnesses examined before the grand jury shall in all cases be inserted at the foot of the indictment, or indorsed thereon, before it shall be presented to the court. (5295) [9132]

167-25, 208+177, notes under §§ 10603, 10617.

In an information, neither the Constitution nor the statute requires the indorsement thereon of the words "A true bill," nor is it necessary to insert the names of the witnesses. 157-168, 195+776.

1. Signing by foreman—Objection that the indictment is not signed by the foreman is waived if not made by motion to quash or by demurrer (10-223, 178).

2. Evidence of finding—Fact that an indictment is indorsed "a true bill," the indorsement signed by the foreman and the indictment properly filed, is evidence that the indictment has been "found" by the grand jury (17-76, 54; 17-241, 218).

3. Number of votes necessary—Indictment cannot be found without the concurrence of at least twelve jurors (72-476, 75+729).

4. Indorsing names of witnesses—The witnesses whose names are required to be indorsed on the indictment, or inserted at the foot thereof, are only those who were examined and gave material evidence on the particular charge alleged in the indictment, at the time when such charge was being investigated by the grand jury. It is not required to indorse or enter the names of the witnesses, who, while other charges were being investigated, may have given evidence material on the charge alleged in the indictment, unless the grand jury found the indictment in whole or in part on such evidence. Fact that the names of such witnesses are not indorsed or entered on the indictment is conclusive that the grand jury did not take such evidence into account in finding "a true bill" (56-129, 57+455; 144-32, 174+529, 195+776). See 17-241, 218). Where in the investigation by a grand jury of a charge against one person, evidence is elicited which proves that another person is guilty of the same or another crime, the jury may, on such evidence, indict the latter person without recalling and re-examining the witnesses; and the names of such witnesses should be indorsed on the indictment (17-241, 218). Where the accused is required to give evidence against himself before the jury the indictment will be quashed although his name is not indorsed thereon (88-130, 92+529). Fact that persons whose names are indorsed were not sworn and examined cannot be shown by the affidavit of a juror (17-241, 218). State not bound to call and examine all the witnesses whose names are indorsed (78-362, 81+17; 100-107, 110+353). If not called by state, witness may be called by defendant, and failure of either to call may, in discretion of court, be commented on by either counsel (100-107, 110+353).

5. Resubmission—113-96, 129+148.

10638. Indictment presented, filed, and recorded—Effect—Whenever an indictment is found, it shall be immediately presented by the foreman, in the presence of the grand jury, to the court, filed with the clerk, recorded in a book kept for that purpose as soon as the arraignment shall have been made, and remain in said clerk's office as a public record. The clerk shall certify at the bottom of the record that he has compared the same with the original, and that it is a true copy thereof. Such record shall have all the force and effect of the original indictment, and in case such indictment should be lost, mislaid, or for any reason not be before the court, any proceeding may be had upon such record in the same manner and with the same effect as if the original was before the court; and in such case no trial, conviction, or sentence shall be invalid by reason of the fact that the original indictment has disappeared from the files of the court after the recording thereof. (5296) [9133]

162-393, 203+49; notes under § 10655; 167-25, 203+177, notes under § 10603, 10617.

Presentment—Indictment found and properly filed is presumed to have been presented to the court. Clerk receives the indictment from the grand jury and files it in silence, allowing no one to inspect it but the judge and county attorney. Not customary to make any note of it in the minutes at the time, if the accused has not been arrested. Record when finally made up should show a due presentment (17-241, 218).

INDICTMENTS

10639. Contents—The first pleading on the part of the state is the indictment, which shall contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

2. A statement of the acts constituting the offence, in ordinary and concise language, without repetition. (5297) [9134]

210+1001.

Indictment examined, and held (1) that it states a public offense, and (2) that it substantially conforms to the requirements of sections 9134 and 9136, G. S.

1913, as qualified by section 9142, G. S. 1913. 159-245, 199+6.

Exceptions and provisos to a criminal statute do not require a negative allegation in an information or indictment, unless they are, in the language of the statute, a part of the definition or description of the offense. 166-116, 207+19.

1. Caption—Indictment for a crime committed in an organized county, to which others are attached for judicial purposes, may be entitled as in all of the counties (16-282, 249). Where several counties are attached for judicial purposes, entitling an indictment only in the name of the county to which the others are attached is a defect of form merely (17-76, 54). Number of the judicial district is no part of the title of the district court and if stated erroneously may be rejected (22-67). All criminal prosecutions whether under statutes or ordinances are properly prosecuted in the name of the state (89-502, 95+449).

2. Commencement or accusing clause—Commencement in the following words is sufficient: "The grand jurors of the county of Rice, in the state of Minnesota, upon their oaths, present that, etc." (4-345, 261). Error in designating name of offense in commencement an irregularity merely (22-67; 66-309, 68+1096). Commencement is strictly no part of the indictment. Fact that the name of the accused is not repeated in the commencement is not material (41-140, 42+790). Where a crime has a name and is divided into several classes or degrees it is sufficient if the accused is charged with the offense by name in the accusing clause and the particular degree or class is made out in the charging part (8-220, 190). An indictment which alleges that the defendant is accused of having committed an offense, but which does not directly charge that he committed the offence, is insufficient (79-388, 82+650; 84-357, 87+935).

3. Laying venue—Every indictment must allege the place where the crime was committed in order to show that it was committed within the jurisdiction of the court and to apprise the accused of the offence charged with certainty. It is the general rule that it must be alleged that the offence was committed within the county in which the indictment is found. But where an offence is committed within one hundred rods of the dividing line between two counties an indictment may be found in either county and it may be alleged that the offence was committed in the county where it was found or that it was committed in the other county within one hundred rods of the dividing line (14-447, 333. See 25-66; 45-128, 47+541). Not necessary to allege the particular place in the county (6-279, 190). Proper county being named in the caption it is sufficient to lay the venue "in said county" (26-388, 5+970), or "in the county aforesaid" (12-490, 393). But the phrase "then and there" is insufficient, standing alone (12-490, 393). Under an indictment charging the offence to have been committed in a certain county the accused may be convicted if the offence was committed on a vessel which passed through the county on the voyage in the course of which the act took place (4-325, 241). Where a blow is inflicted in one county and death ensues in another county and state the venue may be laid in the former county (21-369). Court cannot amend an indictment by inserting an allegation as to venue (4-335, 251).

4. The charging part—The charging part of the indictment is alone to be considered in determining whether the indictment charges a public offence (66-309, 68+1096. See 79-388, 82+650).

5. Direct charge necessary—There must be a direct charge against the accused that he committed the offence. A recital that he is accused of having committed it is not a charge that he has committed it (79-388, 82+650).

6. Mode of charging accessory before the fact—An indictment against an accessory before the fact may charge him directly with the commission of the offence as if he personally committed it, or it may directly charge him as a principal by stating the facts which at common law would make him an accessory before the fact (17-241, 218; 84-357, 87+935).

7. Mode of charging accessory after the fact—An indictment charging the accused with being an accessory to a felony after the fact should allege facts constituting the felony with the same degree of certainty as though the person who committed it were alone indicted (88-175, 92+965).

8. Misnaming offence—Sufficiency of indictment not affected by fact that grand jury misnames or neglects to name offence charged (4-345, 261; 11-154, 95; 18-518, 464; 22-67; 66-309, 68+1096).

9. Words used—Statute provides that "ordinary and concise language" shall be used. Object of this provision was to free criminal pleading of the formality, technicality and tautology of common law pleading (4-345, 261; 38-368, 37+587; 66-309, 68+1096). The words of the statute need not be strictly pursued, but other words conveying the same meaning may be used (38-368, 37+587; 48-466, 51+474; 77-296, 79+1007). If an indictment states fully, directly and clearly acts constituting a pub-

lic offence it is immaterial in what form of words the acts are alleged (33-368, 37+587).

10. Use of technical and composite words.—The statute providing for the use of ordinary and concise language and the rule against pleading legal conclusions do not prohibit the use of technical words or words of a composite meaning compounded of law and fact. Thus, instead of pleading all the minute facts constituting an ultimate fact it is sufficient to use such words as "assault" (26-388, 5+970; 35-182, 28+192); "forge" (76-211, 78+1042); "take" (47-449, 50+692); "executed" (47-483, 50+532); "sell" and "sold" (26-526, 6+339), "indecent liberties" (90-526, 97+131); "ravish" (6-279, 190); "being aided by an accomplice actually present" (71-399, 73+1091).

11. Use of words "feloniously," "criminally" and "unlawfully."—It is not necessary to use the word "feloniously" in an indictment for a felony and its use in an indictment for a misdemeanor is not fatal (12-293, 191; 17-72, 50). Where the statute in defining a crime does not use the words "feloniously" or "criminally" it is not necessary to use them in an indictment (11-154, 95). The words "feloniously" and "unlawfully" held properly disregarded as surplusage (17-72, 50).

12. Alleging intent.—As a general rule it is not necessary to allege an intent to do the acts charged as it is presumed that an act was intentionally done, but when a specific intent is an essential element of an offense such intent must be directly alleged (5-13, 1; 27-309, 7+264; 66-309, 68+1096).

13. Alleging date of offence.—The precise time at which the offence was committed need not be alleged but it may be alleged to have been committed at any time before the finding of the indictment, except where the time is a material ingredient in the offence (23-569; 26-526, 6+339; 65-230, 68+11). See 78-362, 81+17. An indictment is sufficient in this regard if it can be understood therefrom "that the offence was committed at some time prior to the time of finding the indictment" (13-370, 343; 26-526, 6+339). It is ordinarily sufficient to allege the time as "on or about" a specified day (26-526, 6+339). Where the offence is not of a continuous nature it is improper, but not fatal, to allege the time as of a specified day "and divers other days and times since said day" (26-148, 1+1054). Where the time was alleged as "the fifth day of July, one thousand eight hundred and seventy-one" the omission of the word "year" was held not fatal (22-67). Ordinarily the offence need not be proved as of the date alleged (22-76; 23-569; 26-526, 6+339; 41-50, 42+602; 45-128, 47+541; 65-230, 68+11).

14. Essential elements to be alleged.—Every essential element of the offence must be alleged directly and certainly (137-195, 163+282). No allegation may be omitted if without it a criminal offence would not be described (5-13, 1; 27-309, 7+264; 29-134, 12+353; 82-317, 84+1015; 88-171, 92+541). Nothing can be inferred, intended or presumed that is necessary to be alleged as an essential element of a crime (91-365, 378, 98+190). Cited (105-251, 117+482; 141-207, 169+712; 142-327, 171+930).

15. Anticipating defence.—It is sufficient to allege facts constituting a public offence prima facie. It is not necessary to anticipate and negative possible defences (35-182, 28+192).

16. Ultimate facts.—Only the ultimate facts constituting the offence need be alleged. It is not necessary to allege evidentiary facts (29-78, 11+233; 71-399, 73+1091; 86-418, 90+786; 88-171, 92+541).

17. Facts and not conclusions of law.—An indictment must allege facts and not conclusions of law (71-399, 73+1091; 76-211, 78+1042).

18. Following language of statute or ordinance.—An indictment charging an offence in the language of the statute is ordinarily sufficient (11-154, 95; 22-271; 22-311; 23-549; 26-526, 6+339; 29-142, 12+455; 36-62, 30+305; 38-368, 37+587; 41-41, 42+543; 48-466, 51+474; 71-399, 73+1091; 76-211, 78+1042; 77-128, 79+656; 88-262, 92+976; 89-502, 95+449). But the rule is otherwise where the statute does not set forth all of the elements of the offence intended to be punished. If the statute simply names the offence or defines it by its legal result the indictment must allege with certainty all the particular facts necessary to bring the case within the statute (66-309, 68+1096; 78-387, 81+202). The modern tendency is to restrict the exceptions to the general rule (23-311). The judicious pleader will always follow the exact language of the statute and there is no real safety in any other course (48-466, 51+474). But the precise words need not be strictly pursued. Words may be used which are the equivalent in meaning of those found in the statute (77-296, 79+1007). It is to be presumed that all the words used to define an offence are essential and it is accordingly necessary to employ them all or their equivalent in an indictment (5-13, 1). In a complaint under an ordinance it is sufficient to follow the language of the ordinance if it sets forth all the essential elements of the offence (36-62, 30+305; 89-502, 95+449).

19. Negating exceptions.—An indictment must negate exceptions or provisos found in the enacting clause of the statute on which it is based (12-476, 378, 19-93, 65; 67-10, 69+474; 70-12, 72+732; 82-317, 84+1015; 90-526, 97+131. See 69-499, 72+832). The enacting clause, within the meaning of this rule, is that part of the statute which defines the offence. An exception or proviso, which is no part of the enacting clause and is not descriptive of the offence, need not be negated, whether it is found in the same section as the enacting clause, or in a separate one. The test whether an exception or proviso must be negated is whether it is descriptive of the offence (70-12, 72+732). An exception in a subsequent independent statute need not be negated (69-423, 72+700). An exception may be introduced by the word "unless" as well as by the word "except" (19-93, 65). If an act is made unlawful unless done with the consent of some person the consent must be negated (26-191, 2+492).

20. Exhibits.—In pleading a written instrument it should be incorporated in the indictment and not attached as an exhibit. But where an instrument is attached as an exhibit and made a part of the indictment by apt reference it will be deemed a part of the indictment on demurrer (32-537, 21+746).

21. Names.—Misnomer.—Idem sonans.—Where a person is called in an indictment, in describing the offence, by a name other than his true name, but he is known as well by such other name as his true name, it is not a variance (41-50, 42+602. See 40-55, 41+299). In describing an offence it is sufficient to give only the initial of the Christian names of third parties (26-90, 1+821). A variance as to the initial of the middle name of a third party held immaterial (43-273, 45+449). Where the indictment charged the seduction of "Anne Forrest" and it appeared at the trial that her surname was spelled "Fourai," that she was a French Canadian and that the accused spoke French held that he was not misled by the misspelling and that there was no misnomer (4-325, 241). Held, not a fatal variance between "Tonny Barron," "Tony Baron" and "Antonio Barone" (83-432, 86+419). The variance between "Fred Vongard" and "William Bungard" held fatal (40-55, 41+299). The variance between "Kurkowski" and "Kurkowski" held immaterial (26-316, 3+982). A failure to repeat the name of the accused in the commencement of the indictment held not fatal (41-140, 42+790). Use of the word "railroad" for "railway" in naming a company held immaterial (30-522, 16+406).

22. Alleging name of person injured.—As a general rule it is necessary, as a requirement of a certainty of description, to state the name of the person injured, if known, and if not known, to so state (3-438, 325; 27-309, 7+264; 31-207, 17+344; 83-432, 86+419). An indictment for the embezzlement of certain promissory notes held sufficient although it did not state the name of the payee of the notes (72-296, 75+235).

23. Alleging corporation.—In naming a corporation in an indictment it is sufficient to give its corporate name and add "a corporation." It is not necessary to allege its incorporation or the place of its incorporation where those facts are not directly involved (27-521, 8+758; 72-296, 75+235). And it is ordinarily sufficient to prove it a corporation in fact (72-296, 75+235). A mistake in using "railroad" instead of "railway" in describing a corporation held immaterial (30-522, 16+406). A failure to allege that a company was a corporation held immaterial (86-206, 90+398).

24. Alleging that fact is unknown.—Where a mere descriptive fact not vital to the accusation is unknown it may be stated as unknown (16-109, 99; 29-142, 12+455; 30-522, 16+406; 31-207, 17+344; 84-357, 87+935; 91-365, 98+190; 98-515, 108+953). Such an allegation is not traversable (16-109, 99).

25. Conjunctive and disjunctive allegations.—Where a statute declares that the doing of a thing by any of several means shall constitute a criminal offence an indictment charging the act as having been done by all of such means set forth conjunctively is ordinarily sufficient if the means are not repugnant in themselves (29-142, 12+455; 30-52, 14+258). An indictment charging conjunctively matters which might be charged in the alternative is sufficient (29-142, 12+455).

26. Facts presumed.—Facts that will be presumed in the absence of evidence need not be alleged (35-182, 28+192).

27. Facts judicially noticed.—Facts of which judicial notice will be taken need not be alleged (89-502, 95+449).

28. Collective allegation against several.—An indictment against two or more persons may charge the act to have been done by them collectively (37-493, 35+373).

29. Use of videlicet.—To wit.—If an allegation is essential the fact that it follows a videlicet (to wit) is immaterial. Where the matter alleged under a videlicet is essential, entering into the substantial description of the offence, the averment is regarded as positive and direct, and is traversable. It will then be treated as particularizing that which was before general, or as explaining that which was before obscure (50-123, 52+275). It

seems that a videlicet will prevent a non-essential allegation from becoming essential by association with an essential descriptive allegation (23-549; 32-537, 21+746).

30. Obscene facts—Obscene facts may be described in general terms (90-526, 97+131).

31. Surplusage—An indictment is not vitiated by the presence of unnecessary and immaterial words. Such words may be disregarded as surplusage (10-407, 325; 11-154, 95; 17-72, 50; 22-67; 23-549; 26-148, 1-1054; 71-399, 73+1091; 80-314, 83+182; 98-515, 108+953), unless they are essential by being inseparably connected with essential words so as to become descriptive of the identity of that with which they are connected (23-549; 27-309, 7+264). Where an indictment charges two offenses, but one inadequately, the latter may be disregarded as surplusage (39-464, 40+564). A name cannot be disregarded as surplusage if it is descriptive of the identity of an essential element of the offence (27-309, 7+264).

32. Repugnancy—Where one material part of an indictment is repugnant to another the indictment is insufficient (29-142, 12+455; 30-522, 16+406).

33. Specific and general allegations—Specific allegations control general allegations and where it is attempted to allege the particular facts constituting a general or ultimate fact all the particular facts must be alleged (29-78, 11+233; 59-147, 60+1088).

34. Words construed according to common usage—The meaning which, in ordinary use, attaches to words not technical will be given to them in an indictment (22-67; 26-526, 6+339; 89-502, 95+449).

35. Conclusion against the peace and the statute—The constitution provides that all indictments shall conclude "against the peace and dignity of the State of Minnesota" (Const. art. 6, § 14). Possibly a failure to comply with this provision is a mere formal defect (see 12-80, 43; 19-17, 1). If a statute does not create a crime but simply prescribes its punishment the indictment need not conclude against the form of the statute (6-279, 190; 17-72, 50; 18-518, 464). Putting the date when and the place where found, at the end of an indictment, after the words "against the peace and dignity of the state of Minnesota" does not vitiate it (37-493, 35+373). The only purpose of the clause "against the form of the statute" is to show that the prosecution is based on a statute and not on a common law offence, and since the repeal of all common law offences it is functionless except in cases where the same acts are declared to be an offence and punishable both by statute and by a municipal ordinance. In such cases the indictment or complaint ought to conclude contrary to the statute or ordinance as the case may be (89-502, 95+449. See 21-47). A complaint for the violation of an ordinance concluding against both the statute and the ordinance, held not double on that account (84-367, 87+916).

10640. Form—The indictment may be substantially in the following form:

The District Court for the county of and state of Minnesota.

The State of Minnesota

vs.

A. B.

A. B. is accused by the grand jury of the county of by this indictment of the crime of (here insert the name of the offence, if it has one, such as murder, arson, or the like, or, if a misdemeanor having no general name, insert a brief description of it as given by law) committed as follows:

The said A. B., on the day of, 19...., at the town (city, or village, as the case may be) of in this county (here set forth the offence).

Dated at, in the county of, the day of, 19....

(Indorsed) A true bill.

G. H., Foreman of the Grand Jury.

(5298) [9135]

Cited (105-251, 117+482; 137-195, 163+282).

10641. To be direct and certain—The indictment shall be direct and certain as it regards:

1. The party charged.
2. The offence charged.
3. The particular circumstances of the offence charged, when they are necessary to constitute a complete offence. (5299) [9136]

1. Allegations must be direct—The material facts constituting the offence must be alleged directly and positively and not inferentially, argumentatively or by way of recital (65-121, 67+798; 66-309, 68+1696; 79-388, 82+650; 82-448, 85+229; 88-175, 92+965; 91-365, 98+190; 105-251, 117+482). There must be a direct charge against the accused that he committed the offence. A recital that he is accused of having committed it is not a charge that he has committed it (79-388, 82+650).

2. Matters of inducement—Matters of inducement need not be alleged with the same degree of certainty as the facts constituting the gist of the offence (77-128, 79+656). Matters of inducement held not to render an indictment double (78-311, 81+3). All matters of inducement which are necessary to show that the act charged is a criminal offence must be stated (77-128, 79+656).

3. Certainty—The constitution provides that "in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation" (Const. art. 1 § 6). This principle is not original with the constitution, but is as old as the common law itself. The constitutional provision is but declaratory of what the law has always been and hence is to be construed in its historical sense. The information required by the constitution must be contained in the indictment (74-409, 77+223; 91-365, 98+190). Neither did the statute effect any essential change in the law. The common law required the same certainty. It is a general rule of criminal pleading that the offence charged should be described with reasonable certainty, that the accused may know for what offence he is required to answer, that the court may render a proper judgment, and that the conviction or acquittal may be pleaded in bar of another prosecution for the same offence (22-311; 25-368; 29-142, 12+455; 31-207, 17+344; 74-409, 77+223; 82-448, 85+229; 91-365, 98+190; 137-195, 163+282). An indictment is sufficiently certain if "the act or omission charged as the offence is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case" (22-67; 25-66; 59-514, 61+677; 66-309, 68+1096; 81-134, 139, 83+512). The offence charged must be described with sufficient certainty to identify it (25-368; 26-90, 1+821), and to enable the court to determine that the acts alleged constitute a criminal offence (5-13, 1). This degree of certainty must extend to every essential element of the offence (5-13, 1; 12-490, 393; 65-121, 67+798), and to "the particular circumstances of the offence charged when they are necessary to constitute a complete offence" (19-93, 65; 29-142, 12+455; 66-309, 68+1096; 79-388, 82+650). The general rule is limited by the possibilities of the case and should not be so applied as to make the execution of the criminal law depend upon criminals leaving open to discovery by the grand jury the precise methods by which crime has been perpetrated and all the circumstances of its accomplishment. Hence the grand jurors are allowed to state that a particular fact not vital to the accusation is to them unknown (29-142, 12+455). Ordinarily the rule is not applicable to time (22-514; 29-142, 12+455), matters not essentially descriptive of the offence (22-514).

210+1001.

Indictment for taking part in auditing and approving for payment a fraudulent claim against the state held to state the acts constituting the offence with sufficient particularity to inform the defendant of the nature and cause of the accusation against him. 159-228, 198+543.

Indictment examined, and held (1) that it states a public offence, and (2) that it substantially conforms to the requirements of sections 9134 and 9136, G. S. 1913, as qualified by section 9142, G. S. 1913. 159-245, 199+6.

4. Bill of particulars—Where the offence is of a general nature and the charge is in general terms the state may be required to file a specification of the particular acts relied on to sustain the charge (65-230, 68+11. See 62-7, 64+51).

See 142-326, 171+930.

10642. Fictitious name—When a defendant shall be indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name shall be discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment. (5300) [9137]

Cited (105-251, 117+482).

10643. Different counts—When by law an offence comprises different degrees, an indictment may contain counts for the different degrees of the same offence, or for any of such degrees. The same indictment may contain counts for murder, and also for manslaughter, or different degrees of manslaughter. Where the offence may have been committed by the

use of different means, the indictment may allege the means of committing the offence in the alternative. Where it is doubtful to what class an offence belongs, the indictment may contain several counts, describing it as of different classes or kinds. (5301) [9138]

Different degrees (13-121, 112; 126-396, 148+283). Alternative statement of means (22-238; 29-142, 12+455; 73-140, 76+33). Doubt as to class (13-121, 112).

Defendant, indicted for arsenic, asked the court to require the state to elect whether it will attempt to prove that he personally set the fire or caused another to set it. The court's refusal to require an election was not error. 210+833.

10644. Time, how stated. The precise time at which the offence was committed need not be stated in the indictment, but may be alleged to have been committed at any time before the finding thereof, except where the time shall be a material ingredient in the offence. (5302) [9139]

23-569; 26-526, 6+339; 65-230, 68+11; 123-451, 143+1126; 148-389, 182+452.

A person may be convicted of keeping a place where intoxicating liquor is sold without any direct proof a sale on the date alleged. 166-466, 208+189.

Definiteness as to time. 215+46.

10645. Erroneous allegation as to person injured—When the offence shall involve the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be material. (5303) [9140]

3-438, 325; 27-309, 7+264; 50-123, 52+275; 83-432, 86+419; 86-432, 90+1108.

A variance in the name of the person to whom defendant was charged with selling adulterated butter cannot be taken advantage of in this court, unless raised in the court below. 156-27, 194+17.

An indictment for robbery, charging defendant with the felonies taking of the property of A. in the presence and against the will of B., by force and violence, is not fatally defective because it fails to aver that B. had any relationship to A., or the possession or control of the property or any duty with respect to it. 157-272, 196+674.

10646. Words of statute need not be followed—Words used in the statutes to define a public offence need not be strictly pursued in the indictment, but other words conveying the same meaning may be used. (5304) [9141]

38-368, 37+587; 48-466, 51+474; 77-296, 79+1007.

A simple statement of the facts constituting the offence is sufficient. 166-116, 207+19.

10647. Tests of sufficiency—The indictment shall be sufficient if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it, though the name of the court is not accurately stated.

2. That it was found by a grand jury of the county in which the court was held.

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with the statement that he has refused to discover his real name.

4. That the offence was committed at some place within the jurisdiction of the court, except where, as provided by law, the act, though done without the local jurisdiction of the county, is triable therein.

5. That the offence was committed at some time prior to the time of finding the indictment.

6. That the act or omission charged as the offence is clearly and distinctly set forth, in ordinary and concise language, without repetition.

7. That the act or omission charged as the offence

is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case. (5305) [9142]

Statutory test applied (13-370, 343; 14-447, 333; 17-76, 54; 18-518, 464; 22-67; 25-66; 26-526, 6+339; 50-128, 52+387; 65-121, 67+798; 66-309, 68+1096; 78-311, 81+3; 81-134, 83+512; 82-448, 85+229; 91-365, 98+190; 112-108, 127+438; 118-64, 136+419). Other tests are sometimes applied. One test of an indictment is, will it protect the accused from a second prosecution for the same offence? (82-317, 84+1015). Another is, are the essential, ultimate facts alleged consistent with the innocence of the accused? If such facts are reconcilable with the innocence of the accused the indictment is bad (81-134, 83+512).

See 137-195, 163+282; 142-326, 171+930.

Indictment examined, and held (1) that it states a public offence, and (2) that it substantially conforms to the requirements of sections 9134 and 9136, G. S. 1913, as qualified by section 9142, G. S. 1913. 159-245, 199+6.

210+1001.

The indictment charged the defendant with having sold and furnished intoxicating liquor to a girl of the age of 16 years. Read as a whole, it appeared with a sufficient degree of certainty that the gravamen of the offence was giving intoxicating liquor to the girl. 211+319.

10648. Formal defects disregarded—No indictment shall be insufficient, nor shall the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. At any time before the commencement of the trial the court may permit the amendment of an indictment by counsel for the state both as to form and substance, provided no change is made in the name or identity of the crime charged, and provided that in case an amendment is made the defendant shall be given reasonable notice thereof and shall have, if he desires it, such further reasonable time as the court may deem proper in which to prepare his defense, which further time shall be at least four days after notice of the amendment, if demanded by the defendant. (5306) [9143] (Amended '27, c. 297)

Statute applied (13-370, 343; 17-76, 54; 22-67; 38-368, 37+587; 50-128, 52+387; 86-206, 90+398; 112-108, 127+438). This and other statutory provisions (§§ 10639, 10646, 10647) were enacted to free criminal pleading of the excessive technicality, formality and tautology of the common law. They should be construed liberally (4-345, 261; 38-368, 37+587; 66-309, 68+1096). Indictments are therefore to be construed, not with reference to the canons of common law pleading, but in accordance with the more liberal and more reasonable rules prescribed by statute (22-311; 47-559, 50+691; 50-128, 52+387; 79-94, 99, 81+750; 121-381, 141+526; 126-396, 148+283; 141-207, 169+712). These provisions, however, were not intended to encourage laxity in criminal pleading and do not affect the rule that indictments must be direct and certain as to every essential element of the offence (12-490, 393; 66-309, 68+1096; 82-448, 85+229).

210+1001; 167-25, 208+177, notes under § 10603, 10617.

10649. Judgment, how pleaded—In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made. The facts constituting jurisdiction shall, however, be established on trial. (5307) [9144]

10650. Private statute, how pleaded—In pleading a private statute, or right derived therefrom, it shall be sufficient to refer to the statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof. (5308) [9145]

27-521, 8+758.

10651. Indictment for libel—An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the

defamatory matter on which the indictment is founded, but it shall be sufficient to state generally that the same was published concerning him, and the fact that it was so published shall be established on the trial. (5309) [9146]

10652. Misdescription of forged instrument—When an instrument which is the subject of an indictment for forgery has been destroyed or withdrawn by the act or procurement of the defendant, and the fact of the destruction or withholding shall be alleged in the indictment and established on the trial, the misdescription of the instrument shall be immaterial. (5310) [9147]

10653. Indictment for perjury—In an indictment for perjury or subornation of perjury, it shall be sufficient to set forth the substance of the controversy or matter in respect to which the offence was committed, and what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed. (5311) [9148]

74-409, 77+223; 153-167, 190+48.

10654. Compounding felony indictable—A person may be indicted for having, with the knowledge of the commission of a public offence, taken money or property of another, or a gratuity or reward, or an engagement or promise therefor, upon an agreement or understanding, express or implied, to compound or conceal the offence, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offence has not been indicted or tried. (5312) [9149]

10655. Limitations—Indictments for murder may be found at any time after the death of the person killed; in all other cases, indictments shall be found and filed in the proper court within three years after the commission of the offence; but the time during which the defendant shall not be an inhabitant of, or usually resident within, this state, shall not constitute any part of the said limitation of three years. (5313) [9150]

191+605, 123-392, 143+971.

The operation of the statute of limitations is not suspended by merely filing an information within the time allowed by section 10655, G. S. 1923. Unless the information is filed to enable the accused to enter a plea of guilty, as provided by section 10667, it must be presented to the court within three years after the date of the commission of the offence with which the accused is charged. 162-393, 203+49.

10656. Offence committed on vessel, where indictable and triable—When any offence shall be committed within this state on board of a vessel navigating any river or lake, an indictment for the same may be found in any county through which, or any part of which, such vessel shall be navigated, during or in the course of the same voyage or trip, or in the county where such voyage or trip terminates; and such indictment may be tried, and a conviction thereon had, in any such county, in the same manner and with the like effect as in the county where the offence was committed. (5314) [9151]

4-325, 241.

10657. Offences on public conveyances—Jurisdiction—The route traversed by any railway car, coach, train, or public conveyance, and the lake or stream traversed by any boat, shall be deemed and are hereby declared

to be criminal districts; and jurisdiction of all public offences which shall be committed on any such railroad car, coach, train, boat, or other public conveyance, or at any station or depot upon such route, shall be in any county through which said car, coach, train, boat, or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. (5315) [9152]

10658. Offence committed on county lines, where prosecuted—Offences committed on the boundary lines of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment to have been committed in either of them, and may be prosecuted and punished in either county. (5316) [9153]

14-447, 333; 25-66; 45-128, 47+541.

10659. Death ensuing in another county—Prosecution—If any mortal wound shall be given, or other violence or injury inflicted, or any poison administered, in one county, by means whereof death shall ensue in another county, the offense may be prosecuted in either county; and if it be doubtful in which one of two or more counties such mortal wound was given or such other violence or injury was inflicted or such poison was administered, or if it be doubtful in which one of two or more counties death ensued by means whereof, the offense may be prosecuted in any one of such two or more counties. (R. L. '05 § 5317, G. S. '13 § 9154, amended '23 c. 53 § 1)

21-369; 78-362, 81+17.

10660. Prosecution in county where death ensues in all cases—If any such mortal wound shall be inflicted, or other violence or injury done, or poison administered, either within or without the limits of this state, by means whereof death shall ensue in any county thereof, such offence may be prosecuted and punished in the county where such death happens. (5318) [9155]

10661. Death out of state—Prosecution—In all cases of felonious homicide, where the assault shall have been committed in this state, and the person assaulted shall die without the limits thereof, the offender shall and may be indicted, tried, and punished for the crime so committed, in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this state. (5319) [9156]

21-369; 78-362, 81+17.

10662. Larceny by clerks, agents, etc.—Evidence—In any prosecution for the larceny of money, bank notes, checks, drafts, bills of exchange, or other security for money, of any person, by a clerk, agent, or servant of such person, it shall be sufficient to allege generally in the indictment a larceny of money to a certain amount, without specifying any particulars of such larceny, and on the trial evidence may be given of any such larceny committed within six months next after the time stated in the indictment; and it shall be sufficient to maintain the charge in the indictment, and not be deemed a variance, if it is proved that any money, bank note, check, draft, bill of exchange, or other security for money of such person, of whatever amount, was stolen by such clerk, agent, or servant within the said period of six months. (5320) [9157]

22-76; 62-7, 64+51; 65-230, 68+11.

167-216, 208+761.

10663. Evidence of ownership—In the prosecution of any offence committed upon, or in relation to, or in any way affecting real estate, or any offence committed

in stealing, destroying, injuring, or fraudulently receiving or concealing any money, goods, or other personal estate, it shall be sufficient, and shall not be deemed a variance, if it shall be proved on trial that, at the time when such offense was committed, either the actual or constructive possession, or the general or special property, in the whole or any part of such real or personal estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof. (5321) [9158]

50-123, 52+275; 103-92, 114+363.

INFORMATIONS

10664. Powers of district court—The district courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon informations for the crimes, misdemeanors and offenses, specified in section four [10667] of this act and to issue writs and process and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictment. ('05 c. 231 § 1) [9159]

153-153, 189+1023, 195+776.

157-168, 195+776, note under § 10667; 163-154, 203+771, note under § 10665; 164-328, 205+63; 165-423, 206+952.

10665. Information shall state, what—Provisions applicable—The offense charged in any such information shall be stated in plain and concise language, without prolixity or unnecessary repetition, and all the provisions of law relating to indictments and for testing the validity thereof, shall apply to informations, and all provisions of law applying to prosecutions upon indictments, to writs and process thereon, and to the issuing and service thereof; to motions, pleadings, trials and punishments, or to the passing or execution of any sentence thereon, and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall to the same extent and in the same manner, as near as may be, apply to informations and all prosecutions and proceedings thereon. ('05 c. 231 § 2) [9160]

195+776.

Charging prior conviction. 158-230, 197+273.

The names of witnesses are not required to be indorsed on an information filed by a county attorney charging a criminal offense. 160-435, 200+631.

The procedure by information, does not limit the jurisdiction to cases in which the accused asks to plead guilty, but extends to all criminal cases where the maximum punishment does not exceed 10 years in the state prison. 163-154, 203+771.

Title held sufficient under constitution. 163-154, 203+771.

The information is sufficiently definite and states a public offense. 210+1001.

10666. Preliminary examination—No information shall be filed against any person for any offense, until such person shall have had a preliminary examination as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such preliminary examination. ('05 c. 231 § 3) [9161]

164-328, 205+63.

10667. Court may direct filing of information, when—Plea—That in all cases where a person charged with a criminal offense shall have been held to the district court for trial by any court or magistrate, and in all cases where any person shall have been committed for trial and is in actual confinement or in jail by virtue of an indictment or information pending against him, the court having trial jurisdiction of such offense

or of such indictment or information or proceedings shall have the power at any time, whether in term or vacation, upon the application of the prisoner in writing, stating that he desires to plead guilty to the charge made against him by the complaint, indictment or information, or to a lesser degree of the same offense to direct the county attorney to file an information against him for such offense, if any indictment or information had not been filed, and upon the filing of such information and of such application, the court may receive and record a plea of guilty to offense charged in such indictment or information, or to a lesser degree of the same offense and cause judgment to be entered thereon and pass sentence on such person pleading guilty, and such proceedings may be had either in term time or in vacation, at such place within the judicial district where the crime was committed as may be designated by the court.

Whenever such plea shall be received at any place other than at a regular place of holding court in the county where such offense shall have been committed, the sheriff having such accused person in custody, or the deputy of such sheriff, shall take such person before the district court wherever such court may be in the judicial district wherein such crime shall have been committed. In such cases and before such person shall be taken before the court in any other county than that in which the crime shall have been committed, he shall sign a petition in writing, asking leave to enter such plea, and such petition and request shall be approved in writing by the county attorney of the county wherein such crime shall have been committed. In case such county attorney shall decline to approve such petition and request, any judge of said court may nevertheless in his discretion direct that such accused person be brought before the court at such place as it may designate.

When such person shall be brought before the court in a county other than that in which the offense shall have been committed, unless the court shall otherwise order, it shall not be necessary for the county attorney or the clerk of the district court of the county wherein such offense was committed, to attend before the court; and in such cases the court shall cause due information of all proceedings before the court in any such matter to be communicated to such clerk of the district court, and therefrom such clerk shall be authorized to complete his records with reference to such matter.

The expense of the sheriff in taking any such person before the court and in attending on such proceedings, and the expense of the county attorney and of the clerk of the district court when ordered by the court to attend, shall be a charge against the county wherein the crime charged in such indictment or information shall have been committed, and shall be allowed and paid in the same manner as other claims against such county.

Unless the person accused shall expressly waive the services of counsel, and unless the court shall concur therein, no plea of guilty shall be received or entered upon this act unless the person accused shall be represented by competent counsel; and if he have no means with which to employ counsel, the court shall appoint such counsel and shall be authorized to provide and pay compensation therefor under the provisions of Section 9957, General Statutes of Minnesota 1923.

This section shall not apply to cases where the punishment for the offense to which the prisoner desires to plead guilty may exceed ten years imprisonment in

the state's prison. ('05, c. 231, § 5; amended '09, c. 398; '13, c. 65, § 1; '25, c. 136, § 1) [9162]

The operation of the statute of limitations is not suspended by merely filing an information within the time allowed by section 10655, G. S. 1923. Unless the information is filed to enable the accused to enter a plea of guilty, as provided by section 10667, it must be presented to the court within three years after the date of the commission of the offense with which the accused is charged. 162-393, 203+49.

It is held that the provision of section 10667, requiring the appointment of counsel for the defendant before the taking of a plea, applies to an information filed under that section upon the application of the defendant to plead guilty, and not to an information under sections 10664-10666, filed on the initiative of the county attorney 165-423, 206+952.

10668. Form of information—Such information may be in the following form:

State of Minnesota,) District Court,
County of _____,) ss. _____ Judicial District.
The State of Minnesota,
against
(The name of the accused.)

I, _____, county attorney for said county, hereby inform the court that on the _____ day of _____, in the year _____, at said county, A. B. (name or alias of accused) did (state the offense) against the peace and dignity of the State of Minnesota.

Dated, _____,

County Attorney.

('05 c. 231 § 5) [9163]
164-328, 205+63.

ARRAIGNMENT OF DEFENDANT

10669. Presence of defendant—When the indictment is filed, the defendant shall be arraigned thereon before the court in which it is found, if triable therein, and, if not, before the court to which it shall be sent or removed. If it is for felony, the defendant shall be personally present; if for a misdemeanor, he may upon arraignment appear by counsel. Whenever his personal presence shall be necessary, if he is in custody the court may direct the officer having him in custody to bring him before it to be arraigned. (5322) [9164]

It is the duty of the county attorney to bring on the arraignment immediately after the filing of the indictment and an unreasonable delay is a ground for the dismissal of the indictment (32-144, 19+730; 66-294, 69+25). That there is ground for postponing the trial is not an excuse for postponing the arraignment (32-144, 19+730).

10670. Bench warrant—Issuance—If the defendant has been discharged on bail, or has deposited money in lieu thereof, and shall not appear to be arraigned when his personal attendance shall be necessary, in addition to the forfeiture of bail or of the money deposited, the court may direct the clerk to issue a bench warrant for his arrest. On application of the county attorney, the clerk, at any time after the order, whether the court is in session or not, may issue a bench warrant, which may be served in any county in the same manner as a warrant of arrest. (5323) [9165]

10671. Form of bench warrant in felony—The bench warrant, if the offence is a felony, shall be substantially in the following form:

The District Court for the County of _____ and State of Minnesota.
The State of Minnesota, to any Sheriff (or other proper officer):

An indictment having been found on the _____ day of _____, 19____, in the district court for the county of _____, charging C. D. with the

crime of (designating it generally), you are therefore commanded forthwith to arrest the above-named C. D., and bring him before this court (or, if the venue has been changed, take him before that court, as the case may be) to answer the indictment, or, if the court has adjourned for the term, that you deliver him into the custody of the jailer of the county of _____ the _____ day of _____, 19____.

Witness the Honorable _____
By order of the Court. E. F., Clerk.
(5324) [9166]

Number of judicial district not essential (22-67).

10672. Form of bench warrant in misdemeanors—If the offence shall be a misdemeanor, the bench warrant shall be in a similar form, adding to the body thereof a direction to the following effect: "Or, if he shall require it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer the indictment." (5325) [9167]

10673. Court to fix bail—If the offence charged shall be bailable, the court, upon directing the bench warrant to issue, may fix the amount of bail; and in such case an indorsement shall be made upon the bench warrant, and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of _____ dollars." (5326) [9168]

10674. Proceedings before magistrate—If the defendant shall be brought before a magistrate of another county for the purpose of giving bail, the magistrate shall proceed in respect thereto in the same manner as if the defendant had been brought before him on a warrant of arrest. (5327) [9169]

10675. Proceedings where bail is taken—On taking bail, the magistrate shall certify that fact on the warrant, and deliver the warrant and recognizance to the officer having charge of the defendant. The officer shall then discharge the defendant from arrest, and without delay deliver the warrant and recognizance to the clerk of the court before which the defendant is required to appear. (5328) [9170]

10676. Defendant committed, when—When the indictment shall be for felony, and the defendant, before the finding thereof, shall have given bail for his appearance to answer the charge, the court to which the indictment is presented, or sent or removed for trial, may order the defendant to be committed to actual custody, unless he shall give bail in the increased amount to be specified in the order. (5329) [9171]

10677. Bench warrant to enforce order—If the defendant shall be present when the order is made, he shall be forthwith committed; if he is not present, a bench warrant shall be issued and proceeded upon in the manner provided in this chapter. (5330) [9172]

10678. Defendant informed of his right to counsel—If the defendant shall appear for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel. (5331) [9173]

The trial court substantially informed the defendant of his right to counsel. 165-423, 206+952.

10679. Arraignment—How made—The arraignment shall be made by the court, or by the clerk or county attorney under its direction, and shall consist in reading the indictment to the defendant, and delivering to him a copy thereof and of the indorsement thereon, including the list of witnesses indorsed on it or appended thereto, and asking him whether he pleads guilty or not guilty to the indictment. Provided, if the defendant waives the reading of the indictment, it

need not be read to him. (5332) [9174] (Amended '25, c. 137)

Defective copy of indictment (13-341, 315; 54-300, 56+50).

10680. Defendant to be asked his true name—When the defendant shall be arraigned, he shall be informed that, if the name by which he has been indicted is not his true name, he shall then declare his true name, or be proceeded against by the name in the indictment. If he shall give no other name, the court may proceed accordingly; if he shall allege that another name is his true name, the court shall direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings may be had against him by that name, referring also to the name by which he was indicted. (5333) [9175]

10681. Time to plead—Demurrer—Plea—Motion to set aside—Upon being arraigned, the defendant shall be allowed until the next day, if he requires it, to answer the indictment, and, upon his request, such further time as the court shall determine. If he does not require time, or upon the next day, or such further day as shall be allowed by the court, if he does, he shall answer to the arraignment, and either move the court to set aside the indictment, or demur or plead thereto. (5334) [9176]

A motion to set aside an indictment for defects in the organization of the grand jury must be made at the time of the arraignment unless for good cause the court allows it to be made subsequently (47-373, 50+362; 47-375, 50+362). A motion to set aside the indictment must be made before a demurrer or plea is entered (19-484, 418; 70-462, 73+403). An objection to the jurisdiction of the court over the person must be made before a plea is entered (51-534, 53+799). Challenges to individual grand jurors based upon the ground of prejudice or bias cannot be made at the time of the arraignment by way of a plea in abatement or motion to quash the indictment (90-183, 96+330).

10682. Crimes of corporations—Indictment—Service of summons—Whenever an indictment shall be filed in any district court against a corporation, charging it with the commission of a crime, a summons shall be issued by the clerk of the court in which such indictment shall be found, signed by one of the judges thereof, commanding the sheriff to forthwith notify the accused thereof, and commanding it to appear before such court within twenty-four hours after service thereof upon it. Such summons and a copy of the indictment shall be at once delivered by such clerk to said sheriff, and by him forthwith served and returned in the manner provided for the service of summons upon such corporation in a civil action. Whenever a complaint against a corporation, charging it with the commission of a crime, shall be made before any justice of the peace or municipal court, a like summons, signed by such justice or municipal judge, shall be issued, which, together with a copy of said complaint, shall be delivered to the sheriff at once, and by him forthwith served as herein provided. (5335) [9177]

10683. Appearance—Trial—Upon such service being made, such corporation shall appear within the time limited, by one of its officers or by counsel; and upon such appearance, and thereafter, the same course shall be pursued, as nearly as may be, as upon the appearance of an individual to an indictment, or complaint and warrant, charging him with the same offence. Upon failure of the corporation to make such appearance, said clerk, justice of the peace, or municipal judge shall enter or cause to be entered a plea of "not guilty," and, upon appearance made or plea entered, the corporation shall be deemed thenceforth continuously present in court until the case shall be finally disposed of. (5336) [9178]

10684. Fine, how collected—If the corporation shall be found guilty and a fine imposed, it shall be entered and docketed by the clerk, justice of the peace, or municipal judge, as the case may be, as a judgment against the corporation, and it shall be of the same force and effect, and be enforced against such corporation in the same manner, as if the judgment had been recovered against it in a civil action. (5337) [9179]

SETTING ASIDE INDICTMENT

10685. Grounds—Waiver of objections—The indictment shall be set aside by the court in which the defendant is arraigned, upon his motion, in any of the following cases:

1. When it shall not be found, indorsed, and presented as prescribed in the subdivision relating to grand juries;

2. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon;

3. Whenever a person shall have been permitted to be present at the session of the grand jury while the charge embraced in the indictment was under consideration, except as provided by § 10627.

If the motion to set aside the indictment shall not be made, the defendant shall be precluded from afterwards taking advantage of the foregoing objections. (5338) [9180]

½. In general.

Under section 10358, G. S. 1923, a person may be indicted by a grand jury for having defrauded another by false pretense, when the ingredient of the offense is that such representations have been believed and relied upon, even though the person victimized may not have been a witness before that body. 209+633.

The names of witnesses are not required to be indorsed on an information filed by a county attorney charging a criminal offense. 160-435, 200+631.

1. **Under subd. 1**—10-223, 178; 16-313, 277; 19-484, 418; 23-209; 47-373, 50+362; 47-375, 50+362; 56-129, 57+455; 67-176, 69+815; 70-462, 73+403; 72-476, 75+729.

2. **Under subd. 2**—56-129, 57+455. See § 10637.

3. **Under subd. 3**—A case is "under consideration" when witnesses are being examined (111-328, 126+1096).

4. **Statutory grounds not exclusive**—The statutory grounds for setting aside an indictment are not exclusive (41-50, 42+602). Thus an indictment may be set aside because the defendant was compelled to testify against himself before the grand jury (16-296, 260; 56-129, 57+455; 88-130, 92+529); or because, in a prosecution for adultery, complaint was not made by the husband or wife (41-50, 42+602).

5. **Held not grounds for setting aside**—An indictment will not be set aside because there is another indictment pending in the same court against the same defendant for the same offence (13-341, 315); because one of the grand jurors was not present when the grand jury was charged, but was present during the examination of the charge against defendant and voted upon the finding (16-313, 277); because when the grand jury was impeached and sworn the defendant was in jail (13-132, 125; 144-32, 174+529; 147-81, 179+640); because the names of witnesses before the grand jury whose testimony was not considered in finding the indictment are not indorsed on the indictment (56-129, 57+455); because the grand jury was filled out by a special venire (69-502, 72+832); because less than a full panel of grand jurors found the indictment (72-476, 75+729); because the grand jury was reconvened at an adjourned term of court (67-176, 69+815); because of an immaterial irregularity in drawing the grand jury list (67-176, 69+815); because of bias or prejudice in the grand jury (90-183, 96+330). It is not an abuse of discretion for the court to deny defendant leave to withdraw his plea of not guilty for the purpose of enabling him to move to set aside the indictment on the ground that members of the grand jury were aliens (70-462, 73+403). One who is held to answer at a term of the district court for a criminal offence must make any objection that he has to the manner of procuring the grand jury by challenge and not by motion to set aside the indictment (23-209). An indictment should not be set aside for any defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits (§ 9143).

6. Affidavits on motion—The affidavit of a grand juror is not admissible to show misconduct on the part of the grand jury (17-241, 218). An affidavit upon motion to quash the indictment for the reason that the accused was compelled to be a witness against himself before the grand jury held sufficient to require the state to traverse it and the court to determine the motion on the merits (88-130, 92+529).

7. Waiver by failure to move—10-223, 178; 19-484, 418; 47-373, 50+362; 47-375, 50+362).

10686. Motion, when heard—Decision—The motion to set aside shall be heard at the time of the arraignment, unless, for a good cause, the court shall postpone such hearing. If the motion is denied, the defendant shall immediately answer the indictment, either by demurring or pleading thereto; if it be granted the court shall order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or, if he has deposited money in lieu of bail, that it be refunded to him, unless it shall direct that the case be resubmitted to the same or another grand jury. (5339) [9181]

10687. Effect of resubmission—If the court shall direct that the case be resubmitted, the defendant, if already in custody, shall so remain, unless he be admitted to bail; if already admitted to bail, or money deposited in lieu thereof, the bail or money shall be answerable for his appearance to answer a new indictment. (5340) [9182]

66-294, 69+25.

10688. Proceedings if new indictment is not found—Setting aside no bar—Unless a new indictment shall be found before the next grand jury of the county shall be discharged, the court, on the discharge of such grand jury, shall make the order prescribed in § 10686. An order to set aside an indictment as provided in this chapter shall be no bar to a future prosecution for the same offence. (5341) [9183]

DEMURRERS

10689. Pleadings by defendant—The only pleading on the part of the defendant is a demurrer or plea. Both shall be made in open court, either at the time of the arraignment, or at such other time as may be allowed to the defendant for that purpose. (5342) [9184]

10690. Grounds of demurrer—The defendant may demur to the indictment when it shall appear from the face thereof:

1. That the grand jury by which it was found had no legal authority to inquire into the offence charged, by reason of its not being within the local jurisdiction of the county;

2. That it does not substantially conform to the requirements of §§ 10639-10642, as qualified by § 10647, or was not found within the time prescribed therein;

3. That more than one offence is charged in the indictment, except in cases where it is allowed by statute;

4. That the facts stated do not constitute a public offence;

5. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offence charged, or other legal bar to the prosecution. (5343) [9185]

1. **In general**—A demurrer goes to the whole indictment, and if, omitting the objectionable parts, there still remains an offence properly charged, the indictment must be sustained (4-345, 261). The fact that a written instrument is attached to an indictment in the form of an exhibit instead of being incorporated in the body of an indictment is not a ground for demurrer (32-537, 21+746).

2. **Jurisdiction of the grand jury**—41-50, 42+602.

DUPLICITY

3. General principles—If an indictment charges two offences, but one of them insufficiently so that no conviction could be had thereon, it is not double (39-464, 40+564). Where, in defining an offence, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offence, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offence, all of them do no more, and likewise constitute but one and the same offence (76-207, 78+1044).

146-52, 177+937.

4. A defect of substance—At common law a court has discretionary power to sustain a double indictment but in our practice the defect is one of substance and there is no such discretion (13-121, 112).

5. Objection, how taken—Duplicity is a ground for demurrer (13-121, 112; 19-271, 230); and if not so taken it is waived (39-464, 40+564; 84-357, 87+935; 90-526, 97+131).

6. Amendment by striking out—If the court sustains a demurrer on the ground of duplicity it may allow an amendment striking out one of the charges (13-121, 112; 19-271, 230).

7. Indictments held double—Against a justice of the peace for neglect of duty, charging several acts of omission and commission (14-156, 340); for a nuisance, charging the maintenance of a building in an unsafe condition and allowing filth to accumulate therein (19-271, 230); for forging and uttering a note (13-121, 112).

8. Indictments held not double—For an assault with a dangerous weapon with intent to do great bodily harm, charging a beating and wounding with the weapon (10-407, 325); for swindling by three card monte, charging different means conjunctively (29-142, 12+455); for selling liquor without a license, alleging one sale of beer, "a fermented or malt liquor" (33-480, 24+321); for larceny, with allegations insufficient to charge forgery (39-464, 40+564); for larceny, alleging an unlawful conversion with the superfluous words "steal and carry away" (54-359, 56+50); for rape, charging the commission of the offence in different ways (73-140, 76+33); for forgery, charging several acts but committed at the same time and with reference to the same instrument (76-207, 78+1044); for perjury under 1895 c. 175 § 104 (78-311, 81+3); for inducing and procuring another to keep a gambling device (84-357, 87+935); for indecent liberties (90-526, 97+131); for selling liquor (26-148, 1+1054); for accepting bribes from prostitutes (91-365, 98+190); for forging and uttering the same instrument (91-406, 98+99); for uttering several forged instruments at the same time and to the same person (86-422, 90+787); for libeling two or more persons in a single writing (60-168, 62+270); for selling mortgaged property to several persons (32-537, 21+746); for selling liquors, alleging a sale and disposal (30-52, 14+258); for keeping a saloon open during prohibited hours contrary to the statute and a city ordinance (84-367, 87+916).

10691. Requisites—When heard—Judgment—The demurrer shall be in writing, signed by the defendant or his counsel. It shall distinctly specify the ground of objection to the indictment, or it may be disregarded. Upon its being filed, the objection presented thereby shall be heard, either immediately, or at such time as the court may appoint. Upon considering the demurrer, the court shall give judgment, either allowing or disallowing it, and an order to that effect shall be entered upon the minutes. (5344) [9186]

Form of order sustaining demurrer (2-224, 187).

153-40, 189+408.

10692. Proceedings on allowance—Defendant, when discharged—If the demurrer shall be allowed, the judgment shall be final upon the indictment demurred to, and a bar to another prosecution for the same offence, unless the court shall allow an amendment, where the defendant will not be unjustly prejudiced thereby, or, being of opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, shall direct the case to be resubmitted to the same or another grand jury. If the court does not allow an amendment, or shall direct the case to be resubmitted, the defendant, if in custody, shall be discharged, or, if admitted to bail, his bail shall be exonerated, or, if he shall have deposited money in lieu of bail, that shall be refunded to him. (5345) [9187]

The allowance of an amendment, or direction for re-submission must be by matter of record, made at the same time when the demurrer is allowed, and ought regularly to be made in the order or judgment allowing the demurrer (22-271). An indictment cannot be amended by the court except as to matters of mere form, as, for example, the date or place of finding or the court in which found. It cannot be amended by inserting the county in which the offence was committed (4-335, 251). It is the right and duty of the court to refuse to receive an informal indictment and to send the jury out to correct it (see 17-241, 218; 32-537, 21-746). An indictment may probably be amended by indorsing the names of the witnesses examined by the grand jury (56-129, 57-455). If the demurrer is allowed the judgment is final upon the indictment demurred to and is a bar to another prosecution for the same offence (2-224, 187; 22-271; 88-171, 92+541). Where upon objection to the introduction of any evidence under an indictment on the ground of its insufficiency the objection is sustained and the court dismisses the indictment without directing that the case be submitted to another grand jury, a second indictment may be found for the same offence (88-171, 92+541). The dismissal of an indictment on the motion of the county attorney after the same has been attacked by demurrer is not equivalent to a declinon of the court sustaining the demurrer, so as to prevent the case from being resubmitted to the same or another grand jury without an order of court (61-73, 63-171).

167-25, 208+177, notes under §§ 10603, 10617.

10693. Proceedings when disallowed or case is submitted anew—If the court shall direct the case to be submitted anew, the same proceedings shall be had thereon as are prescribed in the subdivision on setting aside the indictment. If the demurrer shall be disallowed or the indictment amended, the court shall permit the defendant, at his election, to plead forthwith or at such time as the court may allow. If he does not plead, judgment shall be pronounced against him. (5346) [9188]

The designation of the time within which to plead over is within the discretion of the court and the time originally fixed may be extended. If the defendant refuses to plead judgment as upon a plea of guilty should be entered against him (42-202, 43+1115).

10694. Objections taken by demurrer—Whenever the objections specified in § 10690 shall appear upon the face of the indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a public offence, may be taken at the trial, under the plea of not guilty, and in arrest of judgment. (5347) [9189]

Objections held waived (10-223, 178; 21-47, 49; 27-521, 525, 8+758; 90-526, 97+131). The objection that the evidence does not state facts sufficient to constitute a public offence may be made for the first time on appeal (82-317, 84+1015). In such cases the indictment will be given the benefit of every reasonable intendment (26-388, 5+970; 66-309, 68+1096).

PLEAS

10695. Pleas to indictment—Oral—How entered—There are three pleas to an indictment: (1) Guilty; (2) not guilty; (3) a former judgment of conviction or acquittal of the offence charged, which may be pleaded either with or without the plea of not guilty. Every plea shall be oral, and entered upon the minutes of the court, in substantially the following form:

1. If the defendant pleads guilty, "The defendant pleads that he is guilty of the offence charged in this indictment."

2. If he pleads not guilty, "The defendant pleads that he is not guilty of the offence charged in this indictment."

3. If he pleads a former conviction or acquittal, "The defendant pleads that he has already been convicted (or acquitted, as the case may be) of the offence charged in this indictment, by the judgment of the court of (naming it), rendered at

..... (naming the place), on the day of " (5348) [9190]

In this state there is no plea in abatement (41-50, 42+602), or plea of benefit of clergy (3-246, 169). A plea of former jeopardy has been sustained though not expressly authorized (60-90, 61+907). By entering a plea a party waives objection to the jurisdiction of the court over his person (51-534, 53+799). A plea of former conviction must show authority to convict by the court in which it was had (16-474, 426). A plea of former acquittal is sufficient whenever it shows on its face that the second indictment is based upon the same single criminal act which is the basis of the indictment upon which the accused was acquitted (91-406, 98+99).

A plea to a charge in an indictment or information of former jeopardy must be entered at the time of arraignment. That issue cannot be raised by objection made at the close of the trial. 165-79, 205+692.

Under our statutes there is no plea of nolo contendere. 166-302, 207+646.

The sufficiency of a plea of former jeopardy may be questioned by demurrer, but a motion to strike is the better practice. 166-302, 207+646.

An acquittal in the trial of one offense cannot exclude the evidence used in that trial from use in the trial of another offense, when the same single criminal act is not the basis of both prosecutions. 166-466, 208+189.

10696. Plea of guilty—A plea of guilty can in no case be put in except by the defendant himself in open court, unless upon an indictment against a corporation, in which case it may be put in by counsel. At any time before judgment the court may permit it to be withdrawn and a plea of not guilty substituted. (5349) [9191]

165-79, 205+692.

Whether a defendant shall be permitted to withdraw his plea of guilty rests within the sound discretion of the trial court, and its discretion was not abused. 165-423, 206+952.

10696-1. Plea of guilty to lesser degree of offense—Record of—Whenever any person [charged with] with crime shall be permitted by any court or magistrate to plead guilty to a lesser degree of the offense than that which he is charged, or to a lesser offense included within the offense with which he is charged, the reasons for the acceptance of such plea shall be set forth in an order of the court directing such acceptance and entered upon the minutes, and any recommendations of the county attorney or other prosecuting officer in reference thereto, with his reasons therefor, shall be stated in writing and filed as a public record with the official files of the case. ('27, c. 255)

10697. Plea of not guilty—Evidence under—The plea of not guilty is a denial of every material allegation in the indictment, and all matters of fact tending to establish a defence, other than a former conviction or acquittal, may be given in evidence under such plea. (5350) [9192]

By entering a plea of not guilty in a criminal prosecution, a party waives objection to the jurisdiction of the court over his person. 165-79, 205+692.

10698. Acquittal—When a bar—If the defendant was formerly acquitted on the ground of a variance between the indictment and the proof, or the indictment was dismissed, upon an objection to its form or substance, without a judgment of acquittal, it is not an acquittal of the same offence. If he was acquitted on the merits, he shall be deemed acquitted of the same offence, notwithstanding a defect in the form or substance of the indictment on which he was acquitted. (5351) [9193]

88-171, 92+541. See Const. art. 1 § 7. 153-40, 189+408.

The wilful and inexcusable failure of a father to provide for the support of his minor children is a continuing offense. An acquittal in a prosecution for deserting them is not a bar to another prosecution for non-support subsequent to the date of the alleged desertion. 209+629.

10699. Indictment for offence of different degrees— If the defendant shall have been convicted or acquitted upon an indictment for an offence consisting of different degrees, such conviction or acquittal shall be a bar to another indictment for the offence charged in the former, or for any inferior degree of that offence, or for an attempt to commit the same, or for an offence necessarily included therein of which he might have been convicted under that indictment. (5352) [9194]

16-75, 64; 26-381, 4+615; 47-425, 50+472; 149-41, 182+721. See Const. art 1 § 7.

10700. Refusal to plead— If the defendant shall refuse to answer an indictment by demurrer or plea, a plea of not guilty shall be entered. (5353) [9195]

CHANGE OF VENUE

10701. Place of trial—Change of venue— Every criminal cause shall be tried in the county where the offence was committed, except as otherwise provided by law, unless it shall appear to the satisfaction of the court, by affidavit, that a fair and impartial trial cannot be had in such county, in which case the court before whom the same shall be pending, if the offence charged in the indictment is punishable with death or imprisonment in the state prison, may direct the person accused to be tried in some other county, in the same or any other judicial district in the state, where a fair and impartial trial can be had; but the party accused shall be entitled to one change of venue only. (5354) [9196]

1. Place of trial— It is for his acts that defendant is responsible. They constitute his offence. The place where they are committed must be the place where his offence is committed, and there the place where he should be indicted and tried (21-369; 78-362, 81+17; 85-114, 88+415). An act authorizing a change in the place of holding court in the district but not changing the district is not unconstitutional (13-341, 315).

138-369, 165+132.

The venue in a prosecution under G. S. 1923, § 3907, may be laid in the county where the lower price is paid 162-146, 202+714.

2. Proof as to venue— 22-76; 26-262, 3+345; 29-221, 13+140; 34-1, 24+458.

3. Change of venue— An application for change of venue is addressed to the discretion of the trial court and its action will rarely be reversed on appeal (13-341, 315; 15-344, 277; 16-282, 249; 91-143, 97+652). The trial may be changed to a county in an adjoining district (13-341, 315). Counter affidavits may be received (16-282, 349). An order denying a change cannot be reviewed on certiorari (23-366). There can only be one change (88-130, 92+529).

10702. Proceedings on change of venue—Costs— Whenever the venue shall be changed to another county in a criminal case, the trial shall be conducted in all respects as if the indictment had been found in the county to which the venue is changed, and all the costs and expenses of the prosecution and trial of the case in such county to which the venue shall have been changed, including officers', witnesses', and jurors' fees, shall be paid by the county in which the offence was committed. (5355) [9197]

84-267, 87+846. overruled by 1902 c. 31.

10703. Recognizance — Warrant — Whenever the court shall have ordered a change of venue, it shall require the accused, if the offence is bailable, to enter into a recognizance with good and sufficient sureties, to be approved by a judge thereof, in such sum as he may direct, and conditioned for his appearance in the court to which the venue has been changed on the first day of the next term thereof, and to abide the order of such court; and in default thereof, or if the offence be not bailable, a warrant shall be issued, directed to the

sheriff, commanding him safely to convey the prisoner to the jail of the county where he is to be tried, there to be safely kept by the jailer thereof until discharged by due course of law. The court shall also recognize the witnesses on the part of the state to appear before the court in which the prisoner is to be tried. (5356) [9198]

10704. Change of venue by state— The attorney on behalf of the state may also apply for a change of venue, and the court, being satisfied that it will promote the ends of justice, may award a change of venue upon the same terms and to the same extent that are provided in this subdivision; and the proceedings on such change shall be in all respects as before provided. (5357) [9199]

15-344, 277.

ISSUES AND MODE OF TRIAL

10705. Issue of fact—How tried—Appearance in person— An issue of fact arises: (1) Upon a plea of not guilty; or (2) upon a plea of a former conviction or acquittal of the same offence. Every issue of fact shall be tried by a jury of the county in which the indictment was found, unless the action shall have been removed by order of court as provided in §§ 10701-10704. If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he shall appear by counsel; but, if it be for a felony, he shall be personally present. (5358) [9200]

A hypothetical question, the answer of which tends to refute or weaken the testimony of an expert witness may be asked him on cross-examination. 156-27, 194+17.

The conflicting affidavits presented a question of fact. 167-348, 209+30.

Presence of accused— The statute is merely an affirmation of the common law rule (21-47). In a prosecution for a felony the accused has a right to be present at every stage of the trial. In his absence a jury cannot properly be discharged for inability to agree (24-87; 60-90, 61+907). The objection that he was not personally present cannot be raised by habeas corpus (24-87). The mere fact that the record does not show that he was present is not fatal to a verdict or judgment (41-319, 43+69). Defendant held to have waived right to be present when a verdict was received (113-401, 129+589).

See 145-303, 177+358.

The record fails to show that defendant's right to be present at all stages of the trial was violated. 158-329, 197+667.

10706. Continuance—Defendant committed, when— When an indictment shall be called for trial, or at any time previous thereto, upon sufficient cause shown by either party, the court may direct the trial to be postponed to another day in the same term, or to another term, and all affidavits read upon the application shall be filed with the clerk at the same time. When a defendant who has given bail shall appear for trial, the court may, in its discretion, at any time after such appearance, order him committed to the custody of the proper officer of the county, to abide the judgment or further order of the court. (5359) [9201]

An application for a continuance is addressed to the discretion of the trial court and its action will rarely be reversed on appeal (17-76, 54; 33-480, 24+321; 83-269, 92+978). A continuance should not be granted on the verbal statements of counsel that it is necessary, or on the mere suspicion that absent witnesses may be needed at the trial. A substantial reason for a continuance must be properly shown (88-269, 92+978).

In a case triable without a jury, the court may properly impose a condition for a continuance asked by defendant that the testimony of a witness for the prosecution be taken immediately. 164-499, 205+450.

10707. Joint indictment, separate trial— Whenever two or more defendants shall be jointly indicted for a felony, any defendant who shall require it shall be

tried separately. In other cases defendants jointly indicted may be tried jointly or separately, in the discretion of the court, and any one or more may be convicted or acquitted. (5360) [9202]

43-325, 45+614. Separate trial to each of several defendants indicted jointly for misdemeanor discretionary (99-234, 109+113).

See 149-5, 182+773.

10708. Excluding minors—Duty of officer—Penalty—No person under the age of seventeen years, not a party to, witness in, or directly interested in a criminal prosecution or trial being heard before any district, municipal, police, or justice court, shall attend or be present at such trial; and every police officer, constable, sheriff, or other officer in charge of any such court, and attending upon the trial of any such criminal case in any such court, shall exclude from the room in which such trial is being had every such minor, except when he is permitted to attend by order of the court before which the trial shall be had; and every police officer, constable, sheriff, or deputy sheriff who shall knowingly neglect or refuse to carry out the provisions of this section shall be guilty of a misdemeanor, and punished by a fine of not less than ten dollars nor more than twenty-five dollars. (5361) [9203]

10709. Juror may testify, when—View—If a juror has any personal knowledge respecting a fact in controversy in a cause, he shall declare it in open court during the trial; if, during the retirement of a jury, a juror shall declare a fact, which could be evidence in the cause, as of his own knowledge, the jury shall return into court; and in either of these cases the juror making the statement shall be sworn as a witness and examined in the presence of the parties. The court may order a view by any jury impaneled to try a criminal case. (5362) [9204]

Granting view discretionary (19-271, 230).
145-303, 177+358.

10710. Questions of law and fact, how decided—On the trial of an indictment for any offence, questions of law shall be decided by the court, except in cases of libel, saving the right of the defendant to except, and questions of fact by the jury; and, although the jury may find a general verdict which shall include questions of law as well as of fact, they shall receive as law what shall be laid down by the court as such. (5363) [9205]

1. Province of court and jury generally—It is the duty of the court to declare the law in criminal cases as well as in civil, and the jury have no right in either class of cases to present a verdict without regard to the law so declared, and by which their judgment should be controlled. Whether the evidence has a tendency to prove any fact in issue is a question for the court, but its weight is for the jury (34-18, 24+302). The court cannot direct the jury to return a verdict of guilty (91-143, 97+652). All questions of issuable fact are for the jury, as, for example, whether the circumstances warranted the use of force in self-defence and the degree of force necessary (3-270, 185. See 34-18, 24+302; 58-478, 59+1101); whether an accused person charged with the murder of an officer knew that the deceased was an officer and as such was attempting to arrest the accused (34-361, 25+793); whether a peace officer had reasonable cause to believe that a felony had been committed and the person arrested guilty of the offence (34-385, 293); whether a witness was an accomplice in the commission of a crime for which the accused is on trial (28-216, 9+698); whether the accused is insane (34-430, 26+397); whether a crime was committed with premeditation (41-319, 43+69); whether there was cooling time (13-132, 125); whether there was provocation (13-132, 125. See 10-223, 178; 13-341, 315; 34-430, 26+397). When an act becomes criminal only in case it is done with a certain intention the existence of such intention is always for the jury, as, for example, embezzlement of public funds (62-7, 64+51; 69-508, 72+799, 975; 72-296, 75+235); intent to defraud in uttering a forged instrument (88-301, 92+980); assault with intent to do great bodily harm (10-407, 325; 11-154, 95); mayhem (37-351,

34+893); assault with intent to murder (2-123, 99). Intent in the sense of doing the act constituting the crime purposely and not accidentally or involuntarily is a question for the jury. But in the absence of evidence tending to prove that the act was done accidentally or involuntarily the court may instruct the jury that it is their duty to draw the inference of intent in accordance with the presumption that men intend their voluntary acts (21-22; 22-514; 41-319, 43+69; 45-177, 47+720). Whether a sale of liquor was made in a village held a question of law (86-121, 90+161, 1133).

A defendant is not entitled to a jury trial when charged with an offense under a municipal ordinance. 157-506, 196+279.

In a criminal case tried by the court without a jury, specific findings of fact are not necessary. 161-422, 201+933.

Credibility of witnesses is for jury. 163-271, 203+964.

In a prosecution for sale of intoxicating liquor to a person under 21 years of age, it is necessary for the state to establish by legal evidence each of the elemental facts constituting the crime charged. Under the evidence in this case, an instruction that the defendant was guilty, if the liquor furnished to the person named in the indictment was an intoxicant, should not have been given. 163-271, 203+964.

Even though the jury in a criminal libel prosecution, under our statute, has the right to determine the law and the fact, the function of the court is to instruct them as to the law applicable to the issues, including the right given them by said statute. 166-279, 207+648.

2. Libel—In prosecutions for libel the jury are judges both of the law and the facts (82-452, 85+217; 83-441, 86+431).

10711. Order of argument—When the evidence shall be concluded upon the trial of any indictment, unless the cause shall be submitted on either or both sides without argument, the plaintiff shall commence and the defendant conclude the argument to the jury. (5364) [9206]

Applicable only to the trial of indictments (23-544). Rule prior to statute (17-241, 218).

10712. Charge of court—In charging the jury the court shall state to them all matters of law which it thinks necessary for their information in rendering a verdict, and, if it shall present the facts of the case, shall, in addition, inform the jury that they are the exclusive judges of all questions of fact. (5365) [9207]

1. In general.

It is proper for the court to review and analyze the evidence. The court may state to the jury that certain evidence is material, or that it tends to prove certain facts, or may comment on the evidence when it is done fairly and the jury are fully advised of their duty and responsibility in the premises (16-109, 99; 47-47, 49+404; 130-84, 153+271). The court should not give undue prominence to particular items of evidence and instruct the jury that they might or might not create in their minds a reasonable doubt as to the guilt of the accused (90-183, 96+330). It is error for the court to express its opinion of the facts unless it informs the jury that they are the exclusive judges of all questions of fact (26-150, 1+1051). It will be presumed on appeal that the court so informed the jury (16-109, 99). Error to review evidence in argumentative manner, or to single out and give undue prominence to testimony of particular witnesses (99-461, 109+1070). Defendant must request such instructions as he wishes; otherwise error cannot be predicated on failure to give particular instructions (103-428, 115+275). Cited (103-552, 115+636). Where charge argumentative, error is not cured by instruction that jury are sole judges of weight and effect of evidence (99-461, 109+1070). Requirement that judge shall instruct they are exclusive judges of questions of fact does not apply to civil cases (97-227, 106+909).

The testimony as to the sale and character of the liquor being direct and positive and uncontradicted, the court did not err in charging that the jury should convict if they believed the testimony, but should acquit if they had a reasonable doubt of its truth. 160-435, 200+631.

It was duty of counsel to call court's attention to an inadvertent statement in charge to jury. 210+403.

Instruction to jury was not argumentative or prejudicial. 210+403.

The charge was fair and clear, and contained nothing which could have misled the jury. 211+305.

The instructions to the jury were full and as favorable to defendant as he was entitled to, under the proofs. 211+334.

The charge unduly minimized the weight to be given to evidence of good character. 211+958.

The charge without qualification that a witness for the state was an accomplice of the defendant necessarily included an assumption of defendant's guilt. 211+958.

2. Argumentative instructions.

The charge stated, first, the claims of the state and indicated those that were not disputed by the defendant. Next the claims for the defendant were summarized, and, finally, the precise issues were stated. The charge held not argumentative. 210+108.

The charge of the court was not in error as argumentative. 213+34.

3. Charge on lesser offenses.

Where the evidence shows that the defendant, if guilty of any crime, is guilty of the crime charged, the court may properly refuse to instruct the jury as to lesser crimes included therein. 212+588.

4. Alibi.

The charge did not put the defendant to the proof beyond a reasonable doubt, or at all, of the alibi he claimed. 157-461, 196+490.

5. Requests for instructions.

Accused cannot predicate error on failure to charge as to lesser offense when he has not requested such charge. 157-408, 196+645.

There being no request for a further or more specific instruction, the charge is held to be without error. 210+108.

A request to instruct the jury that it is no offense to give liquor in one's own house to an invited guest with no purpose to evade the law held to have been properly refused, as being inapplicable to the facts disclosed by the evidence. 165-79, 205+692.

Defendant objected to a remark made by the county attorney. The court said the objection would be covered in the instructions, but failed to refer to it in charging the jury. The omission was not called to the court's attention. Defendant's failure to call the court's attention to it waived the point. 210+286.

In the absence of a request for an instruction that defendant might be found guilty of a lesser offense, there was no reversible error in the failure to give such an instruction. 210+286.

In a criminal case where the evidence of guilt is both direct and circumstantial, it is not error, in the absence of a request for such an instruction, not to charge specially concerning the weight of circumstantial evidence. 212+894.

10713. Jury—How and where kept while deliberating—Separate accommodations for women jurors—After hearing the charge the jury may either decide in court, or retire for deliberation, if they shall not agree without retiring, one or more officers shall be sworn to take charge of them, and they shall be kept together in some private and convenient place, without food or drink except water, unless otherwise ordered by the court, and no person shall be permitted to speak to or communicate with them or anyone of their number unless by order of court, nor listen to the deliberations; and they shall be returned into court when agreed, or when so ordered by the court. Provided, however, that in case of mixed juries counties shall provide adequate, separate quarters for women jurors with proper accommodations and in the event the county shall so fail to provide such proper accommodations the court shall order such women jurors kept in a suitable hotel for the night. (5366) [9208] (Amended '27, c. 210, § 1)

Explanatory note—Laws 1927, c. 210, § 3 repeals all inconsistent acts or parts of acts.

It is discretionary with the court to allow the jury to separate during the course of the trial and before the case is finally submitted to them (3-427, 313; 13-370, 343; 87-40, 91+1; 91-143, 97+652; 96-351, 105+265). After submission the jury cannot be permitted to separate until their discharge (3-444, 329; 16-178, 157; 41-104, 42+736; 73-150, 75+1127). Any separation after final submission is presumptively prejudicial and ground for a new trial (3-444, 329). But such a separation is no ground for a new trial where it clearly and affirmatively appears that no prejudice resulted, and that the facts and circumstances connected with the separation were such as to exclude all reasonable presumption or suspicion that

the jury were tampered with, or that the verdict was or could have been in any way influenced or affected by the irregularity (23-291; 59-514, 61+677). A sealed verdict cannot be directed against the objection of the accused (41-104, 42+736).

It is discretionary with the trial court to permit the jury to separate during the trial and pending the final submission of the case to them. 212+804.

10713-1. Same—Preceding section applicable only where jury fails to agree—The provisions of Section 1 of this act shall apply only in cases where the jury has failed to agree. ('27, c. 210, § 2)

10714. What papers may go to jury room—Upon retiring for deliberation, the jury may take all papers which have been received as evidence in the cause, or copies of such parts of public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them notes of the testimony or other proceedings on the trial taken by one of their number, but none taken by any other person. (5367) [9209]

10715. Jury may return into court for information—After the jury has retired for deliberation, if there shall be a disagreement as to any part of the testimony, or a desire for information upon any point of law arising in the cause, they may require the officer to conduct them into court. Upon being brought into court, the information required shall be given in the presence of, or after notice to, the prosecuting officer and the defendant or his counsel. (5368) [9210]

After the jury have retired the court cannot communicate with them except in open court and in the presence of the parties (3-262, 181).

137-468, 163+125.

In this, a criminal action, the charge given to the jury considered, and held to have gone beyond the proper limit in an effort to assist the jury in arriving at a verdict, and for that reason may have tended to coerce the minority of the jury. 159-415, 199+1.

10716. Discharge of jury without verdict—If, after the retirement of the jury, one of them shall become so sick as to prevent the continuance of his duty, or if they shall be unable to agree upon a verdict, or any other accident or cause shall occur to prevent their being kept together for deliberation, they may be discharged by the court. (5369) [9211]

When a juror becomes sick during the course of the trial and before final submission the only course for the court to pursue in the absence of consent of the parties is to discharge the entire panel and summon a new jury at the same or a succeeding term. But the defendant may consent to have the sick juror excused and a new juror substituted in his place (91-419, 98+334). It is for the trial court to determine the existence of facts justifying a discharge under this section (24-87).

10717. Second trial—In all cases where a jury shall be discharged or prevented from giving a verdict by reason of accident, disagreement, or other cause, except when the defendant shall be discharged from the indictment during the progress of the trial, or after the cause shall be submitted to them, the cause may be again tried at the same or another term. (5370) [9212]

10718. Verdict for lesser offence—Upon an indictment for an offence 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; upon an indictment for any offence the jury may find the defendant not guilty of the commission thereof, and guilty of an attempt to commit the same; upon an indictment for murder, if the jury shall find the defendant not guilty thereof, they may, upon the same indictment, find the defendant guilty of manslaughter in any degree. In all other cases, the

defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment. (5371) [9213]

If the jury have a reasonable doubt whether the accused is guilty of a higher or lower degree of crime they must find him guilty of the latter (4-368, 277). If evidence is introduced reasonably tending to reduce the crime charged to one of a lower degree it is the duty of the court to instruct the jury as to the different degrees and the right to find the accused guilty of the lesser crime (45-521, 48+401; 56-78, 57+325); and they should be instructed that if they find for a lesser degree than charged they must specify in their verdict of what degree they find the accused guilty (8-220, 190). The court may refuse to instruct the jury as to lesser degrees if there is no evidence reasonably tending to justify a verdict for such lesser degrees (56-78, 57+325). In an unequivocal case the court may instruct the jury that there is no evidence in the case justifying a verdict for a lesser degree than the one charged or that it is their duty either to find the accused guilty as charged or to acquit him (34-1, 24+458; 34-18, 24+302; 34-430, 26+397; 45-177, 47+720; 91-143, 97+652). Upon an indictment for a crime of which there are several degrees a general verdict of guilty is sufficient. It is necessary for the verdict to specify the degree only when the jury find the accused guilty of a lesser degree than charged (3-427, 313; 8-220, 190). The accused may be found guilty of an assault, on an indictment for assault with intent to murder (4-321, 237); of an assault with intent to commit rape, on an indictment for rape (6-279, 190; 41-285, 43+5); of taking indecent liberties, on an indictment for assault with intent to carnally know and abuse a child (39-321, 40+249); of assault in the second degree, on an indictment for rape (21-382; 41-285, 43+5); of simple larceny, on an indictment for larceny from the person (8-220, 190; 26-381, 4+615); of an attempt to carnally know and abuse a child, on an indictment for unlawfully and carnally knowing a child (45-128, 47+541); of robbery in the second degree, on an indictment for robbery in the first degree (71-399, 73+1091); of manslaughter in any degree, on an indictment for murder (16-75, 64; 34-1, 24+458); of the offence specified in 1873 c. 9 § 2, on an indictment for the offence specified in § 1 of the same act (22-238); of assault, on an indictment for an assault with intent to do great bodily harm (22-51); of assault, on indictment for maiming (114-467, 131+496). On an indictment for burglary a party cannot be convicted of the crime of larceny (47-425, 50+472).

Cited (126-396, 148+283; 149-134, 182+961; 149-297, 183+669).

212+588, note under § 10712.

An assault, whether it be indecent or simple, is an essential and necessary element of the offense of attempt to commit the crime of carnal knowledge. 196+645.

Indictment charging carnal knowledge necessarily includes as lesser offenses: (1) Attempt to carnally know; (2) indecent assault or indecent liberties; and (3) simple assault. 157-408, 196+645.

10719. Verdict as to some defendants, and disagreement as to others—On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the case as to the rest may be tried by another jury. (5372) [9214]

10720. Polling jury—Further deliberation, when—When a verdict shall be rendered, and before it is recorded, the jury may be polled on request of either party, in which case each member thereof shall be asked whether it is his verdict; and, if any one shall answer in the negative, the jury shall be sent out for further deliberation. (5373) [9215]

12-434, 319; 113-401, 129+589.

10721. Reception of verdict—When a verdict such as the court may receive shall be returned, the clerk shall immediately record it in full upon the minutes, read it to the jury, and inquire of them if it is their verdict. If any juror shall disagree, that fact shall be entered upon the minutes, and the jury again sent out; but, if no disagreement is expressed, the verdict shall be complete, and the jury be discharged from the case. (5374) [9216]

A sealed verdict cannot be directed against the objection of the accused (41-104, 42+786).

A juror's affidavit to the effect that she was coerced into the verdict, assented to by all the jurors when polled, is not available to impeach the same. 158-254, 197+284.

10722. Insanity, etc., of defendant—Whenever any person under indictment or information, and before or during the trial thereon and before verdict is rendered, shall be found to be insane, an idiot, or an imbecile, the court in which such indictment or information is filed, shall forthwith commit him to the proper state hospital or asylum for safe keeping and treatment; and whenever at such time any such person shall, in addition, be found to have homicidal tendencies, such court shall forthwith commit him to the asylum for the dangerous insane for safe keeping and treatment; and in either case such person shall be received and cared for at the institution to which he is thus committed until he shall recover, when he shall be returned to the court from which he was received to be placed on trial upon said indictment or information. (R. L. § 5375, amended '07 c. 358 § 1) [9217]

Amendment of 1907 not retroactive, and does not apply to commitments prior to passage (116-62, 133+82). See (152-502, 189+411).

10723. Acquitted on ground of insanity—Whenever during the trial of any person on an indictment, or information, such person shall be found to have been, at the date of the offense alleged in said indictment, insane, an idiot, or an imbecile and is acquitted on that ground, the jury or the court, as the case may be, shall so state in the verdict, or upon the minutes, and the court shall thereupon, forthwith, commit such person to the proper state hospital or asylum for safe keeping and treatment; and whenever in the opinion of such jury or court such person, at said date, had homicidal tendencies, the same shall also be stated in said verdict or upon said minutes, and said court shall thereupon forthwith commit such person to the hospital for the dangerous insane for safe keeping and treatment; and in either case such person shall be received and cared for at said hospital or asylum to which he is thus committed. No such person so acquitted shall be liberated therefrom, except upon the order of the court committing him thereto and until the superintendent of the hospital or asylum where such person is confined shall certify in writing to such committing court that, in his opinion, such person is wholly recovered and that no person will be endangered by his discharge. Provided, that nothing herein shall be construed as preventing the transfer of any person from one institution to another by the order of the board of control, as it may deem necessary. (R. L. § 5376, amended '07 c. 358 § 1) [9218]

2-123, 99.

10724. Hearing on punishment—After a plea or verdict of guilty, in a case where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct. Such circumstances shall be presented by the testimony of witnesses examined in open court. (5377) [9219]

140-112, 167+345.

10725. Dismissal of cause—Record of reasons for—The court may, either of its own motion or upon the application of the prosecuting officer, and in further-

ance of justice, order any criminal action, whether prosecuted upon indictment, information, or complaint, to be dismissed; but in that case the reasons for the dismissal shall be set forth in the order, and entered upon the minutes, and the recommendations of the prosecuting officer in reference thereto, with his reasons therefor, shall be stated in writing and filed as a public record with the official files of the case. (5378) [9220] (Amended '27, c. 296)

147-272, 180+99, 191+605.

167-25, 203+177, notes under §§ 10603, 10617.

The district court has no power before trial and on motion of the county attorney to dismiss a criminal prosecution on the merits. 166-302, 207+646.

CALENDAR

10726. Contents—The clerk shall prepare a calendar of the indictments pending to be tried at the term, enumerating them according to the date of filing the indictment, and specifying, opposite to the title of each action, whether it is a felony or a misdemeanor, and whether the defendant is in custody or on bail, and shall in like manner enter therein all indictments found during the term, and on which issues of fact or law are joined. (5379) [9221]

10727. Issues, how disposed of—Time for trial—The issues on the calendar shall be disposed of in the following order, unless, upon the application of either party, for good cause, the court directs an indictment to be tried out of its order:

1. Indictments for felony, where the defendant is in custody;
2. Indictments for misdemeanor, where the defendant is in custody;
3. Indictments for felony, where the defendant is on bail; and
4. Indictments for misdemeanor, where the defendant is on bail.

After his plea, the defendant shall be entitled to at least four days to prepare for his trial, if he requires it. (5380) [9222]

Cited (111-325, 126+1090).

10728. Register—The clerk shall keep a register of all criminal actions, in which he shall enter:

1. All cases returned to the court by a magistrate, whether the defendant is discharged or held to answer;
2. All indictments found in the court, or sent or removed thereto for trial, with the time of finding the indictment, or when it was sent or removed; and
3. The time of arraignment, of the demurrer or plea, and of the trial, conviction, or acquittal of the defendant, together with a brief note of all the other proceedings in the action. (5381) [9223]

123-392, 143+971.

CHALLENGING JURORS

10729. Challenge defined—Kinds—Defendants to join—A challenge is an objection made to a trial jury, and is of two kinds:

1. To the panel;
2. To an individual juror.

When several defendants are tried together, they cannot sever the challenge, but shall join therein. (5382) [9224]

134-309, 159+789.

10730. Challenge to panel—A challenge to the panel is an objection made to all the petit jurors returned, and may be taken by either party. It can be founded only on a material departure from the forms prescribed by law in respect to the drawing and return of the

jury, and shall be taken before a jury is sworn, and be in writing, specifying plainly and distinctly the facts constituting the ground of challenge. (5383) [9225]

This provision is exclusive (13-341, 315). Objections to a petit jury must be made by challenge to the panel and not by motion to quash or by plea in abatement (19-484, 418). The failure of the chairman of the county board to sign or certify the petit jury list is a material departure within this provision (23-209; 47-373, 50+362). Putting fewer names in the jury box than the law requires is a material departure (41-50, 42+602). See 23-209). The law is watchful of the manner in which jurors are selected (23-209). The following objections have been held not good ground of challenge to the panel: the failure to file forthwith in the office of the clerk of court the list of petit jurors selected by the county board (13-341, 315); the fact that the sheriff while serving a special venire, endeavored to ascertain the opinions of the jurors and selected them with reference thereto (17-76, 54); that the venire describes the action as a "civil" instead of a "criminal" action, the jurors all appearing pursuant to it (33-480, 24+321); that the jurors were taken from among jurors summoned on two previous special venires (10-233, 185). In the absence of fraud or collusion in the selection of a jury objection to the panel is too late after verdict (1-347, 257). Failure to comply with statutory requirements in summoning and drawing not ground for new trial, when record shows that fair and impartial jury was secured, and that defendant accepted jury when he had numerous peremptory challenges unused (101-334, 112+409).

Cited (124-162, 144+752; 134-309, 159+789).

213+545 note under § 9468.

A challenge to the panel of jurors will not lie unless the objection affects the entire panel. 210+65.

10731. Exception to challenge—If the sufficiency of the facts alleged as a ground for challenge shall be denied, the adverse party may except to the challenge. The exception need not be in writing, but shall be entered upon the minutes of the court, and thereupon the court shall proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true. If on the exception the court shall deem the challenge sufficient, it may, if justice requires it, permit the party excepting to withdraw his exception and deny the facts alleged in the challenge; if the exception is allowed, the court may in like manner permit an amendment of the challenge. (5384) [9226]

73-150, 75+1127; 134-309, 158+789.

10732. Denial of challenge—Proceedings—If the challenge is denied, the denial may in like manner be oral, and shall be entered upon the minutes of the court, and the court shall proceed to try the question of fact. Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge. Before a juror is called, the defendant shall be informed by the court, or under its direction, that, if he intends to challenge an individual juror, he shall do so when the juror appears, and before he is sworn. (5385) [9227]

Objection to the want of a formal denial held waived (73-150, 75+1127). It is no objection that the testimony of officers contradicts their official certificates (13-341, 315; 41-50, 42+602).

Cited (124-162, 144+752; 134-309, 159+789).

10733. Challenge to individual juror—A challenge to an individual juror is either (1) peremptory, or (2) for cause. It shall be taken when the juror appears, and before he is sworn; but the court, for good cause, may permit it to be taken after he is sworn, and before the jury is completed. Before challenging a juror, either party may examine him in reference to his qualification to sit as a juror in the cause. (5386) [9228]

1. Method of impaneling jury—In criminal actions a full panel is not called in the first instance. The

jurors are called separately and challenged when called and the jury box is filled gradually as each juror is accepted (25-29). It is proper practice to swear each juror separately when accepted and not to wait until the jury box is filled (12-538, 448).

2. Preliminary examination—It is discretionary with the court whether or not to allow either party to interrogate a juror as to his qualifications without first interposing a challenge (22-514). It is so although the party has exhausted his peremptory challenges (56-78, 57-325). In all cases it is customary to allow a general preliminary examination before challenge as to residence, occupation, relationship to the parties and the like (see 89-354, 94-1079).

3. When challenge may be made—A party who waives his right to challenge a juror peremptorily when the juror is called has not the right to do so after the panel is completed although the jury has not been sworn (25-29; 41-365, 42-62). When a party challenges a juror for actual bias, but subsequently withdraws the challenge, it is discretionary with the court to allow him to renew it at any time before the jury is complete (4-438, 340). For good cause the court may permit a challenge to be taken after a juror is sworn and before the jury is complete (91-365, 98-190).

4. Waiver of challenge—An accused person may waive the right to challenge (91-419, 98-334).

5. Withdrawing challenge—After a challenge is admitted it is purely discretionary with the court to allow it to be withdrawn (4-438, 340; 6-319, 224; 22-514; 56-78, 57-325). A challenge for actual bias which has been withdrawn may be renewed, with permission of the court, at any time before the jury is complete (4-438, 340).

10734. Peremptory challenge—A peremptory challenge can be taken either by the state or the defendant, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court shall exclude him. If the offense charged be punishable with death, or with imprisonment in the state prison for life, the state shall be entitled to ten, and the defendant to twenty, peremptory challenges. On a trial for any other offense the state shall be entitled to three, and the defendant to five, peremptory challenges. (5387) [9229]

In a criminal action a party waives the right to challenge peremptorily by failing to exercise the right when the juror appears (25-29; 41-365, 43-62). Either party may at any time indicate to the court that he is satisfied with the jury, and, when he does so, cannot thereafter, without leave of court, challenge peremptorily one of the jurors so accepted (80-56, 82-1093; 91-419, 98-334). But if the opposing party thereafter makes a further challenge, and a new juror is called, the right to challenge such juror remains and may be exercised unless the party has previously exhausted his peremptory challenges (80-56, 82-1093; 97-269, 105-967).

10735. Challenge for cause—A challenge for cause is an objection to a particular juror, and is either:

1. General, that the juror is disqualified from serving in any case; or
2. Particular, that he is disqualified from serving in the case on trial.

Such challenge may be taken either by the state or by the defendant. (5388) [9230]

10736. General causes of challenge—General causes of challenge are:

1. A conviction for a felony;
2. A want of any of the qualifications prescribed by law to render a person a competent juror; and
3. Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of performing the duties of a juror. (5389) [9231]

10737. Particular causes of challenge—Particular causes of challenge are of two kinds:

1. For such bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and known as implied bias; and
2. For the existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the triers, in the exercise of a sound discretion, that he cannot try the issue impartially and

without prejudice to the substantial rights of the party challenging, and known as actual bias. (5390) [9232]
Cited (111-110, 126-477); 130-3, 153-250.

10738. Causes of challenge for implied bias—A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offence charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any one of the attorneys either for the prosecution or for the defence;

2. Standing in relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offence, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action, or having complained against, or been accused by him, in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of the person whose death is the subject of indictment;

5. Having served on a trial jury which has tried another person for the offence charged in the indictment;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside, or which was discharged without a verdict after the cause was submitted to it;

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offence;

8. If the offence charged is punishable with death, the entertaining of such conscientious opinions 'as would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror. (5391) [9233]

1. In general—The decisions are apparently not harmonious as to whether the statutory causes are exclusive (19-484, 418; 34-430, 26-397; 59-364, 61-135; 89-354, 94-1079). This section is not applicable to judges (20-313, 271, 295; 26-501, 5-677). Cited (111-110, 126-477).

2. Subd. 1—20-313, 271, 295; 111-275, 126-903.

3. Subd. 2—Relationship between juror and general manager and stockholder of plaintiff corporation (59-364, 61-135). That a juror is a stockholder in an accident insurance company which has insured the defendant is probably a ground of challenge for implied bias (89-354, 94-1079). Relation of attorney and client between juror and attorney for one of parties not ground for challenge (111-275, 126-903). Cited (130-3, 153-250).

4. Subd. 6—18-82, 65; 19-484, 418.

10739. Challenge for actual bias—A challenge for actual bias may be taken for the cause mentioned in § 10737, subd. 2, and for no other cause, provided, that during the examination of a juror, the trial court may in its discretion exclude from the court room all other jurors upon the panel. (R. L. § 5392, amended '13 c. 53 § 1) [9234]

10740. Exemption from jury duty not a cause—Exemption from service on a jury shall not be a cause of challenge, but the privilege of the person exempted. (5393) [9235]

10741. Challenge—Statement of cause—Exception—In a challenge for implied bias, one or more of the causes stated in § 10738 shall be alleged; in a challenge for actual bias, the cause stated in § 10737 subd. 2 shall be alleged; in either case the challenge may be oral, but shall be entered upon the minutes of the court. The adverse party may except to the challenge

in the same manner as to a challenge to a panel, and the same proceedings shall be had thereon as prescribed in §§ 10730, 10731, except that, if the challenge be sustained, the juror shall be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge. (5394) [9236]

A challenge for "actual bias" is sufficient (73-150, 75-1127).

10742. Trial of challenge — Triers — Appointment, compensation, etc.—If the facts are denied, the challenge shall be tried as follows:

1. For implied bias, by the court.
2. For actual bias, by triers, unless, in cases not capital, the parties shall consent to trial by the court.

The triers shall consist of three impartial persons, not on the jury panel, appointed by the court. Every challenge for actual bias shall be tried by such triers, a majority of whom shall decide. They shall be sworn generally to inquire whether or not the challenges for actual bias against the several persons who may be challenged are true, and that they will decide the same according to the evidence. Each trier shall be allowed for his services such amount, not less than five dollars nor more than ten dollars per day, as the presiding judge shall determine, which shall be paid in the same manner as jurors are paid for their services. (5395) [9237]

1. Effect of admission of challenge—When a challenge is interposed by one party and admitted by the other, there is nothing to try, and the juror must stand aside, unless the court, in its discretion, allows the challenge to be withdrawn. The challenging party has no right to examine the juror (6-319, 224; 22-514; 56-78, 57+325).

2. Trial by the court—The two modes of trial provided by this section are distinct (34-430, 26+397). The accused held to have consented to the trial by the court when challenging for actual bias (78-362, 81+17).

3. Triers to be sworn—The triers need not be sworn for every challenge (12-538, 448).

10743. Challenged juror examined—Evidence—Upon the trial of a challenge to an individual juror, he may be examined as a witness to prove or disprove the challenge, and is bound to answer every question pertinent to the inquiry, and, when challenged on the ground that he is not a citizen of the United States, his own testimony shall be competent evidence of the fact of naturalization, without other evidence; but his testimony may be disputed by the challenger. Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge. (5396) [9238]

A party has a right, at least after challenge, to put any question to the juror properly tending to disclose his bias, prejudice, leanings, or general qualifications. The range of such inquiry is almost wholly in the discretion of the trial court. A party has a right, in good faith, to challenge a juror for cause and upon the examination to elicit information to be used in determining whether to interpose a peremptory challenge (59-281, 61+450; 89-354, 94+1079; 97-217, 106+517). The questions propounded, after a challenge, must be pertinent to the particular ground of challenge specified (34-430, 26+397). The court has discretionary power to prevent useless iteration of questions (43-265, 45+432). Whether a court will delay the trial to bring in other witnesses is purely discretionary (40-65, 41+459).

10744. Court to determine implied bias—On the trial of a challenge for implied bias, the court shall determine the law and the fact, and either allow or disallow the challenge, and direct an entry accordingly upon the minutes. (5397) [9239]

10745. Actual bias—Instruction to triers—Decision—Effect—On the trial of a challenge for actual bias, when the evidence is concluded, the court shall instruct the triers that it is their duty to find the challenge

true if the evidence establishes the existence of a state of mind on the part of the juror in reference to the case, or to either party, which satisfies them, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging; and that if otherwise, they shall find the challenge not true. The court can give them no other instruction. The triers shall thereupon find the challenge either true or not true, and their decision shall be final. If they find it true, the juror shall be discharged. (5398) [9240]

The decision of the court upon a question of actual bias of a juror submitted to it for determination by consent is final (6-319, 224; 26-183, 2+494, 683; 57-323, 59+309; 61-412, 63+1040; 73-150, 75+1127; 77-198, 79+682; 80-314, 82+182; 88-262, 92+976).

10746. Challenges — In what order taken—Every challenge to an individual juror shall be taken first by the defendant, and then by the state; and each party shall exhaust all his challenges of such juror before the other shall begin. The challenges of either party need not all be taken at once, but may be taken separately in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel.
2. To an individual juror for a general disqualification.
3. To an individual juror for implied bias.
4. To an individual juror for actual bias. (5399) [9241]

1. Order of challenging as between parties—When a juror is called the defendant must exhaust all his challenges (both peremptory and for cause) to that juror and then the state must exhaust all its challenges to him, and so on, successively, as each juror is called (20-376, 328; 25-29).

2. Order of challenges as to kind—Questions that are proper on a challenge for actual bias may be entirely improper on a challenge for implied bias, or general disqualification. For that reason the proper practice is to dispose of each challenge in the order named in the statute and to restrict the questions asked to the particular ground of the challenge. The nature of the challenge, as actually made on the trial, cannot be regarded as merely formal, so that any misstatement of the ground of the challenge intended may be deemed immaterial and the examination on the trial of the challenge be referred to a different ground than the one announced (34-430, 26+397).

APPEALS AND WRITS OF ERROR

10747. Removal to supreme court—Criminal cases may be removed by the defendant to the supreme court, by appeal or writ of error, at any time within six months after judgment, or after the decision of a motion denying a new trial; but, if the order denying a new trial be affirmed upon hearing upon the merits, no appeal shall be allowed from the judgment. (5400) [9242]

No appeal lies from intermediate orders (24-174; 42-202, 43+1115). They cannot be reviewed on certiorari (23-366). An order overruling a demurrer is not appealable (42-202, 43+1115). No appeal lies from a verdict (21-462). An appeal lies only from final judgments—such as determine the measure of punishment to be inflicted and are to be enforced without further judicial action (42-202, 43+1115). Upon an appeal from a final judgment no questions will be considered which might have been raised on a prior appeal from an order denying a new trial (26-494, 5+369). The state cannot appeal (2-224, 187). A party may waive his right to appeal by giving a bond to abide the judgment (43-202, 45+155). Whether a party waives the right to appeal by accepting a commutation of sentence from the board of pardons is an open question (93-38, 100+633).

Appeal cannot be taken from "findings" of the court. 156-100, 194+318.

A motion for new trial made 11 months after conviction is too late. 157-97, 195+635.

The practice relating to new trials in criminal cases is the same as in civil. 157-97, 195+635.

10748. Stay of proceeding—When an appeal is taken, it shall not stay the execution of the judgment, unless an order to that effect shall be made by the trial judge or a judge of the supreme court. Notice of the appeal and the order staying proceedings, if any, shall be filed with the clerk of the court where the judgment is entered, and served on the attorney general. (5401) [9243]

1. Stay—There is no stay except as expressly ordered (24-362). A stay, even in a capital case, is a matter of discretion (38-363, 37+587; 62-1114, 64+90; 93-176, 100+1125).

2. Notice of appeal—Immaterial defects in a notice will be disregarded (55-329, 56+1068). In a prosecution for the violation of a city ordinance the notice should be served on the city attorney rather than on the attorney general (42-154, 43+845).

10749. Writ of error—By whom allowed—When a stay—No writ of error upon a judgment for any capital offence shall issue unless allowed by one of the judges of the supreme court after notice to the attorney general. Writs of error upon judgment in all other criminal cases shall issue of course, but they shall not stay or delay the execution of the judgment or sentence, unless allowed by one of the judges of the supreme court, with an express order thereon for a stay of proceedings. (5402) [9244]

Application for second writ (3-427, 313). No stay unless ordered (24-174). Notice to attorney general and county attorney (rule 27, Supreme Court). Waiver of right to writ by giving bond to abide judgment (43-202, 45+155).

10750. Return—Upon an appeal being perfected, or a writ of error filed with him, the clerk shall transmit to the supreme court a copy of the judgment roll, and of the bill of exceptions, if any. (5403) [9245]

16-75, 64. Supreme court will order return without payment of clerk's fees, if appellant unable to pay (98-179, 107+542, 108+825).

10751. Bill of exceptions—Any person who shall be convicted of a crime before the district court, being aggrieved by any opinion, direction, or judgment of such court in any matter of law, may allege exceptions thereto, which, being reduced to writing in a summary manner and presented to the court at any time before the end of the term, or within such time thereafter as the court shall designate, and being found conformable to the truth of the case, shall be allowed and signed by the judge, and may be used on a motion for a new trial, and, when judgment is rendered, shall be attached to, and become part of, the judgment roll. (5404) [9246]

The county attorney cannot be ignored in the settlement. After a bill has been settled by the judge he cannot correct mistakes in it without calling in both parties and allowing them to be heard (4-379, 286). A case or bill of exceptions is conclusive on appeal (91-419, 98+334). Intermediate orders or rulings will not be considered on appeal unless incorporated in bill of exceptions or case (24-174; 33-34, 21+843; 39-69, 38+773). The sufficiency of the evidence will not be considered unless the record on appeal contains all the evidence introduced on the trial (22-238; 23-291; 26-8, 46+445). When the record on appeal contains no bill of exceptions or case the only question that can be considered is the sufficiency of the indictment to support the judgment (23-352; 42-182, 43+1116). Cited (23-366).

Cited (151-215, 186+581).

A transcript of the testimony was unnecessary, as the assignments of error need not be specified in criminal actions. 157-97, 155+635.

To avail himself of errors in the reception of evidence, the defendant in a criminal case must object. 164-10, 204+467.

A motion for a new trial, based on newly discovered evidence because of the contents of the affidavit, upon the record in this case, rests in the discretion of the trial court. 166-300, 267+623.

10752. Proceedings in supreme court—No assign-

ment of errors or joinder in error shall be necessary upon any writ of error issued or appeal taken in a criminal case, but on the return thereto the court shall proceed and render judgment upon the record before it. If the court affirms the judgment, it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly. If it reverses such judgment, it shall either direct a new trial, or that the defendant be absolutely discharged, as the case may require. (5405) [9247]

1. In general.

96-318, 104+971, 976. Substantial error is ground for new trial, unless it appears that defendant could not have been prejudiced thereby; but, if it affirmatively appears from whole record that defendant could not have been prejudiced by error, it is not ground for new trial. That some of jurors during trial (151-215, 186+581) read newspaper articles not prejudicial error (96-351, 105+265). New trial should not be granted for newly discovered evidence which is merely impeaching (100-107, 110+353).

Cited (97-125, 105+1127; 99-123, 108+851; 109-270, 123+474).

2. Incomplete record.

The record is so incomplete that it presents no question which this court can review. 209+489.

There was no error, available to the defendant, in a ruling in his favor upon an objection; nor did the remark of the court in making the ruling indicate that an issue in the case had been proved. 213+34.

3. New trial.

The interjection of uncalled-for remarks by officers who testified for the state, and the remarks of the trial judge in granting defendant's motion to strike them out, were not so prejudicial as to require a new trial. 164-110, 204+554.

Matter largely in discretion of trial court, and record fails to disclose any violation of a clear legal right or an abuse of discretion. 167-348, 269+30.

No prejudice resulted from improper questions asked defendant, objections to which were sustained. 212+588.

4. Misconduct of counsel.

There was no misconduct of the county attorney of such a nature as to entitle defendant to a new trial. 162-76, 202+51.

Under the circumstances of this case, dealt with in the opinion, the conduct of the county attorney is held, so far as it was misconduct, not to have been prejudicial or such as to compel a new trial. 163-109, 293+596.

There was no misconduct of counsel for the state, requiring a new trial, in offering incompetent testimony to which no objection was made. 164-10, 204+467.

There was no misconduct of counsel for the state requiring a new trial. 166-453, 208+415.

It was misconduct for the county attorney to inquire on cross-examination of defendant whether he had been charged with a stated crime, the prosecutor knowing that there had been no conviction. 167-234, 208+653.

5. Newly discovered evidence.

Order denying a motion for a new trial on ground of newly discovered evidence cannot be disturbed because the new evidence was cumulative. 167-348, 209+30.

10753. Admission to bail or appearance before supreme court—If upon appeal or writ of error the defendant shall be admitted to bail he may recognize to the state in such sum as shall be ordered, with sufficient sureties, conditioned for his appearance before the supreme court, and the presentation and prosecution of the appeal or writ of error with effect, and in harmony with the rules of that court, to abide the judgment of the court thereon, and in the meantime to keep the peace and be of good behavior, and the trial judge, or a justice of the supreme court on the allowance of a writ of error or after an appeal has been perfected, may in his discretion allow such recognizance in all cases where the death penalty does not apply. (R. L. '05 § 5406, G. S. '13 § 9248, amended '19 c. 95 § 1).

The district court may admit to bail after verdict and before sentence (24-362). Cited (26-494, 5+369).

10754. Defendant committed, when—Copy of record filed, etc.—If any person so appealing or taking a writ

of error does not so recognize, he shall be committed to prison to await the decision of the supreme court; and in that case the clerk of the court in which the conviction was had shall file a certified copy of the record and proceedings in the case in the supreme court, which shall have cognizance thereof, and consider and decide the questions of law, and render judgment or make such order therein as law and justice shall require; and, if a new trial is ordered, the cause shall be remanded to the district court for such new trial. (5407) [9249]

This and the two preceding sections are construed together and held to authorize the supreme court to modify as well as reverse or affirm judgments. If the conviction is right and the judgment and sentence thereon wrong the supreme court may correct the error by a proper judgment and sentence or order its correction by the trial court (26-494, 5+369; 43-490, 45+1098; 68-465, 71+681). A judgment may be affirmed in part and reversed in part (26-498, 5+374). If a judgment is affirmed execution of the sentence of the district court is directed (96-95, 104+822).

10755. Dismissal of appeal—Not to preclude another—If any of the provisions made requisite by law to the taking of an appeal or a writ of error shall not be complied with, the supreme court may dismiss the same, but no discontinuance or dismissal of an appeal or writ of error in the supreme court shall prevent a person from suing out another writ of error or taking another appeal in the same case within the time limited by law. (5408) [9250]

An appeal will not be dismissed for immaterial defects in the notice of appeal (55-329, 56+1068). An appeal will be dismissed if the return is insufficient to justify a consideration of any of the assignments of error (59-484, 61+448).

10756. Certifying proceedings—Stay—If upon the trial of any person convicted in any district court, or if, upon any demurrer or special plea to an indictment, or upon any motion upon or relating thereto, any question of law shall arise which in the opinion of the judge is so important or doubtful as to require the decision of the supreme court, he shall, if the defendant shall request or consent thereto, report the case, so far as may be necessary to present the question of law arising therein, and certify the report to the supreme court, and thereupon all proceedings in said cause shall be stayed until the decision of the supreme court shall have been made. The county attorney shall, upon the certification of any such report, forthwith furnish a copy thereof to the attorney general at the expense of the county. Other criminal causes in said court involving or depending upon the same question may, if the defendants so request, or consent thereto, be stayed in like manner until the decision of the cause so certified. (5409) [9251]

Court has no power to certify questions arising in midst of trial. Must be either in course of preliminary proceedings or on conviction (96-533, 104+1150. See also 116-228, 133+614). Has no application to prosecutions commenced in, and within jurisdiction of, municipal courts or justice courts (109-431, 124+4); or to questions raised by objections to sufficiency of affidavit made basis in district court of contempt proceedings, affidavit not being "indictment" (116-228, 133+614). What is "question of law" (118-77, 136+311). Not substitute for an appeal (118-77, 136+311). Cited (111-110, 126+477; 117-186, 134+496).

Cited (124-532, 144+474, 1135; 138-321, 164+1011; 139-500, 166+123; 189+411).

162-502, 202+883; 162-351, 202+737.

JUDGMENTS AND EXECUTION THEREOF

10757. Judgment on conviction—Judgment roll—When judgment upon a conviction shall be rendered, the clerk shall enter the same upon the minutes, stating briefly the offence for which the conviction was

had, and immediately annex together and file the following papers, which constitute the judgment roll:

1. A copy of the minutes of challenge interposed by the defendant to the panel of the grand jury, or to an individual grand juror, and the proceedings and decisions thereon.

2. The indictment and a copy of the minutes of the plea or demurrer.

3. A copy of the minutes of any challenge interposed to the panel of the trial jury or to an individual juror, and the proceedings and decision thereon.

4. A copy of the minutes of the trial.

5. A copy of the minutes of the judgment.

6. The bill of exceptions, if there be one. (5410) [9252]

Minutes of the evidence are no part of the judgment roll unless incorporated in a bill of exceptions (42-182, 43+1116). The minutes of the trial are a part of the judgment roll (16-75, 64). Minutes of the conviction and sentence held sufficient (83-460, 86+449).

10758. Clerk to deliver transcript to sheriff—Whenever any person convicted of an offence shall be sentenced to pay a fine or costs, or to be imprisoned in the county jail or state prison, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff or his deputy a transcript from the minutes of the court of such conviction and sentence, duly certified by such clerk, which shall be a sufficient authority for the sheriff to execute such sentence; and he shall execute the same accordingly. (5411) [9253]

Murder in the first degree being now punishable only by imprisonment, there is no crime punishable by death. For this reason R. L. §§ 5412, 5418-5422, and Laws 1905 c. 290, making provision for capital cases, although unrepealed, have been omitted.

Stay of execution (38-368, 37+587; 62-114, 64+90; 93-176, 100+1125; 112-157, 127+473).

10759. Form of sentence to state prison—In every case in which punishment in the state prison shall be awarded against any convict, the form of the sentence shall be that he be punished by confinement at hard labor; and, whenever practicable, his term of imprisonment shall be so fixed as to expire between April 1 and November 1. (5413) [9254]

A judgment omitting the direction as to hard labor held not subject to impeachment on habeas corpus (68-465, 71+681). The last clause is directory (26-494, 5+369).

10760. Sentence when punishment not prescribed—Whenever no punishment shall be provided by statute, the court shall award such sentence as, in view of the degree and aggravation of the offence, shall not be cruel, unusual, or repugnant to the constitutional rights of the party. (5414) [9255]

10761. Recognizance to keep peace—Every court before whom any person shall be convicted upon an indictment for any offence not punishable with death or imprisonment in the state prison or county jail, in addition to the punishment prescribed by law, may require such person to recognize, with sufficient sureties, in a reasonable sum, to keep the peace and be of good behavior for any term not more than two years, and to stand committed until he shall so recognize. (5415) [9256]

10762. Same—Breach—In case of the breach of the conditions of any such recognizance, the same proceedings shall be had that are by law prescribed in relation to recognizances to keep the peace. (5416) [9257]

10763. Jail sentence—How executed when no jail in county—Whenever it shall appear to the court at the time of passing sentence upon any convict to be punished by confinement in the county jail that there is

no suitable jail in the county in which the offence was committed, it may order sentence to be executed in any other county where there shall be a suitable jail; and the expense of supporting him shall be paid by the county in which the offence was committed. (5417) [9258-9265]

10764. Ball and chain, etc., prohibited—No person shall be required, as a punishment for crime or the violation of any ordinance or municipal regulation, to labor, with ball and chain attached, upon the streets, parks, or other public works, nor, as a punishment for crime, be held, tied, or bound in public; but such person may be tied or bound for the purpose of taking him to or from jail or prison, or any place used for holding him in custody. (5423) [9266]

INDETERMINATE SENTENCES AND PAROLES

10765. Term of sentence—Whenever any person is convicted of any felony or crime committed after the passage of this act, punishable by imprisonment in the state prison or state reformatory, except treason or murder in the first or second degree as defined by law, the court in imposing sentence shall not fix a definite term of imprisonment, but may fix in said sentence the maximum term of such imprisonment, and shall sentence every such person to the state reformatory or to the state prison, as the case may require, and the person sentenced shall be subject to release on parole and to final discharge by the board of parole as hereinafter provided, but imprisonment under such sentence shall not exceed the maximum term fixed by law or by the court, if the court has fixed the maximum term, provided that if a person be sentenced for two or more such separate offenses sentence shall be pronounced for each offense, and imprisonment thereunder may equal, but shall not exceed the total of the maximum terms, fixed by law or by the court if the court has fixed the maximum term for such separate offenses, which total shall, for the purpose of this act, be construed as one continuous term of imprisonment. And provided further that where one is convicted of a felony or crime that is punishable by imprisonment in the state prison or state reformatory or by fine or imprisonment in the county jail, or both, the court may impose the lighter sentence if it shall so elect. ('11 c. 298 § 1, amended '17 c. 319 § 1) [9267]

Explanatory note—Laws '17, c. 319, § 2 repeals G. S. '13, § 9268.

Cited (119-368, 138+315).

138-465, 163+984; 146-149, 177+1021.

10766. Parole board—A board having power to parole and discharge prisoners confined in the state prison, state reformatory or state reformatory for women is hereby created, to be known and designated as "state board of parole." Said board shall be composed of five persons, viz: the member of the state board of control oldest in continuous service as a member of said board of control shall be ex officio a member of said board of parole and chairman thereof; the warden of the state prison at Stillwater shall be ex officio a member of said board of parole and secretary thereof; the superintendent of the state reformatory at St. Cloud shall be ex officio a member of said board of parole and first assistant secretary thereof; the superintendent of the state reformatory for women shall be ex officio a member of said board of parole and second assistant secretary thereof; the fifth member thereof shall be a citizen of this state who shall be appointed by the governor by and with the consent of the senate.

The first assistant secretary shall have the powers and shall perform the duties of the secretary in case of the latter's absence from the state, absence from any meeting of the board of parole or sickness or inability to act. The second assistant secretary shall have the powers and shall perform the duties of the secretary in case of the absence of the secretary and first assistant secretary from the state, or from any meeting of the board of parole, or when in case of sickness or for other reason both the secretary and first assistant secretary are unable to act. All records and papers attested or authenticated by the first assistant secretary or second assistant secretary shall have the same force and effect as though the same were made, attested or authenticated by the secretary. Any two of said board shall constitute a quorum with power to act.

Provided the Warden of the State Prison at Stillwater shall only vote in reference to the parole of inmates of said State Prison.

The Superintendent of the State Reformatory at St. Cloud shall only vote with reference to the parole of inmates of the State Reformatory at St. Cloud.

The Superintendent of the State Reformatory for Women shall only vote in reference to the parole of the inmates of the State Reformatory for Women. ('11 c. 298 § 3, amended '13 c. 280 § 1; '21 c. 56 § 1) [9269]

10767. Present law not changed—The board of parole constituted under the provisions of this act shall be deemed a continuation of the board of parole constituted under the provisions of chapter 298, Laws 1911, as amended by chapter 280, Laws 1913, and the citizen member thereof shall continue to hold such office for the time for which he was originally appointed and all matters and proceedings pending before the board of parole as constituted before the passage of this act shall be carried on and completed by the board as constituted under the provisions of this act. ('13 c. 280 § 2, amended '21 c. 56 § 2) [9270]

Explanatory note—For Laws 1911, c. 298, see §§ 10765, 10766, 10768 to 10778, herein.

10768. Registers and records—The state board of parole shall cause to be kept at the state prison and state reformatory such registers and records of the prisoners in said respective institutions as they may from time to time require, and said board shall keep a separate record of all its acts relating to each of said institutions, and the persons confined in, removed or committed thereto, or paroled or discharged therefrom, and the secretary shall furnish a copy thereof to the state board of control. ('11 c. 298 § 4) [9271]

10769. Citizen member of board—Compensation—Expenses—The citizen so appointed as a member of said state board of parole shall hold his office for the term of six years and until his successor is appointed and qualified and shall receive as compensation the sum of fifteen dollars per day for each day actually spent in the discharge of his official duties, and all necessary expenses while on official business. The other members of the board shall receive no additional salaries or compensation for services performed as provided therein. Said per diem and all the expenses of said state board of parole, including expenses of all investigations authorized by this act, and of all appointees and employes thereof, and the salaries of the same shall be verified, audited and paid through the state board of control in the same manner that expenses and salaries of the members and employes of said board of control are verified, audited and paid, and in respect thereto shall be subject to all of the laws

and rules governing said state board of control and such salaries and expenses shall be paid out of the funds of said state prison and said state reformatory in the proportion that may be determined by said state board of control. ('11 c. 298 § 5) [9272]

10770. Powers of board—The said state board of parole may parole any person sentenced to confinement in the state prison or state reformatory, provided that no convict serving a life sentence shall be paroled until he has served thirty-five years, less the diminution which would have been allowed for good conduct had his sentence been for thirty-five years and then only by unanimous consent in writing of the members of the board of pardons. Such convicts while on parole shall remain in the legal custody and under the control of the state board of parole, subject at any time to be returned to the state prison or state reformatory, and the written order of said board, certified by the warden or superintendent of the state reformatory, shall be a sufficient warrant to any officer to retake and return to actual custody any such convict. Geographical limits wholly within the state may be fixed in each case and the same enlarged or reduced according to the conduct of the prisoner.

In considering applications for parole or final release said board shall not be required to hear oral argument from any attorney or other person not connected with the prison or reformatory in favor of or against the parole or release of any prisoners, but it may institute inquiries by correspondence, taking testimony or otherwise, as to the previous history, physical or mental condition, and character of such prisoner, and each member of said board is hereby authorized to administer oaths to witnesses for every such purpose. ('11 c. 298 § 6) [9273]

150-80, 184+567.

10771. Female prisoners—Pregnant—Whenever it shall be made to appear by the properly verified petition of any woman, who has been sentenced to imprisonment in a penal institution in this state and is in prison thereunder, that she is about to give birth to a child, the board of control, if satisfied of the truth of the petition, shall order the transfer of such woman to a public hospital to be designated in its order, there to be detained under such guard and under such rules and regulations as the board shall make in the order of transfer until the birth of the child and the recovery of the mother to such an extent that the imprisonment may be resumed without danger of serious impairment of her health.

The board of control shall adopt such proper rules and regulations as may be necessary to carry out the purposes of this act. ('23 c. 165 § 1)

10772. Credits for prisoners—Release—Each prisoner shall be credited for good prison demeanor, diligence in labor and study and results accomplished, and be charged for derelictions, negligences and offenses under such uniform system of marks or other methods as shall be prescribed by the board. He shall be informed of his standing under such system each month. Whenever said board shall grant an absolute release it shall certify the fact and the grounds therefor to the governor, who may in his discretion restore the prisoner released to citizenship. But no application for such release shall be entertained by the board. ('11 c. 298 § 7) [9274]

10773. Duty of board—Final discharge—It shall be the duty of the state board of parole to keep in communication, as far as possible, with all prisoners who are on parole and also with their employers, and when

any person upon parole has kept the conditions thereof in such manner and for such period of time as shall satisfy the board that he is reliable and trustworthy, and that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, then said board shall have power in its discretion to grant to such prisoner a final discharge from confinement under any such sentence, and thereupon said board shall issue to such prisoner a certificate of such final discharge, and shall also cause a record of the acts of said prisoner to be made showing the date of his commitment, his record while in prison, the date of his parole, his record while on parole, and their reasons for determining his final discharge, together with any other facts which such board may deem proper, and shall forward such record to the governor, together with the recommendation of said board as to whether such prisoner should be restored to any of the rights and privileges of citizenship, and the governor may in his discretion restore such person so released to any or all of the rights and privileges of citizenship, except in cases where deprivation of any of the rights or privileges of citizenship is specifically made a part of the penalty for the offense for which such person shall have been committed. Nothing in this act shall be construed as impairing the power of the board of pardons to grant a pardon or commutation in any case. ('11 c. 298 § 8) [9275]

10774. Persons sentenced prior to parole law—All persons convicted and sentenced to imprisonment in the state prison or in the reformatory prior to the year 1912 shall have the same right of parole and discharge as those convicted since that year, and all the powers, duties and functions conferred by law upon and exercised by the board of parole with reference to the custody and control of any person convicted of a crime committed subsequent to April 20, 1911, and paroled under the provisions of chapter 298, Laws 1911, and the acts amendatory thereof, shall extend to and be applicable to any such person when paroled. ('11 c. 298 § 9, amended '17 c. 262 § 1) [9276]

10775. Supervision by board—Agents—Said board of parole as far as possible, shall exercise supervision over paroled and discharged convicts and when deemed necessary for that purpose, may appoint state agents, fix their salaries and allow them traveling expenses. It may also appoint suitable persons in any part of the state for the same purpose. Every such agent or person shall perform such duties as said board may prescribe in behalf of or in the supervision of prisoners paroled or discharged from the state prison, state reformatory, or other public prison in the state, including assistance in obtaining employment and the return of paroled prisoners. Such agents and such persons shall hold office at the will of the board of parole and the person so appointed shall be paid reasonable compensation for the services actually performed by them. Each shall be paid from the current expense fund of the institution or institutions for whose benefit he was appointed. ('11 c. 298 § 10) [9277]

10776. Duty of county attorney—It shall be the duty of the county attorney upon the conviction of any person to the state prison or reformatory, to furnish to the warden or superintendent thereof, as the case may be, all information and data in his possession relating to the history and character of every such person so convicted, and a brief synopsis of all information in his possession relating to the commission of the crime of which such person is convicted. ('11 c. 298 § 11) [9278]

10777. Rules governing paroles, etc.—Said board of parole shall have power from time to time to make, alter, amend and publish rules governing the granting of paroles and final discharges and the procedure relating thereto, and as to the conditions of parole and the conduct and employment of prisoners on parole, and such other matters touching the exercise of the powers and duties conferred upon said board by this act as to their agents and employes as said board may deem proper. ('11 c. 298 § 12) [9279]

10778. Acts repealed, etc.—All acts and parts of acts in conflict herewith are hereby repealed, provided that the repeal thereof shall not in any manner affect the parole, release, discharge, custody, retaking or re-confinement of any prisoner now or heretofore confined, paroled, or subject to be retaken or reimprisoned. ('11 c. 298 § 13) [9280]

BOARD OF PARDONS

10779. How constituted — Powers—The board of pardons shall consist of the governor, the chief justice of the supreme court, and the attorney general. Said board may grant pardons and reprieves and commute the sentence of any person convicted of any offence against the laws of the state, in the manner and under the conditions and regulations hereinafter prescribed, but not otherwise. (5424) [9281]

Whether a party waives the right to appeal by accepting a commutation of sentence is an open question (93-38, 100+638).

10780. Pardons — Reprieves — Unanimous vote — Such board may grant an absolute or a conditional pardon, but every conditional pardon shall state the terms and conditions on which it was granted. A reprieve in a case where capital punishment has been imposed may be granted by any member of the board, but for such time only as may be reasonably necessary to secure a meeting for the consideration of an application for pardon or commutation of sentence. Every pardon or commutation of sentence shall be in writing, and shall have no force or effect unless granted by a unanimous vote of the board duly convened. (5425) [9282]

10781. Warrant—Return—Such board may issue its warrant under its seal to any proper officers to carry into effect any pardon, commutation, or reprieve. As soon as may be after the execution of the warrant, the officer to whom it is directed shall make return thereof, under his hand, with his doings thereon, to the governor. Such officer shall also file with the clerk of the court in which the offender was convicted an attested copy of the warrant and return, a brief abstract of which such clerk shall subjoin to the record of the conviction. (5426) [9283]

10782. Meetings—The board shall hold regular meetings on the second Monday in January, April, July, and October of each year, and such other meetings as it shall deem expedient, and all shall be held in the executive chamber in the state capitol, or at such other place as may be ordered by the board. (5427) [9284]

10783. Application for pardon—Every application for a pardon or commutation of sentence shall be in writing, addressed to the board of pardons, signed by the convict or some one in his behalf, shall state concisely the grounds upon which the pardon or commutation is sought, and in addition shall contain the following facts:

1. The name under which the convict was indicted, and every alias by which he has been known.

2. The date and terms of sentence, and the names of the offence for which it was imposed.

3. The name of the trial judge and of the county attorney who participated in the trial of the convict, together with that of the county in which he was tried.

4. A succinct statement of the evidence adduced at the trial, with the indorsement of the judge or county attorney who tried the case that the same is substantially correct. If such statement and indorsement are not furnished, the reason thereof shall be stated.

5. The age, birthplace, parentage, and occupation and residence of convict during five years immediately preceding conviction.

6. A statement of other arrests, indictments, and convictions, if any, of the convict. (5428) [9285]

10784. Action on application—Every such application shall be filed with the clerk of the board. But if an application for a pardon or commutation has been once heard and denied on the merits, no subsequent application shall be filed without the consent of two members of the board indorsed thereon. Said clerk shall, immediately on receipt of any application, mail notice thereof, and of the time and place of hearing thereon, to the judge of the court wherein the applicant was tried and sentenced, and to the prosecuting attorney who prosecuted the applicant, or his successor in office: Provided, that pardons or commutations of sentence of persons committed to a county jail or work-house may be granted by said board without notice. (5429) [9286]

10785. Records—Secretary—The board shall keep a record of every petition received, and of every pardon, reprieve or commutation of sentence granted or refused, and the reasons assigned therefor, and shall have a seal, with which every pardon, reprieve or commutation of sentence shall be attested. It may adopt such additional necessary and proper rules and regulations as are not inconsistent herewith. The board may appoint a secretary, to serve for such time as the board may prescribe, who shall have charge of and keep its records and perform such other duties as the board may from time to time direct. He shall qualify by taking the usual oath of office, and is hereby authorized and empowered to serve subpoenas and other writs or processes necessary to return parole violators to prison, and to bring before the board witnesses to be heard in matters pending before it; and shall receive an annual salary of three thousand dollars, to be paid as other state officers are paid. The records and all the files shall be kept and preserved in the office of the governor, and shall be open to public inspection at all reasonable times. (R. L. '05 § 5430, G. S. '13 § 9287, amended '21 c. 427 § 1)

Office of secretary of state board of pardons abolished. See § 53-45, herein.

Executive secretary of Executive Council as secretary of board of pardons, see § 53-2, herein.

10786. Issuance of process—Witnesses—Standing appropriation—The board may issue process requiring the presence of any person or officer before it, with or without books and papers, in any matter pending, and may take such reasonable steps in the matter as it may deem necessary to a proper determination thereof. Whenever any person is summoned before the board by its authority, he may be allowed such compensation for travel and attendance as it may deem reasonable. The sum of three hundred dollars is hereby appropriated annually for carrying out the provisions of this subdivision. (5431) [9288]

131-116, 154+750.

1940 Supplement
To
Mason's Minnesota Statutes
1927

(1927 to 1940)
(Superseding Mason's 1931, 1934, 1936 and 1938
Supplements)

Containing the text of the acts of the 1929, 1931, 1933, 1935, 1937 and 1939 General Sessions,
and the 1933-34, 1935-36, 1936 and 1937 Special Sessions of the Legislature, both new and
amendatory, and notes showing repeals, together with annotations from the
various courts, state and federal, and the opinions of the Attorney
General, construing the constitution, statutes, charters
and court rules of Minnesota together with digest
of all common law decisions.



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10536-3. Violation a gross misdemeanor.—Any person or persons, firm or corporation violating the provisions of this Act shall be guilty of a gross misdemeanor and upon conviction shall be punished by a fine of not more than \$1,000.00 or by imprisonment in the county jail for a period not to exceed one year, or by both such fine and imprisonment. (Act Apr. 21, 1933, c. 357, §2.)

10536-4. All Acts and parts of Acts inconsistent herewith are repealed. (Act Apr. 21, 1933, c. 357, §3.)

10536-5. Visitors at tourist camps, etc., to register.—Every person operating within this State a tourist camp, cabin camp or other resort furnishing sleeping or over-night stopping accommodations for transient guests, shall provide and keep thereat a suitable guest register for the registration of all guests provided with sleeping accommodations or other over-night stopping accommodations at such camp or resort; and each and every such guest shall be registered therein. Upon the arrival of every such guest, the operator of such camp or resort shall require him to enter in such register, or enter for him therein, in separate columns provided in such register, the name and home address of the guest and each and every person, if any, with him as a member of his party; and if traveling by motor vehicle, the make of such vehicle, registration number, and other identifying letters or characters appearing on the official number plate carried thereon, including the name of the State issuing such official plate. (Apr. 12, 1937, c. 186, §1.)

10536-6. Shall register upon arrival.—Every person upon arriving at any touring camp, cabin camp or other resort described in this act and applying for guest accommodations therein of the character described in the preceding section shall furnish to the operator or other attendant in charge at such camp or resort the registration information necessary to complete his registration in accordance with the requirements of Section 1 hereof, and shall not be provided with accommodations unless and until such information shall be so furnished. (Apr. 12, 1937, c. 186, §2.)

10536-7. Registration records to be open for inspection of officers.—The registration records herein provided for shall be open to the inspection of all law enforcement officers of the State and its subdivisions. (Apr. 12, 1937, c. 186, §3.)

10536-8. Violation a misdemeanor.—Every person who shall violate any of the provisions of this act shall be guilty of a misdemeanor. (Apr. 12, 1937, c. 186, §4.)

Sec. 5 of Act Apr. 12, 1937, cited, provides that the Act shall take effect from its passage.

10536-11. County board to license shows, etc.—The board of county commissioners of the several counties of this state are hereby authorized to license and regulate itinerant shows, carnivals, circuses, endurance contests and exhibitions of any nature whatsoever except those prohibited by Laws 1935, Chapter 228 [§§10267-1, 10267-2]. Provided, however, that this act shall not apply to shows, carnivals, circuses, contests and exhibitions held within the incorporated limits of a village, borough or city. (Apr. 21, 1937, c. 331, §1.)

10536-12. County board to fix fees.—The fee for such license shall be fixed by the board of county commissioners in such amount as the board shall deem advisable. (Apr. 21, 1937, c. 331, §2.)

10536-13. May require bond.—The board of county commissioners may require, as a condition to the granting of such license, the posting of a penal bond in such amount as it shall determine. (Apr. 21, 1937, c. 331, §3.)

10536-14. Applications—forms.—Application for such license shall be made on such form as the board of county commissioners shall determine. Upon the approval of such application and the payment of the license fee and the posting of such bond as may be required the county auditor shall issue the license. (Apr. 21, 1937, c. 331, §4.)

10536-15. Taking part in unlicensed show, etc., to be misdemeanor.—Any person, partnership, association or corporation who conducts or takes part in any itinerant show, carnival, circus, endurance contest or exhibition not licensed as herein provided, shall be guilty of a misdemeanor. (Apr. 21, 1937, c. 331, §5.)

10536-16. Exceptions.—The provisions of this act shall not apply to any itinerant show, carnival, circus, endurance contest or exhibition held in connection with any agricultural association fair. (Apr. 21, 1937, c. 331, §6.)

10536-17. Blending of petroleum products prohibited.—The blending or mixing of petroleum products, such as kerosene, distillate, fuel oil or any by-product of crude oil or coal upon which gasoline tax has not already been paid or liability therefor reported to the Chief Oil Inspector, with gasoline upon which a tax has been paid or liability assessed therefor by the Chief Oil Inspector, is prohibited. (Act Apr. 22, 1939, c. 408, §1.)

10536-18. Same — Violations — Penalties.—Violation of this act shall constitute a gross misdemeanor and be punished accordingly. (Act Apr. 22, 1939, c. 408, §2.)

CHAPTER 104

Criminal Procedure

SEARCH WARRANTS

10537. When issued.

There was no error in condemning and destroying slot machines, though there was no search warrant. 176M 346, 223NW455.

Search warrants may not be issued in intoxicating liquor cases. Op. Atty. Gen. (218f-3), Apr. 18, 1934.

If an intoxicating liquor inspector is rightfully within a place where non-intoxicating liquors are sold, he may seize intoxicating liquor for purpose of using same for evidence in a prosecution, but he may not search premises for intoxicating liquors, and in such case a search warrant is not necessary. Op. Atty. Gen. (218f), Feb. 6, 1935.

State law does not provide for search and seizure of intoxicating liquors, and it would be necessary for village ordinance to provide therefor. Op. Atty. Gen. (218f-3), Dec. 27, 1935.

10540. Property seized—How kept and disposed of.—Whenever, any officer, in the execution of a search warrant, shall find any stolen property, or seize any other things for which search is allowed by law, the same shall be safely kept by direction of the court or magistrate, so long as may be necessary for the purpose of being produced as evidence on any trial, and then the stolen property shall be returned to the owner thereof, and the other things seized destroyed under the direction of the court or magistrate. Any money found in gambling devices when seized shall be paid into the county treasury, or, if such gambling devices are seized by a police officer of a municipality, such money shall be paid into the treasury of such munic-

ipality. (R. L. '05, §5199; G. S. '13, §9036; Apr. 13, 1929, c. 177.)

Court erred in ordering that destroyed slot machines should be sold and proceeds of sale and money found in slot machines turned into county treasury. 176M346, 223NW455.

Fact that liquor was unlawfully taken from possession of defendant does not prevent its use in evidence against him. *State v. Kaasa*, 198M181, 269NW365. See Dun. Dig. 24681, 3239.

Gambling devices suitable only for use as such may be destroyed under Stillwater ordinance without first prosecuting the keepers thereof. Op. Atty. Gen., June 19, 1931.

Money found in slot machines may not be confiscated, under Stillwater ordinance, and paid into city treasury. Op. Atty. Gen., June 19, 1931.

This section contains no provision for procedure which would be applicable to the forfeiture of money found in gambling devices. Op. Atty. Gen., June 19, 1931.

Where sheriff seized slot machines containing money and proprietor died before trial after pleading not guilty, slot machines could be destroyed upon summary order of court and probably money could be paid into county treasury, but safest course would be to bring proceeding in rem and make personal representative of proprietor a party. Op. Atty. Gen., Sept. 15, 1932.

EXTRADITION

10541 to 10547. [Repealed Apr. 14, 1939, c. 240, §80, Post §10457-40.]

"Uniform Criminal Extradition Act." Laws 1939, c. 240. See §§10547-11 to 10547-42, this Supp.

ANNOTATIONS UNDER REPEALED SECTIONS

10541. Extradition agents—Appointment—Reports, etc.

Whether extradition will lie depends on whether defendant has been in this state after date alleged in complaint. Op. Atty. Gen. (494b-15), Oct. 6, 1938.

Extradition may not be secured on a charge of illegitimacy, but may be secured for absconding from the state with intent to evade proceedings to establish paternity. Op. Atty. Gen. (193b-20), Jan. 28, 1939.

10542. Warrant of extradition, service; etc.

1. In general.

Extradition is governed by the Constitution and laws of the United States, and chapter 19, Laws 1929, ante, §40, cannot interfere or delay its operation. *State v. Moeller*, 182M369, 234NW649. See Dun. Dig. 8835, 1721.

A prisoner who has been removed from demanding state by federal authorities is nevertheless a fugitive from justice in an asylum state and must be delivered to demanding state upon proper extradition process. *State v. Wall*, 187M246, 244NW811. See Dun. Dig. 3705.

County attorney is not required to appear for and on behalf of the sheriff in habeas corpus proceedings brought to discharge a person held by the sheriff for the purpose of being extradited to another state. Op. Atty. Gen., May 6, 1931.

Sheriff may charge officials of another state a fee of \$4.00 per day in transporting a prisoner demanded by another state to the boundary line of this state. Op. Atty. Gen., May 6, 1931.

Limitations against prosecution for abandonment of children does not run where father left state and remained away, and passage of four years should not be any reason for failure to extradite. Op. Atty. Gen. (605a-13), Aug. 25, 1937.

2. Who is a fugitive from justice.

Father and husband, guilty of abandoning wife and child, when he stopped payments to them for their support, could not be extradited where he was not in the state when the crime was committed, though by failing to make payments he committed a crime within the state. Op. Atty. Gen. (840a-1), Apr. 13, 1934.

Where husband and father deserted wife and child in Chicago and wife and children came to Minnesota, the husband and father was a fugitive from justice if he made trip to Minnesota while refusing to furnish wife and children a home and support. Op. Atty. Gen. (339a), July 13, 1934.

A resident of another state who sends wife and children into certain county in state with intent to follow but then neglects to support them commits crime of abandonment in such county in state, but cannot be extradited where he has never come into the state, as he is not a fugitive from justice. Op. Atty. Gen. (494b-15), Nov. 1, 1934.

Minor charged with being delinquent cannot be extradited from another state. Op. Atty. Gen. (494b-15), Sept. 9, 1936.

3. Proof that party demanded is a fugitive.

Governor's issuance of extradition warrant raises presumption which controls until rebutted that named person is a "fugitive from justice" and hence subject to extradition. *State v. Moeller*, 191M193, 253NW668. See Dun. Dig. 3707.

4. The crime charged.

Generally speaking extradition on misdemeanor is not favorably considered, but law permits extradition in misdemeanor cases within the discretion of a governor. Op. Atty. Gen. (605a-6), Nov. 1, 1934.

Abandonment under §10135 is an extraditable offense. Op. Atty. Gen. (193b-1), Mar. 26, 1936.

6. Requisition papers.

Whether there was a compliance with Georgia statutes as regarded prerequisites for issuance of requisition warrant was a matter for the governor of that state, and a matter not reviewable by the courts of this state. 178M368, 227NW176.

It is enough that the indictment shows in general terms the commission of a crime; it need not be sufficient as a criminal pleading. 178M368, 227NW176.

"Complaint" sworn to on information and belief attached to requisition papers is sufficient "indictment" or "affidavit" to authorize the issuance of extradition papers by the governor of asylum state. *State v. Moeller*, 191M193, 253NW668. See Dun. Dig. 3708, 3709(20).

7. The warrant.

Where, pursuant to a hearing before governor in person, extradition warrant originally issued by clerk in governor's absence is reinstated, such warrant is valid even though not signed personally by the governor. *State v. Moeller*, 191M193, 253NW668. See Dun. Dig. 3709.

11. Review by courts.

Neither the good faith of the prosecution nor the guilt or innocence of the fugitive is open to inquiry. 178M368, 227NW176.

Prerequisites required by foreign statute not for court to review. 178M368, 227NW176.

Governor's rendition warrant creates a presumption that accused is a fugitive from justice, and to entitle a prisoner held under such a warrant to discharge on habeas corpus evidence must be clear and satisfactory that he was not in demanding state at time alleged crime was committed. *State v. Owens*, 187M244, 244NW820. See Dun. Dig. 3713(30).

Discharge by writ of habeas corpus of a prisoner held upon an extradition warrant for reason that courts of one state hold that he is not a fugitive from justice is not res judicata in habeas corpus proceedings in another state. *State v. Wall*, 187M246, 244NW811. See Dun. Dig. 3713, 5207.

10543. Fugitive from another state arrested, when.

A demand for extradition complies with the federal statute when it clearly shows that a criminal charge is pending in the demanding state, even though the papers are insufficient as a criminal pleading under the laws of this state. *State ex rel. King v. Wall*, 181M456, 232 NW738. See Dun. Dig. 3706.

10544. May give recognizance, when.

Where a person is held as a fugitive from justice under a rendition warrant issued by the Governor of this state he ordinarily should not be released on bail pending a decision in a habeas corpus proceeding to test the legality of his arrest. *State ex rel. Hildebrand v. Moeller*, 182M369, 234NW649. See Dun. Dig. 3713.

Where bond to appear in municipal court is forfeited and amount paid into court, it should be turned over to county. Op. Atty. Gen., Oct. 5, 1929.

FRESH PURSUIT ACT

This act was adopted by Colorado, Maine, Michigan, Minnesota, South Dakota, Tennessee and Wisconsin.

10547-1. Uniform law on fresh pursuit.—Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state, provided, however, the rights extended by this section shall be extended only to those states granting these same rights to peace officers of this state who may be in fresh pursuit of suspected criminals in such reciprocating states. (Act Mar. 17, 1939, c. 64, §1.)

10547-2. Arrest—Hearing.—If any arrest is made in this state by an officer of another state in accordance with the provisions of Section 1 of this act he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition war-

rant by the Governor of this state, or admit him to bail for such purpose. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested. (Act Mar. 17, 1939, c. 64, §2.)

10547-3. Construction of act.—Section 1 of this act shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful. (Act Mar. 17, 1939, c. 64, §3.)

10547-4. State shall include District of Columbia.—For the purpose of this act the word "State" shall include the District of Columbia. (Act Mar. 17, 1939, c. 64, §4.)

10547-5. Definition.—The term "fresh pursuit" as used in this act shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay. (Act Mar. 17, 1939, c. 64, §5.)

10547-6. Secretary of State to certify copies to other states.—Upon the passage and approval by the Governor of this act it shall be the duty of the Secretary of State (or other officer) to certify a copy of this act to the Executive Department of each of the states of the United States. (Act Mar. 17, 1939, c. 64, §6.)

10547-7. Provisions severable.—If any part of this act is for any reason declared void, it is declared to be the intent of this act that such invalidity shall not affect the validity of the remaining portions of this act. (Act Mar. 17, 1939, c. 64, §7.)

10547-8. Uniform Act on Fresh Pursuit, to be known as.—This act may be cited as the Uniform Act on Fresh Pursuit. (Act Mar. 17, 1939, c. 64, §8.)

UNIFORM CRIMINAL EXTRADITION ACT

This act was adopted by Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Vermont, West Virginia, Wisconsin and Wyoming.

10547-11. Definitions.—Where appearing in this act, the term "Governor" includes any person performing the functions of Governor by authority of the law of this state. The term "Executive Authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "State," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America. (Act Apr. 14, 1939, c. 240, §1.)

10547-12. Duties of Governor in extradition matters.—Subject to the provisions of this act, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and if found in this state. (Act Apr. 14, 1939, c. 240, §2.)

10547-13. Demand must be in writing.—No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under section 6, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy

of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the Executive Authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of the indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the Executive Authority making the demand. (Act Apr. 14, 1939, c. 240, §3.)

10547-14. Attorney General to investigate.—When a demand shall be made upon the governor of this state by the Executive Authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. (Act Apr. 14, 1939, c. 240, §4.)

10547-15. Extradition by agreement.—When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the Executive Authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the Executive Authority of any other state any person in this state who is charged in the manner provided in section 23 of this act with having violated the laws of the state whose Executive Authority is making the demand, even though such person left the demanding state involuntarily. (Act Apr. 14, 1939, c. 240, §5.)

10547-16. May extradite persons causing crime.—The governor of this state may also surrender, on demand of the Executive Authority of any other state, any person in this state charged in such other state in the manner provided in section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state, whose Executive Authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom. (Act Apr. 14, 1939, c. 240, §6.)

10547-17. Warrant of arrest.—If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance. (Act Apr. 14, 1939, c. 240, §7.)

10547-18. Accused to be turned over to demanding state.—Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act to the duly authorized agent of the demanding state. (Act Apr. 14, 1939, c. 240, §8.)

10547-19. Powers of officer.—Every such peace officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance. (Act Apr. 14, 1939, c. 240, §9.)

10547-20. Accused to be taken before court.—No person arrested upon such warrant shall be delivered over to the agent whom the Executive Authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state. (Act Apr. 14, 1939, c. 240, §10.)

10547-21. Violation a gross misdemeanor.—Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience to the last section, shall be guilty of a gross misdemeanor and, on conviction, shall be fined not more than \$1,000 or be imprisoned not more than six months. (Act Apr. 14, 1939, c. 240, §11.)

10547-22. Accused may be confined in jail.—The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the Executive Authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state. (Act Apr. 14, 1939, c. 240, §12.)

10547-23. Who may be apprehended.—Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except in cases arising under Section 6 with having fled from justice, with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or when-

ever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under Section 6, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant. (Act Apr. 14, 1939, c. 240, §13.)

10547-24. Arrest without warrant.—The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant. (Act Apr. 14, 1939, c. 240, §14.)

10547-25. Court may commit to jail.—If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under section 6, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation commit him to the county jail for such a time not exceeding 30 days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the Executive Authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged. (Act Apr. 14, 1939, c. 240, §15.)

10547-26. May be admitted to bail.—Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time in such bond, and for his surrender, to be arrested upon the warrant of the Governor of this state. (Act Apr. 14, 1939, c. 240, §16.)

10547-27. May be discharged—When.—If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in section 16, but within a period not to exceed 60 days after the date of such new bond. (Act Apr. 14, 1939, c. 240, §17.)

10547-28. May declare bond forfeited.—If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate

arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state. (Act Apr. 14, 1939, c. 240, §18.)

10547-29. May either hold or surrender prisoner.—If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state. (Act Apr. 14, 1939, c. 240, §19.)

10547-30. Governor not to inquire into guilt or innocence.—The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime. (Act Apr. 14, 1939, c. 240, §20.)

10547-31. May recall warrant.—The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. (Act Apr. 14, 1939, c. 240, §21.)

10547-32. Warrant for fugitives, parolees or probationers.—Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the Executive Authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed. (Act Apr. 14, 1939, c. 240, §22.)

10547-33. Prosecuting attorney or other officers to make written application.—(1) When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

(2) When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

(3) The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment re-

turned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the Governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition. (Act Apr. 14, 1939, c. 240, §23.)

10547-34. May not be served with civil process—Consent to return to demanding state—Delivery of prisoner—Voluntary return—Crime committed in this state.—A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

(a) Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 7 and 8 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 10.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the Governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such persons to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

(b) Nothing in this act contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever. (Act Apr. 14, 1939, c. 240, §24.)

10547-35. May be tried for other crimes.—After a person has been brought back to this state by, or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition. (Act Apr. 14, 1939, c. 240, §25.)

10547-36. Interpretation and construction of act.—The provisions of this act shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. (Act Apr. 14, 1939, c. 240, §26.)

10547-37. Provisions severable.—If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable. (Act Apr. 14, 1939, c. 240, §27.)

10547-38. Governor may appoint agent.—In every case authorized by the constitution and laws of the United States, the Governor may appoint an agent, who shall be the sheriff of the county from which the application for extradition shall come, when he can act, to demand of the Executive Authority of any state or territory any fugitive from justice or any person charged with a felony or other crime in this state; and whenever an application shall be made to the Governor for that purpose, the attorney general, when so required by him, shall forthwith investigate or cause to be investigated by any county attorney the grounds of such application, and report to the Governor all material circumstances which shall come to his knowledge, with an abstract of the evidence, and his opinion as to the expediency of the demand. The accounts of agents so appointed shall in each case be audited by the county board of the county wherein the crime upon which extradition proceedings are based shall be alleged to have been committed, and every such agent shall receive from the treasury of such county four dollars for each calendar day, and the necessary expenses incurred by him in the performance of such duties. (Act Apr. 14, 1939, c. 240, §28.)

10547-39. Transit of extradited person through state—Powers of officers.—Any person who has been or shall be convicted of or charged with a crime in any other state, and who shall be lawfully in the custody of any officer of the state where such offense is claimed to have been committed, may be by said officer conveyed through or from this state, for which purpose such officer shall have all the powers in regard to his control or custody that an officer of this state has over a prisoner in his charge. (Act Apr. 14, 1939, c. 240, §29.)

10547-40. Laws repealed.—Mason's Minnesota Statutes of 1927, Sections 10541, 10542, 10543, 10544, 10545, 10546 and 10547, and all acts and parts of acts inconsistent with the provisions of this act and not expressly repealed herein, are hereby repealed. (Act Apr. 14, 1939, c. 240, §30.)

10547-41. Short title.—This act may be cited as the Uniform Criminal Extradition Act. (Act Apr. 14, 1939, c. 240, §31.)

10547-42. Effective date.—This act shall take effect 30 days after its passage. (Act Apr. 14, 1939, c. 240, §32.)

PROCEEDINGS TO PREVENT CRIME

10548. Conservators of the peace.
Injunction may be brought against places selling liquor illegally. Op. Atty. Gen. (494b-21), Apr. 30, 1936.

ARRESTS

10566. Defined—By whom made—Aiding officer.
By pleading not guilty to a complaint filed in a justice court, charging defendant with petit larceny, he submitted himself to jurisdiction of court; and there was no error in denying motion to withdraw plea in order that defendant might question legality of arrest. State v. Henspeter, 195M359, 271NF700. See Dun. Dig. 2443, 2444.
Deputy sheriff residing outside of village may make arrest within village for violation of its ordinances, fees of sheriff being paid by village, but village has no au-

thority to compensate deputy in addition to fees prescribed. Op. Atty. Gen., May 26, 1932.

Mayor and councilmen of city of St. Peter have full powers of all peace officers in maintaining the peace and are not limited to exercise of such authority to times of riots and public disturbances. Op. Atty. Gen. (847), Aug. 8, 1934.

10570. Without warrant, when—Break door, etc.

Threat to shoot an officer if he takes property under replevin papers is a misdemeanor under §10431 and the officer may arrest the offender without a warrant. 177M307, 225NW148.

Whether officer failed to take prisoner before magistrate within a reasonable time held for jury. 177M307, 225NW148.

If restraint after receiving warrant was illegal, prisoner had a right of action for false imprisonment, irrespective of his release. 177M307, 225NW148.

Where an officer arrests a person without a warrant, the burden rests upon the officer to plead and prove justification. Otherwise the arrest is prima facie unlawful. Evans v. J., 182M282, 234NW292. See Dun. Dig. 512, 3729(91).

In action for false imprisonment, whether the plaintiff was drunk at the time of arrest held for jury. Evans v. J., 182M282, 234NW292. See Dun. Dig. 3732a(1).

Whether the sheriff detained the plaintiff in the county jail for unreasonable time before bringing her before magistrate or obtaining warrant held question for jury. Evans v. J., 182M282, 234NW292. See Dun. Dig. 517, 3732a(1).

Whether the sheriff of the county directed or authorized the constable to make the arrest was under the evidence, a question of fact for the jury. Evans v. J., 182M282, 234NW292. See Dun. Dig. 512, 3732a(1).

10575-1. Arrests any place in state—When allowed.

Any peace officer, such as a constable, may make an arrest anywhere in the state for an offense committed in his local jurisdiction. Op. Atty. Gen., Nov. 22, 1929.

A village constable or other peace officer can make an arrest anywhere in state only for an offense committed within village limits. Op. Atty. Gen., Dec. 21, 1933.

EXAMINATION OF OFFENDERS—COMMITMENT—BAIL

10577. Proceedings on complaint—Warrant.

1. Nature of proceeding.
The preliminary examination referred in §10666 is that provided for by §§10577 to 10587. 175M508, 221NW900.

4. Waiver.
Where defendant, when arraigned in district court, stood mute and did not call court's attention to state's failure to file formal complaint against him and to hold a preliminary examination, objections to district court's jurisdiction were thereby waived. State v. Puent, 198M 175, 269NW372. See Dun. Dig. 2431.

5. The complaint.
An objection that a criminal complaint is void for duplicity must be taken at or before trial, or it will be considered as waived. 175M222, 220NW611.

A justice has no authority to issue a subpoena requiring the appearance of a witness until the complaint has been signed and an action is pending before him. Op. Atty. Gen., Aug. 5, 1930.

6. The examination.
Testimony taken by a committing magistrate under §10577 need not be reduced to writing or certified and returned to clerk of district court under §10592. State v. District Court, 192M620, 257NW340. See Dun. Dig. 2438.

10578. Warrant executed, where.
Uniform Act on Fresh Pursuit, Laws 1939, c. 64, app. March 17. See §§10547-1 to 10547-8.

10579. Offender may give recognizance, etc.
Defendant held to have broken his bond by failing to appear on the day that his case was called for trial, though he appeared at a later date and during the term and entered a plea of guilty. U. S. v. Pleason (DC-Minn) 26F(2d) 104.

10585. Examination—Rights of accused.
An automobile belonging to the victim of an assault while in custody of the law is subject to the order of the magistrate before whom the proceeding is pending. Op. Atty. Gen., Feb. 3, 1932.

A photographer who takes photographs for the state in investigating a criminal case is an employee or agent of the state, and plates in his hands are no more subject to examination or production in behalf of the defendant than in the hands of the sheriff or county attorney. Op. Atty. Gen., Feb. 3, 1932.

10586. Witnesses kept separate—Testimony, how taken.

County cannot pay reporter for taking testimony at preliminary hearing. Op. Atty. Gen. (129), Apr. 20, 1937.

10587. Prisoner discharged, when—Offenses not bailable.

Accused in a criminal case has no right to compel the production at preliminary examination of evidence obtained by the state in the course of its investigation. *Op. Atty. Gen., Feb. 3, 1932.*

Court commissioner has authority to fix bail of one charged with an assault in the first degree. *Op. Atty. Gen., Feb. 3, 1932.*

10588. Bail—Commitment.

1/2. In general.

This section has no application to bail money given to a United States court commissioner. *Moerke, 184M314, 238NW690. See Dun. Dig. 724b.*

2. Bail.

Applications for bail should be addressed to district court after return of magistrate is filed in district court, if not sooner. *Op. Atty. Gen., Apr. 3, 1929.*

10592. Certifying testimony.

The court, not the jury, has the benefit of knowledge disclosed by testimony certified by magistrate in the files of the case in the office of the clerk of the trial court. *State v. Irish, 183M49, 235NW625. See Dun. Dig. 2438(8).*

Testimony taken by a committing magistrate under §10577 need not be reduced to writing or certified and returned to clerk of district court under §10592. *State v. District Court, 192M620, 257NW340. See Dun. Dig. 2438.*

It is not necessary for a justice of the peace to make a return to the clerk of the district court of a preliminary hearing where the defendant is discharged and not bound over. *Op. Atty. Gen., Dec. 19, 1931.*

10593. Proceedings on default.

Defendant held to have broken his bond by failing to appear on the day that his case was called for trial, though he appeared at a later date and during the term and entered a plea of guilty. *U. S. v. Pleason (DC-Minn) 26F(2d)104.*

City may refund money collected on bond if ordered by municipal court. *Op. Atty. Gen. (306a-3), Aug. 25, 1937.*

10595. Action on recognizance—Not barred, when.

U. S. v. Pleason (DC-Minn) 26F(2d)104.

10598. Application for bail—Justification.

Op. Atty. Gen., Apr. 3, 1929; note under §10588.

10599. Surrender of principal—Notice to sheriff.

Right of surety to recapture principal in another state. *16MinnLawRev197.*

10602-4. Corporate bonds authorized in criminal cases.—Any defendant required to give a bond, recognizance or undertaking to secure his appearance in any criminal case in any court of record, may, if he so elects, give a surety bond, recognizance or undertaking executed by a corporation authorized by law to execute such bonds, recognizances or undertakings, provided, that the amount of the bond, recognizance or undertaking as fixed by the court must be the same regardless of the kind of bond, recognizance or undertaking given. (Act Apr. 25, 1931, c. 386, §1.)

GRAND JURIES

10603. Members—Quorum.

Grand jurors are not entitled to extra compensation for committee meetings or for investigation when no quorum is present. *Op. Atty. Gen. (260b), Apr. 30, 1937.*

10604. Grand juries—When to be drawn—Who liable.

Where county attorney more than 15 days before regular term obtained order from judge of district court for grand jury, but did not file order with clerk of court until less than 15 days before term, no grand jury could be called for such term. *Op. Atty. Gen. (494a-3), Sept. 30, 1937.*

10606. Names, how prepared and drawn.

Op. Atty. Gen. (494a-3), Sept. 30, 1937; note under §10604.

10622. Evidence—For defendant.

1. In general.

A witness before a grand jury may not refuse to answer questions because they have not been ruled upon by the court or because they seem to relate only to an offense, the prosecution of which is barred by a statute of limitation. *177M200, 224NW838.*

Defendant is not entitled to have an indictment quashed simply because grand jury declined to call a witness on his behalf, whom he had requested them to call, even though an earlier grand jury, with testimony

of designated witness before them, had refused to indict. *State v. Lane, 195M587, 263NW608. See Dun. Dig. 4422.*

Date of alleged larceny of money by employee with drawing from bank account should be alleged as first act during six months' period, so that subsequent acts during period could be proved. *Op. Atty. Gen., Feb. 2, 1933.*

2. Accused as witness.

Where, after a complaint is filed against defendant in municipal court charging him with a felony and a warrant is issued thereon, but, before hearing thereon, he is subpoenaed to appear before grand jury and compelled to give evidence as to facts upon which said charge is based, his constitutional right not to be compelled in any criminal case to be a witness against himself is violated. Defendant is entitled to have an information thereafter filed against him on such charge, by county attorney in district court, set aside. *State v. Corteau, 198M433, 270NW144. See Dun. Dig. 10337.*

10625. Matters inquired into.

A witness before a grand jury may not refuse to answer questions because they have not been ruled upon by the court or because they seem to relate only to an offense, the prosecution of which is barred by a statute of limitation. *177M200, 224NW838.*

10637. Indictment—How found and indorsed—Names of witnesses.

A county attorney has not the power to institute a prosecution where the grand jury has once passed upon the evidence and returned a no-bill without first obtaining a court order in advance. *Op. Atty. Gen., Oct. 19, 1931.*

Where the grand jury has actually considered a specific charge and returned no-bill, the matter may be submitted to another jury again only by direction of the district court. *Op. Atty. Gen., Oct. 19, 1931.*

4. Indorsing names of witnesses.

It was not fatal that names of some who appeared before grand jury were not endorsed on indictment, already containing names of 23 witnesses. *State v. Waddell, 187M191, 245NW140. See Dun. Dig. 4358.*

Aside from what is required by statute, it is not necessary for state to furnish defendant with names of persons it intends to call as witnesses and it was not error for trial court to deny defendant's motion to require state to do so. *State v. Poelaert, 200M30, 273NW641. See Dun. Dig. 4358.*

10638. Indictment presented, filed, and recorded.

It is not proper in district court to include in one file several charges against the same defendant, even though these charges arise out of the same transaction. *Op. Atty. Gen., April 28, 1931.*

INDICTMENTS

10639. Contents.

Pendency of a proceeding for preliminary examination in municipal and justice court does not prevent the finding of an indictment by the grand jury. *175M607, 222NW280.*

Indictment charging maintenance of a liquor nuisance, held sufficient. *177M278, 225NW20.*

4. The charging part.

State cannot be expected to draft such an indictment as will disclose all of its evidence. *State v. Nuser, 199M315, 271NW811. See Dun. Dig. 4384.*

Putting a person in fear of injury should be expressly alleged in a robbery indictment if it is desired to introduce evidence thereon. *Op. Atty. Gen., Dec. 15, 1931. Necessity of word "feloniously." 23MinnLawRev226.*

4 1/2. Joinder of offenses.

Where partners in a store are robbed, and robber takes money from the persons of each and from the store till, three offenses are committed, and there should be three separate indictments. *Op. Atty. Gen., Dec. 15, 1931.*

Where two or more persons are robbed at the same time, a separate offense is committed as to each and separate indictments are necessary. *Op. Atty. Gen., Dec. 15, 1931.*

14. Essential elements to be alleged.

An indictment should be so worded as to charge particular offense of which complaint is made in order that accused will be apprised of nature of charge. *State v. Nuser, 199M315, 271NW811. See Dun. Dig. 4360.*

18. Following language of statute or ordinance.

Indictment charging that defendant did "ask, agree to receive, and receive" a bribe, was not duplicitous or repugnant. *178M437, 227NW497.*

An indictment or information is sufficient if it sets forth in language of statute elements of offense intended to be punished. *State v. Omody, 198M165, 269NW360. See Dun. Dig. 4377, 4379.*

A person may be charged in an indictment in words of statute without particular statement of facts and circumstances if offense is fully, directly, and expressly alleged, but if statute does not set forth all elements necessary to constitute offense an accusation which simply follows words of statute is not sufficient. *State v. Eich, 204M134, 282NW810. See Dun. Dig. 4379.*

10641. To be direct and certain.**1. Allegations must be direct.**

Indictment charging maintenance of a liquor nuisance, held sufficient. 177M278, 225NW20.

A given conclusion goes from category of inference into that of implication when all possibility of other or differing conclusion is negated. *State v. Lopes*, 201M20, 275NW374. See Dun. Dig. 4385.

Information or indictment must aver every essential element of crime positively and not inferentially as by way of mere recital or argument. *Id.*

2. Matters of inducement.

All matters of inducement which are necessary in order to show that act charged is a criminal offense must be stated in indictment or information. *State v. Bean*, 199M16, 270NW918. See Dun. Dig. 4375.

Averments in way of inducements set forth in indictment held not to render indictment double. *Id.* See Dun. Dig. 4413.

3. Certainty.

Indictment charging that defendant did "ask, agree to receive, and receive" a bribe, was not duplicitous or repugnant. 178M437, 227NW497.

Information charging that defendant unjustifiably exposed poison with intent that it should be taken by a dog held sufficiently definite to state an offense. *State v. Eich*, 204M134, 282NW810. See Dun. Dig. 4360.

4. Bill of particulars.

It is only when offense is of a general nature and charge is in general terms that prosecution may be required to file a specification of particular acts relied upon to sustain charge. *State v. Poelaert*, 200M30, 273NW641. See Dun. Dig. 4401.

10642. Fictitious name.

Misnomer of defendant in criminal complaint and warrant may be corrected by amendment, and is an irregularity which is waived by plea to indictment or information after waiver or examination in municipal court. 179M53, 228NW437.

10643. Different counts.

An information could not join an assault inflicting grievous bodily harm with an assault with intent to rob. *Op. Atty. Gen.* (494a-1), Dec. 26, 1935.

10644. Time, how stated.

An information may be amended on trial, and such an amendment may consist of changing the date of the commission of the crime. *State v. Irish*, 183M49, 235NW625. See Dun. Dig. 4374(01).

10645. Erroneous allegation as to person injured.

Alleged variances between the proofs and the facts alleged concerning ownership of the stolen goods and the place from which they were stolen were not material. 172M139, 214NW785.

10646. Words of statute need not be followed.

Where indictment charged extortion by threat to expose another to disgrace by accusing him of operating a gambling house, proof that money was extorted by threat to arrest him for operating such house, held not a material variance. 179M439, 229NW558.

10647. Tests of sufficiency.

Indictment charging maintenance of a liquor nuisance, held sufficient. 177M278, 225NW20.

Information charging that defendant unjustifiably exposed poison with intent that it should be taken by a dog held sufficiently definite to state an offense. *State v. Eich*, 204M134, 282NW810. See Dun. Dig. 4360.

(4).

Indictments charging that offense occurred in a given county, without going further, are upheld. *State v. Putzier*, 183M423, 236NW765. See Dun. Dig. 4373(43), (44), (45).

(5).

An information may be amended on trial, and such an amendment may consist of changing the date of the commission of the crime. *State v. Irish*, 183M49, 235NW625. See Dun. Dig. 4374(01).

10648. Formal defects disregarded.

See also notes under §10752.

Error in trial of one count of indictment does not require reversal where conviction upon other count is proper and sentences run concurrently. *Neal v. U. S.*, (CCA8), 102F(2d)643.

Information alleging the stealing of men's clothing in the nighttime without alleging that it was taken from a building, charged grand larceny in the second degree, and not grand larceny in the first degree. 172M139, 214NW785.

There was no fatal variance where information charged carrying of a revolver and proof showed weapon to be an automatic pistol. 176M238, 222NW925.

Indictment charging maintenance of a liquor nuisance, held sufficient. 177M278, 225NW20.

Rule of variance is not strictly applied. Proof of crediting amount not variance from allegation of receiving money as bribe. 178M437, 227NW497.

Reception of evidence. *Id.*

Testimony of a conspirator that he and his associates committed other offenses, held not prejudicial error where the commission of the offense for which the prosecution was had was undisputed. 179M439, 229NW558.

An information may be amended on trial, and such an amendment may consist of changing the date of the commission of the crime. *State v. Irish*, 183M49, 235NW625. See Dun. Dig. 4430(01).

While a deputy public examiner should not have been interrogated as a witness for the state on direct examination concerning statements made by defendant in response to a subpoena, the examination did not go far enough along that line to prejudice defendant, both the statements in question and their truth having been established by other evidence. *State v. Stearns*, 184M452, 238NW895. See Dun. Dig. 10337-10343.

There being no question of authenticity of indictment, and none as to its substance, misnomer of deceased in minutes of grand jury, held immaterial. *State v. Waddell*, 187M191, 245NW140. See Dun. Dig. 4355.

Assertion by the county attorney that "state tells you" defendant is guilty, disapproved; but held without prejudice. *State v. Waddell*, 187M191, 245NW140. See Dun. Dig. 2478.

In prosecution for unlawful possession of intoxicating liquor, failure to strike testimony of policeman that caramel coloring found on premises was used for coloring moonshine, held not reversible error. *State v. Olson*, 187M527, 246NW117. See Dun. Dig. 4945.

Clause in instruction that presumption of innocence is for benefit of innocent person and not intended as a shield for guilty, was improper but not prejudicial. *State v. Bauer*, 189M280, 249NW40. See Dun. Dig. 4365.

Exclusion of evidence was not prejudicial where facts were shown by other evidence. *State v. Scott*, 190M462, 252NW225. See Dun. Dig. 2490.

While it may have been improper for county attorney, in opening to jury, to suggest that defendant had expressed a desire formally to plead guilty, there was no prejudice to defendant because he voluntarily, as witness in his own behalf, explained fully incident referred to, without denial or qualification by state. *State v. Cater*, 190M485, 252NW421. See Dun. Dig. 2478, 2500.

Where evidence leaves no doubt of defendant's guilt, alleged errors with no adverse effect on defendant's substantial or constitutional rights will not be considered on appeal. *State v. MacLean*, 192M96, 255NW821. See Dun. Dig. 416.

A new trial in criminal cases should be granted cautiously and only for substantial error. *State v. Barnett*, 193M336, 258NW608. See Dun. Dig. 2490.

Admission of testimony as to conversation had with deceased after performance of illegal operation held not prejudicial error, since defendant was in no way mentioned in conversation testified to. *State v. Zabrocki*, 194M346, 260NW507. See Dun. Dig. 2490.

Misconduct of jury in visiting building from which property was charged to have been stolen without order of court or notice to defendant held not prejudicial where inspection could not have influenced verdict. *State v. Simenson*, 195M258, 262NW638. See Dun. Dig. 2476.

Where misconduct of jury is urged as ground for a new trial, duty to determine whether such misconduct may have been prejudicial to complaining party rests primarily upon trial court, and if court can determine with reasonable certainty that misconduct did not affect result, verdict should stand. *Id.* See Dun. Dig. 2500.

Accused should be given a copy of amended indictment, as well as a copy of the original, but failure to do so was not prejudicial or jurisdictional where accused knew what amendment was and opposed motion to amend. *State v. Heffelfinger*, 197M173, 266NW751. See Dun. Dig. 2441, 4430.

Court may allow amendments of indictments as to matters of substance, even though period of limitations has run against offense, provided original indictment was returned from grand jury within required time. *Id.* See Dun. Dig. 2419a, 4430.

Section is constitutional. *Id.* See Dun. Dig. 4365, 4430. Section 10692 has no application where demurrer had not been sustained at time amendments were offered. *Id.* See Dun. Dig. 4430.

An indictment which would not be good as against a demurrer may be amended. *Id.*

Purpose of amendment to this section was to liberalize power of court with respect to indictments to minimize insubstantial defects, and it should be construed to carry out that purpose. *Id.*

Court may in its discretion allow amendments of an indictment or information both as to form and substance. *State v. Omodt*, 198M165, 269NW360. See Dun. Dig. 4430.

Statement in charge in manslaughter case that it appeared from statement of counsel that neither fact that deceased was dead or fact that he was killed in road at place in question was disputed was erroneous, but not prejudicial in view of balance of charge, and its withdrawal from consideration of jury by the court. *State v. Warren*, 201M369, 276NW655. See Dun. Dig. 2479.

In prosecution of a motorist for second degree manslaughter, no error prejudicial to defendant resulted from instruction defining all of different degrees of homicide in order to explain nature of manslaughter, as distinguished from murder. *Id.*

Jury may be prejudiced by admission of incompetent evidence even though it be subsequently stricken from

the record, particularly where prosecuting attorney outlines evidence in his opening statement to jury. *State v. Elias*, 285NW475. See Dun. Dig. 2490.

An indictment charging a violation of the state prohibition laws may be amended by including an allegation of a prior conviction. *Op. Atty. Gen.*, Dec. 5, 1929.

10651. Indictment for libel.

In a prosecution for criminal libel, where indictment charges that libelous matter was published of and concerning a person or persons named, it need not otherwise state extrinsic facts to show that language used applied to person or persons named in indictment as being libeled. Such extrinsic facts are to be shown by evidence at trial. *State v. Cramer*, 193M344, 258NW525. See Dun. Dig. 4384.

Where a libelous article charges a named voluntary unincorporated association of persons with wrongdoing, libel applies to the members of such association, although not specifically named in the article. *Id.* See Dun. Dig. 4360.

Where an indictment for libel sufficiently charges that libelous language tended to and did expose persons named therein as having been libeled, to hatred, contempt, ridicule, and obloquy, and caused them to be shunned and avoided, a further but insufficient charge as to injury to business and occupation of such persons may be disregarded as surplusage. *Id.* See Dun. Dig. 4364.

10654. Compounding felony indictable.

Complaint held not bad for duplicity, and evidence held to support conviction. 181M106, 231NW804.

10655. Limitations.

Prosecution of guardian of incompetent for grand larceny in embezzling money, held not barred by limitations. *State v. Thang*, 188M224, 246NW891. See Dun. Dig. 2419a.

Where information clearly shows that time within which statute permits offense to be prosecuted has elapsed, absent any allegation avoiding operation of statute, information is demurrable. *State v. Tupa*, 194M 488, 260NW875. See Dun. Dig. 4416.

Defendant did not waive statute of limitations by pleading guilty after his demurrer to information had been overruled. *Id.* See Dun. Dig. 4418.

Court may allow amendments of indictments as to matters of substance, even though period of limitations has run against offense, provided original indictment was returned from grand jury within required time. *State v. Heffelfinger*, 197M173, 266NW751. See Dun. Dig. 2419a, 4430.

Statute of limitations held not to have run against prosecution for embezzlement. *State v. Chisholm*, 198M 241, 269NW463. See Dun. Dig. 2419a.

Limitations begin to run in an embezzlement case from the time of the actual conversion of the money or property, even though the crime is not discovered, except in the case of guardians as to which limitations starts to run from the time when a demand and failure to pay occur. *Op. Atty. Gen.*, Jan. 11, 1932.

Where an indictment for an offense other than murder was dismissed some 10 years after it was returned, a subsequent indictment is barred by limitations. *Op. Atty. Gen.*, Mar. 23, 1933.

Limitations run from date of embezzlement in ordinary case. *Op. Atty. Gen.* (605a-13), Mar. 6, 1936.

Limitations ran against prosecution for larceny of a pen from a building, though identity of thief was not known until after expiration of period. *Op. Atty. Gen.* (605a-13), Apr. 1, 1936.

Limitations against prosecution for abandonment of children does not run where father left state and remained away, and passage of four years should not be any reason for failure to extradite. *Op. Atty. Gen.* (605a-13), Aug. 25, 1937.

Abandonment is a continuing crime and prosecution may be had in any county in which wife and children lived after desertion. *Op. Atty. Gen.* (133b-1), July 15, 1938.

10659. Death ensuing in another county—Prosecution.

Venue in abortion cases involving accomplices. *Op. Atty. Gen.* (133b-3), Oct. 15, 1935.

10662. Larceny by clerks, agents, etc.

Statute permits conviction of larceny by embezzlement for any taking within stated six-month period from time charged in information or indictment, but it does not exclude otherwise relevant evidence of doings of accused outside of six-month period. *State v. Cater*, 190M485, 252NW421. See Dun. Dig. 3007.

Statute of limitation held not to have run against prosecution for embezzlement. *State v. Chisholm*, 198M241, 269NW463. See Dun. Dig. 2419a.

Where a salesman has been taking small amounts at various times over a period of six months, he may be charged with and convicted of grand larceny of the total amount taken. *Op. Atty. Gen.* (494b-20), Feb. 19, 1935.

10663. Evidence of ownership.

Evidence held to sustain conviction. 175M607, 222NW 280.

INFORMATIONS

10664. Powers of district court.

175M508, 221NW900; note under §10666.

10665. Information shall state, what—Etc.

Information alleging the stealing of men's clothing in the nighttime, without alleging that it was taken from a building, charged second degree and not first degree larceny. 172M139, 214NW785.

An information may be amended on trial, and such an amendment may consist of changing the date of the commission of the crime. *State v. Irish*, 183M49, 235NW 625. See Dun. Dig. 4430.

Information charging that defendant unjustifiably exposed poison with intent that it should be taken by a dog held sufficiently definite to state an offense. *State v. Eich*, 204M134, 282NW810. See Dun. Dig. 4360.

10666. Preliminary examination.

Prosecution under §9931-2, permitting increased punishment of habitual criminals, may be initiated by information though a sentence of imprisonment for more than 10 years may result. 175M508, 221NW900.

This section has no application to the procedure under §4 of Laws 1927, c. 236 (§9931-3) and is not repealed by that act. 175M508, 221NW900.

The preliminary examination referred to in this section is that provided for by §§10577 to 10587. 175M508, 221NW900.

Pendency of a proceeding for preliminary examination in municipal or justice court does not prevent the finding of an indictment by the grand jury. 175M607, 222 NW280.

The court, not the jury, has the benefit of knowledge disclosed by the files of the case in the office of the clerk of the trial court as to evidence on preliminary examination. *State v. Irish*, 183M49, 235NW625. See Dun. Dig. 2431.

Where defendant, when arraigned in district court, stood mute and did not call court's attention to state's failure to file formal complaint against him and to hold a preliminary examination, objections to district court's jurisdiction were thereby waived. *State v. Puent*, 198M 175, 269NW372. See Dun. Dig. 2431.

10667. Court may direct filing of information, when—Plea—etc.—That in all cases where a person charged with a criminal offense shall have been held to the district court for trial by any court or magistrate, and in all cases where any person shall have been committed for trial and is in actual confinement or in jail by virtue of an indictment or information pending against him, the court having trial jurisdiction of such offense or of such indictment or information or proceedings shall have the power at any time, whether in term or vacation, upon the application of the prisoner in writing, stating that he desires to plead guilty to the charge made against him by the complaint, indictment or information, or to a lesser degree of the same offense to direct the county attorney to file an information against him for such offense, if any indictment or information had not been filed, and upon the filing of such information and of such application, the court may receive and record a plea of guilty to offense charged in such indictment or information, or to a lesser degree of the same offense and cause judgment to be entered thereon and pass sentence on such person pleading guilty, and such proceedings may be had either in term time or in vacation, at such place within the judicial district where the crime was committed as may be designated by the court.

Whenever such plea shall be received at any place other than at a regular place of holding court in the county where such offense shall have been committed, the sheriff having such accused person in custody, or the deputy of such sheriff, shall take such person before the district court wherever such court may be in the judicial district wherein such crime shall have been committed. In such cases and before such person shall be taken before the court in any other county than that in which the crime shall have been committed, he shall sign a petition in writing, asking leave to enter such plea, and such petition and request shall be approved in writing by the county attorney of the county wherein such crime shall have been committed. In case such county attorney shall decline to approve such petition and request, any judge of said court may nevertheless in his discretion direct that such accused person be brought before the court at such place as it may designate.

When such person shall be brought before the court in a county other than that in which the offense shall have been committed, unless the court shall otherwise order, it shall not be necessary for the county attorney or the clerk of the district court of the county wherein such offense was committed, to attend before the court; and in such cases the court shall cause due information of all proceedings before the court in any such matter to be communicated to such clerk of the district court, and therefrom such clerk shall be authorized to complete his records with reference to such matter.

The expense of the sheriff in taking any such person before the court and in attending on such proceedings, and the expense of the county attorney and the clerk of the district court when ordered by the court to attend, shall be a charge against the county wherein the crime charged in such indictment or information shall have been committed, and shall be allowed and paid in the same manner as other claims against such county.

Unless the person accused shall expressly waive the services of counsel, and unless the court shall concur therein, no plea of guilty shall be received or entered upon this act unless the person accused shall be represented by competent counsel; and if he have no means with which to employ counsel, the court shall appoint such counsel and shall be authorized to provide and pay compensation therefor under the provisions of Section 9957, General Statutes of Minnesota 1923.

This section shall not apply to cases where the punishment for the offense to which the prisoner desires to plead guilty is imprisonment for life in the state's prison. ('05, c. 231, §5; '09, c. 398; '13, c. 65, §1; G. S. '13, §9162; '25, c. 136, §1; Apr. 17, 1935, c. 194, §1.)

175M508, 221NW900; note under §10666. Where defendant wishes to plead guilty, county attorney has authority to file an information against him in all cases where punishment is less than life imprisonment. Op. Atty. Gen. (494b-17), Apr. 25, 1935.

Information may be filed in all cases where punishment is less than life. Op. Atty. Gen. (494a-1), Oct. 11, 1935.

One charged with first degree manslaughter may be tried upon information. Op. Atty. Gen. (494a-1), Mar. 11, 1938.

Prior to Laws 1935, c. 194, a county attorney was permitted to file information in all cases where penalty did not exceed ten years, and only change made by that act was to permit information in all cases where penalty is less than life imprisonment. Op. Atty. Gen. (494a-2), July 1, 1938.

ARRAIGNMENT OF DEFENDANT

10669. Presence of defendant.

See §10705.

10678. Defendant informed of his right to counsel.

It is not the duty of a justice of the peace to advise the defendant that he is entitled to have assistance of counsel in a defense in a prosecution under a city ordinance. 175M222, 220NW611.

Right of defendant to appeal after plea of guilty in municipal court. Op. Atty. Gen., Dec. 9, 1930.

10679. Arraignment—How made.

Record establishes that defendant was accorded his statutory and constitutional rights of proper arraignment and notice of charge brought against him. State v. Barnett, 193M336, 258NW508. See Dun. Dig. 2439a, 4354.

Accused should be given a copy of amended indictment, as well as a copy of the original, but failure to do so was not prejudicial or jurisdictional where accused knew what amendment was and opposed motion to amend. State v. Heffelfinger, 197M173, 266NW751. See Dun. Dig. 2441, 4430.

10681-1. Defense of alibi—Application by county attorney.—Upon application of the county attorney, the district court in which any criminal proceeding is pending, may require the defendant to file with the court notice of intention to claim an alibi, which notice shall specify the county or municipality in which the defendant claims to have been at the time of the commission of the alleged offense, and upon failure to file such notice the trial court may in its discretion exclude evidence of an alibi in the trial of the case. (Act Apr. 17, 1935, c. 194, §3.)

10682. Crimes of corporations, etc.

A cooperative creamery association may be prosecuted for violation of state dairy and food law, and employee thereof violating law may also be prosecuted, but officers of corporation should not be taken into custody by officer serving summons, corporation, and not officers, being prosecuted. Op. Atty. Gen. (494b-10), Jan. 8, 1935.

SETTING ASIDE INDICTMENT

10685. Grounds—Waiver of objections.

1. Under subd. 1.

Defendant was not entitled to have an indictment quashed simply because grand jury declined to call a witness on his behalf, whom he had requested them to call, even though an earlier grand jury, with testimony of designated witness before them, had refused to indict. State v. Lane, 195M587, 263NW608. See Dun. Dig. 4422.

DEMURRERS

10690. Grounds of demurrer.

1. In general.

Where information clearly shows that time within which statute permits offense to be prosecuted has elapsed, absent any allegation avoiding operation of statute, information is demurrable. State v. Tupa, 194M488, 260NW875. See Dun. Dig. 2419a.

Defendant did not waive statute of limitations by pleading guilty after his demurrer to information had been overruled. Id. See Dun. Dig. 2419a.

10692. Proceedings on allowance—Defendant, when charged.

This statute has no application to amendment of substance offered under §10648 before any demurrer to indictment had been sustained. State v. Heffelfinger, 197M173, 266NW751. See Dun. Dig. 4430.

10694. Objections taken by demurrer.

Point not having been made by demurrer or motion before trial, it is then too late to object to use in an information for bribery of word "tending" rather than "intending" as applied to purpose of feloniously influencing official action. State v. Lopes, 201M20, 275NW374. See Dun. Dig. 4419.

PLEAS

10695. Pleas to indictment—Oral, etc.

The acceptance or rejection of a plea of nolo contendere rests wholly within the discretion of the trial judge. Twin Ports Oil Co. v. P., (DC-Minn), 26FSupp366.

Plea of former jeopardy cannot be presented by motion on affidavits, but must be urged by formal plea, the issues of fact in which must be tried by jury. 180M439, 231NW6.

A plea of guilty does not preclude a defendant from raising, for the first time on appeal, the question of whether or not the complaint, information, or indictment charges a public offense. State v. Parker, 183M588, 237NW409. See Dun. Dig. 2491.

10696. Plea of guilty.

A plea of guilty if withdrawn by leave of the court is not admissible upon the trial of the substituted plea of not guilty. 173M293, 217NW351.

Where plea of guilty, sentence and judgment are set aside, it is error on trial to require defendant to state on cross-examination what he said before the presiding judge after his plea preliminary to sentence. 174M590, 219NW926.

10697. Plea of not guilty—Evidence under.

By pleading not guilty to a complaint filed in a justice court, charging defendant with petit larceny, he submitted himself to jurisdiction of court; and there was no error in denying motion to withdraw plea in order that defendant might question legality of arrest. State v. Henspeter, 199M359, 271NW700. See Dun. Dig. 2443, 2444.

10698. Acquittal—When a bar.

State v. Winger, 204M164, 282NW819; note under §10124. A plea of former conviction or acquittal for same offense raised an issue of fact of which trial court has jurisdiction. State v. Utrecht, 287NW229. See Dun. Dig. 2442.

A defendant's constitutional right to plead former jeopardy may be waived and if such a plea is not entered at proper time, it is waived by defendant and jurisdiction of trial court is not affected by fact that such a plea might have been interposed. Id. See Dun. Dig. 2442.

10699. Indictment for offense of different degrees.

State v. Winger, 204M164, 282NW819; note under §10124. Plea of former jeopardy, that a man shall not be brought into danger of his life or limb for same offense more than once, is established maxim of common law and constitution as a fundamental right of and a safeguard to accused, and protection afforded is not against peril of second punishment, but against being again tried for same offense. State v. Fredlund, 200M44, 273NW353. See Dun. Dig. 2425.

A plea of former jeopardy will not be sustained where it appears that in one transaction two distinct crimes were committed. *Id.*

It is identity of offense, and not of act, which is referred to in constitutional guarantee against putting a person twice in jeopardy. Where two or more persons are injured in their persons, though it be by a single act, yet, since consequences affect, separately, each person injured, there is a corresponding number of distinct offenses, as in separate prosecutions for homicide where two persons in same automobile were killed. *Id.* See Dun, Dig. 2426.

Where facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at same time, a prosecution to final judgment for stealing some of articles will bar a subsequent prosecution for stealing any of articles taken at same time, and same rule applies where acquittal or conviction of a greater, offense necessarily includes a lesser one. *Id.*

Before a defendant may avail himself of plea of former jeopardy it is necessary for him to show that present prosecution is for identical act and that crime both in law and in fact were settled by first prosecution. *Id.* See Dun, Dig. 2427a.

Multiple consequences of a single criminal act. 21 MinnLawRev505.

CHANGE OF VENUE

10701. Place of trial—Change of venue.

1. Place of trial.

Threats of criminal prosecution and exposure to disgrace made in one county, which frightened the threatened person into the payment of money in another county, sustain a conviction of extortion in the latter county. *State v. McKenzie*, 182M513, 235NW274. See Dun, Dig. 2423, 3701.

Venue of prosecution for obtaining money by fraudulent checks was properly laid in county where bank suffering loss was located. *State v. Scott*, 190M462, 252 NW225. See Dun, Dig. 2423.

Evidence sustains jury's finding that an insurance policy was "issued" by defendant in Ramsey county, and as such the offense charged in indictment was properly triable there. *State v. Bean*, 199M16, 270NW918. See Dun, Dig. 2423.

Prosecution for embezzlement by one making collections in various counties should be had in county of his place of business. *Op. Atty. Gen.*, July 28, 1932.

As regards venue of larceny prosecution, county, where collector of money made actual misappropriation, is proper place for trial, though money was collected in another county and demand made for it in still another county. *Op. Atty. Gen.*, Nov. 3, 1933.

A man may be guilty of desertion of wife and child in a county where he has never been actually present, but family must have had valid reason for moving to such county, as affecting venue of prosecution. *Op. Atty. Gen.*, Nov. 7, 1933.

Where party living in Stearns County employed man living in Meeker County to haul stock to South St. Paul and trucker was to account to shipper for sale price in Stearns County but failed to do so, and demand was made upon trucker at his abode to account for the funds, venue of prosecution for larceny would lie in Meeker County. *Op. Atty. Gen.* (494b-20), May 9, 1934.

Where traveling salesman collected money and failed to immediately send it in to employer, venue of crime was where collection was made and not county of salesman's residence or place of employment. *Op. Atty. Gen.* (605a-24), Apr. 25, 1935.

Venue in abortion cases involving accomplices. *Op. Atty. Gen.* (133b-3), Oct. 15, 1935.

Where pursuant to wire from man in H. County liberty bonds were mailed by resident of our county to H. County, and afterwards owner was informed that bonds had been sold and money invested, where as a matter of fact money was appropriated, venue of prosecution was in H. County. *Op. Atty. Gen.* (605a-24), Oct. 15, 1935.

A husband deserting wife and children in county where he has an established home must be prosecuted in that county, and not in county into which wife subsequently moved, in absence of some subsequent conduct amounting to desertion in the new county. *Op. Atty. Gen.* (840a-1), Dec. 28, 1936.

1. Place of trial.

Venue of paternity proceedings is set by statute, but act of absconding from state with intent to evade proceedings to establish paternity determines venue for prosecution for felony. *Op. Atty. Gen.* (193b-20), Jan. 28, 1939.

3. Change of venue.

Mere fact that newspapers aroused the public against the perpetrator of the crime in question held not to require a change of venue. 171M414, 214NW280.

Court did not abuse discretion in denying change of venue in murder prosecution. *State v. Waddell*, 187M191, 245NW140. See Dun, Dig. 2422.

Where two or more persons conspire together to do an unlawful act, anything said, done, or written by one conspirator in furtherance of the common purpose is admissible against all of them. *State v. Binder*, 190M 305, 251NW665. See Dun, Dig. 2460, n. 73.

Declarations of an alleged conspirator are not competent evidence as against another conspirator until existence of conspiracy has been established by other competent evidence. *Id.* See Dun, Dig. 2460.

ISSUES AND MODE OF TRIAL

10705. Issue of fact—How tried—Appearance in person.—An issue of fact arises: (1) Upon a plea of not guilty; or (2) upon a plea of former conviction or acquittal of the same offense. Except where defendant waives a jury trial, every issue of fact shall be tried by a jury of the county in which the indictment was found or information filed, unless the action shall have been removed by order of court as provided in sections 10701-10704. If the defendant shall waive a jury trial, such waiver shall be in writing signed by him in open court after he has been arraigned and has had opportunity to consult with counsel and shall be filed with the clerk. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial. If the charge against the accused be a misdemeanor, the trial may be had in the absence of the defendant, if he shall appear by counsel; but, if it be for a felony or gross misdemeanor, he shall be personally present. (R. L. '05, §5358; G. S. '13, §9200; Apr. 17, 1935, c. 194, §2.)

1. In general.

Rule limiting application of presumptions in criminal cases cannot be invoked to destroy force of legitimate and obvious inferences. *Husten v. U. S.*, (CCA8), 95F(2d) 168.

Plea of former jeopardy cannot be presented by motion on affidavits, but must be urged by formal plea, the issues of fact in which must be tried by jury. 180 M439, 231NW6.

Though a defendant in a criminal case is entitled to a verdict of twelve jurors, yet, where he waives that right and agrees to accept a verdict of eleven jurors, he cannot later object. *State v. Zabrocki*, 194M346, 260NW507. See Dun, Dig. 5236(55).

It was not error to admit in evidence a conversation had between defendant and two of employees of owner of store from which goods were taken, it appearing from that conversation that defendant admitted her guilt in language free from doubt, conversation having taken place immediately after theft of goods which were found upon defendant's person hidden from view under her coat. *State v. Tremont*, 196M36, 263NW907. See Dun, Dig. 2462.

In prosecution for arson for burning wife's house, there was no prejudicial error in admitting in evidence partly burned matches, two candles tied together, and neck of broken glass jar, though they had no probative value whatever as to origin of second fire following a former one, and though there was some change in condition in exhibits between time they were found and time they were introduced in evidence. *State v. Zemple*, 196M159, 264NW587. See Dun, Dig. 517b, 3251.

Where goods are found in possession of defendant and others who are not shown to have any connection with crime charged, and it is not shown that still others did not also have access to place wherein goods were kept, defendant's possession is not exclusive and does not raise an inference of guilt sufficient to convict defendant of crime of burglary. *State v. Zoff*, 196M382, 265NW34. See Dun, Dig. 5496.

Whether a new trial shall result because of misconduct of prosecuting attorney is, in large measure, discretionary with trial court. *State v. Heffelfinger*, 200M 268, 274NW234. See Dun, Dig. 2489.

A plea of former conviction or acquittal for same offense raises an issue of fact of which trial court has jurisdiction. *State v. Utrecht*, 287NW229. See Dun, Dig. 2442.

One charged with an offense under municipal ordinance is not entitled to a jury trial, unless it is expressly provided in such ordinance, or by charter or law under which city or village is operating. *Op. Atty. Gen.* (477a), Mar. 2, 1938.

2. Presence of accused.

Accused at liberty on bail may waive right of being present when verdict is returned. 175M573, 222NW277.

Where court fails to require bailiff to notify defendant's attorney of the return of a verdict, the remedy for this nonobservance of the practice should be a motion for a new trial, and not a motion to set aside the verdict, which would mean an acquittal. 175M573, 222NW 277.

Accused at liberty on bail did not waive right to be present when verdict was received. 177M283, 225NW82.

3. Evidence.

Admission in evidence of a revolver found in defendant's desk six weeks after the commission of the crime of robbery of which he was accused, held error. 181M 566, 233NW307. See Dun, Dig. 2458, 8490.

Admission of license plates found in a car in defendant's possession held improper in prosecution for robbery. 181M566, 233NW307. See Dun, Dig. 2458, 8490.

Evidence of defendant's association with others who were criminals was improperly admitted. 181M566, 233 NW307. See Dun. Dig. 2458.

Fact that evidence of sales introduced to show that sale in question was in courts of successive sales of like securities relates to sales made more than three years before indictment was immaterial. State v. Robbins, 185M202, 240NW456. See Dun. Dig. 2459.

Evidence of other sales is admissible to show that sale upon which conviction is sought was made in the course of repeated and successive sales of like securities. State v. Robbins, 185M202, 240NW456. See Dun. Dig. 2459.

There was no substantial error in robbery prosecution relative to production of dairy which, it was suggested, would corroborate claim of alibi, nor in respect of proof as to gun found in possession of defendant. State v. Stockton, 186M33, 242NW344.

In prosecution for perjury it was error to receive in evidence names of jurors in prosecution for grand larceny in second degree in which defendant in perjury case testified for defendant; and likewise to receive verdict finding him guilty. State v. Olson, 186M45, 242NW 348. See Dun. Dig. 2475a.

Flight of accused after his arrest and when on bail is a circumstance which may be considered, not as a presumption of guilt, but as something for jury, and as suggestive of consciousness of guilt; and same is true of attempt to escape or resistance to arrest or passing under assumed name. State v. McTague, 190M449, 252NW446. See Dun. Dig. 2464.

In prosecution of attorney for forgery of client's name to release, letters written by attorney after it was apparent that he was in trouble over the matter were properly excluded as self-serving. State v. MacLean, 192M96, 255NW821. See Dun. Dig. 2468b.

General rule is that a person charged with the commission of a crime may object to evidence that he has committed other crimes, but exceptions to this rule permit evidence of another crime as his chosen motive for the commission of the crime; if it shows a criminal intent; if it shows guilty knowledge; if it identifies the defendant; if it is a part of a common system, scheme or plan embracing the crime charged; or if it shows the capacity, skill or means to do the act charged, or if it characterizes the possession of stolen goods. State v. Voss, 192M127, 255NW843. See Dun. Dig. 2459.

In prosecution for conspiracy to assault against one not present at time of assault, evidence that defendant was member of racketeering gang and had made threats against complaining witness was admissible. State v. Barnett, 193M336, 258NW608. See Dun. Dig. 541, 2468.

State was properly permitted to show defendant's flight immediately after finding of indictment against him. Id. See Dun. Dig. 2464, 2467, 2468.

It was not error to admit evidence tending to show a disposition by defendant as a witness in his own behalf, to withhold truth or conceal facts. Such evidence did not become inadmissible because it may have suggested defendant's guilt of other crimes. State v. Hankins, 193 M375, 258NW578. See Dun. Dig. 2459.

A paper charging defendant with conduct unbecoming a member of church, signed by an officer of church, held inadmissible in prosecution for rape. State v. Wulff, 194M271, 260NW515. See Dun. Dig. 2458.

Proof beyond a reasonable doubt is not required for conviction for violation of a city ordinance. City of St. Paul v. K., 194M386, 260NW357. See Dun. Dig. 2449(71).

In a prosecution for receiving stolen property, evidence that defendant, shortly prior to offense charged, had received other stolen property from the same parties was admissible to prove guilty knowledge. State v. Gifts, 195M276, 262NW637. See Dun. Dig. 2459.

In prosecution of mother of girl having a baby which defendant threw into fire, evidence that defendant's daughter made statement respecting a baby being born into the world without clothes, and that she would have married a certain person if she had known she was pregnant, was inadmissible as hearsay. State v. Voges, 197 M85, 266NW265. See Dun. Dig. 328b.

Evidence of other crimes is admissible if it tends directly or corroboratively to prove a guilty intent of commission of wrong charged or some essential element thereof. State v. Omodt, 198M165, 269NW360. See Dun. Dig. 2459, 3798a.

A new trial will not be granted for refusal to dismiss when state rested if evidence as finally brought into case warrants conviction. Id. See Dun. Dig. 2477a.

Cross-examination and extent thereof rests in sound discretion of trial court. Id. See Dun. Dig. 10318.

In prosecution under an ordinance same degree of proof is not required as for violation of statute under an indictment or information. City of St. Paul v. M., 198M229, 269NW408. See Dun. Dig. 6806.

Whether a confession was made under such circumstances as to render it admissible in evidence is a question for determination of trial court, and its action will not be reversed on appeal unless manifestly contrary to evidence. State v. Nelson, 199M86, 271NW114. See Dun. Dig. 2462.

Proof of criminal intent is unnecessary where statute makes commission of prohibited act a punishable offense. State v. Sobelman, 199M232, 271NW484. See Dun. Dig. 2409.

Questions of prosecuting attorney made while cross-examining defendant carrying insinuations that defendant had obtained money by false pretenses at other times, though improper, were not prejudicial. State v. Nuser, 199M315, 271NW811. See Dun. Dig. 2459.

Court might doubt value of opinion of woman that one charged with driving while intoxicated had only two drinks, where evidence showed that she also had two highballs. City of Duluth v. L., 199M470, 272NW389. See Dun. Dig. 3322b.

In a prosecution for driving a car while intoxicated, refusal to permit defendant to testify that it was his custom to hire drivers, being at most an offer of proof on a collateral issue, though defendant claimed that he was not driving car at time of alleged offense and so testified. Id. See Dun. Dig. 3241.

In criminal prosecution defendants may offer evidence of good reputation. State v. Oslund, 199M604, 273NW76. See Dun. Dig. 2458.

A defendant in a bastardy proceeding is entitled to prove good character as to chastity and morality. Id.

Fact that there might have been some inconsistency in testimony of state's witnesses or even fact that two or more witnesses for state differ in their testimony does not preclude a conviction. State v. Poelaert, 200M30, 273 NW641. See Dun. Dig. 2455a.

In view of defendant's testimony and other evidence in case, including his written statement, there was no error in court's refusal to require a deputy fire marshal to produce original notes taken by him prior to execution by defendant of statement drawn up by deputy from notes. Id. See Dun. Dig. 3233.

Pamograph records, obtained in wire tapping operations which purported to record conversations in which defendant police officer advised and assisted gamblers in their illegal operations, were properly received in evidence against defendant, although at time records were made pamograph operators may not have seen defendant or heard him speak, their testimony that subsequently they saw and heard him speak, and thus recognized voice they had heard over tapped wire as that of defendant, being sufficient foundation for introduction of records. State v. Raasch, 201M153, 275NW620. See Dun. Dig. 3245, 3538.

It was not prejudicial that those parts of telephone conversations which did not relate to subject-matter of accusation against defendant police officer were not recorded, or that defendant was not permitted to show that his actions in assisting and advising gamblers were under instruction from a superior officer. Id.

Court did not abuse discretion in restricting cross-examination of state witness as to matter fully covered in evidence admitted. Id. See Dun. Dig. 10318.

Defendant in arson, having himself introduced subject of other fires, is not in position to complain because prosecuting attorney on cross-examination brought out facts and circumstances discrediting his story. State v. Tsiolis, 202M117, 277NW409. See Dun. Dig. 2459.

Where a motion to dismiss is denied after plaintiff first rests and defendant then proceeds to introduce evidence, sufficiency of evidence to sustain verdict or decision is to be determined by a consideration of all evidence in case. State v. Tsiolis, 202M117, 277NW409. See Dun. Dig. 2477a.

A defendant may be cross-examined upon collateral matters to affect his credibility and to discredit him, and to some extent state may inquire into his past life, and extent of cross-examination is largely within discretion of trial court. Id. See Dun. Dig. 10309.

Whether trip taken by accused was a vacation to get away from hounding of authorities or flight held for jury. State v. Rowe, 280M172, 280NW646. See Dun. Dig. 2464.

Flight of an accused is a circumstance to be considered as indicative of guilt. Id.

Evidence of distinct and independent offenses cannot ordinarily be admitted on trial of a defendant charged with a criminal offense, but is admissible when it tends to establish motive, intent, absence of mistake or accident, identity of accused, sex crimes, and a common scheme or plan embracing commission of similar crimes so related to each other that proof of one or more of such tends to establish accusation. State v. Stuart, 203M 301, 281NW299. See Dun. Dig. 2459.

In prosecutions for homicide dying declarations of deceased as to cause of his injury or circumstances which resulted in his injury are admissible if it be shown, to satisfaction of trial court, that they were made when deceased was in actual danger of death and had given up all hope of recovery. The state of the declarant's mind must be exhibited by the evidence and not left to conjecture. State v. Elias, 285NW475. See Dun. Dig. 2461.

The weight to be given a dying declaration is for the jury. Id. See Dun. Dig. 2461.

After a defendant in jail has employed counsel, it is unethical for county attorney or sheriff or deputies to try to obtain a statement from the defendant in absence of his attorney. On Atty. Gen. (121b-7), Mar. 1, 1937.

Hearsay—statements of facts against penal interests. 21MinnLawRev181.

4. Jury trial.
One prosecuted for violation of a village ordinance is not entitled to a jury trial and city is not liable for jury fees. Op. Atty. Gen. (605a-11), Feb. 25, 1935.

10706. Continuance—Defendant committed, when.

Refusal of continuance on account of absence of witness held not an error. 173M567, 218NW112.

Granting of continuance in prosecution for violation of a city ordinance is largely a matter within discretion of court, and granting a continuance of only one day was not abuse of discretion to a defendant who had more than a week to prepare for trial and to find alleged witness. *City of Duluth v. L.*, 199M470, 272NW389. See Dun. Dig. 1715.

10709. Juror may testify, when—View.

It was misconduct on part of jury to visit and inspect building from which property was charged to have been stolen without order of court or any notice to defendant. *State v. SImenson*, 195M258, 262NW638. See Dun. Dig. 2475.

10710. Questions of law and fact, how decided.

It was error to charge that the only issue was whether defendant was guilty of robbery in the first degree or of an attempt to commit such robbery, it being within province of jury to return not guilty verdict though contrary to law and evidence. *State v. Corey*, 182M48, 233NW590.

1. Province of court and jury generally.

Credibility of testimony of a paid detective in a prosecution for unlawful sale of intoxicating liquor was for the jury. *State v. Nickolay*, 184M526, 239NW226. See Dun. Dig. 2477(80).

Credibility and weight of testimony is peculiarly for the jury and in absence of substantial error, court will not interfere. *State v. Chick*, 192M539, 257NW280. See Dun. Dig. 2477, 2490.

Where a motion to dismiss is denied after plaintiff first rests, and defendant then proceeds to introduce evidence in his defense, sufficiency of evidence is to be determined by a consideration of all evidence in case. *State v. Traver*, 198M237, 269NW393. See Dun. Dig. 2477a.

Whether a confession was made under such circumstances as to render it admissible in evidence is a question for determination of trial court, and its action will not be reversed on appeal unless manifestly contrary to evidence. *State v. Nelson*, 199M86, 271NW114. See Dun. Dig. 2501.

10711. Order of argument.

Some allowances must be made for rhetorical flights and vigorous arraignment of attempted defenses. 171M414, 214NW280.

Misconduct of county attorney could not be predicated on his reference to defendant's companions as "the mob" where no exception was taken. 173M232, 217NW104.

Where there was evidence of finding of weapon at time of defendant's arrest it was legitimate argument for county attorney to suggest the switching or changing of weapons between companions in crime. 173M232, 217NW104.

Conduct of prosecuting attorney in referring to court's failure to admit incompetent evidence held not reversible error. 173M305, 217NW120.

Comments of the prosecuting attorney upon defendant's association with "murderers and thieves" upon evidence improperly admitted held prejudicial. 181M566, 233NW307. See Dun. Dig. 2478.

Alleged misconduct of prosecuting attorney held not to call for a new trial where trial court was not asked to take any action. *State v. Geary*, 184M387, 239NW158. See Dun. Dig. 2478, 2490.

Prosecuting attorney held not guilty of misconduct as intimating that one charged with manslaughter in driving an automobile was intoxicated. *State v. Geary*, 184M387, 239NW158. See Dun. Dig. 2478.

Statement by prosecuting attorney in argument as to a matter not shown by evidence held not prejudicial. *State v. Geary*, 184M387, 239NW158. See Dun. Dig. 2478.

There can be no reversal in a criminal case for alleged misconduct of prosecuting attorney, without a record of conduct claimed to be prejudicial and objection thereto, with an exception if needed. *State v. Hankins*, 193M375, 258NW578. See Dun. Dig. 2479a, 2500.

Allusion to fact that defendant did not take stand was harmless in view of strong evidence of guilt. *State v. Zemple*, 196M159, 264NW587. See Dun. Dig. 2490.

Prosecuting attorney is not forbidden in an argument to state his opinion as to conclusions or inferences which human minds may reasonably draw from evidence. *State v. Heffelfinger*, 200M268, 274NW234. See Dun. Dig. 2478.

10712. Charge of court.**1. In general.**

Instruction detailing matters to be considered by the jury in determining defendant's knowledge that goods received by him were stolen, held based on the evidence. *Balman v. U. S.*, (CCA8), 94F(2d)197.

Charge in bank robbery prosecution held not objectionable as warranting a conviction for violation of liquor laws. 171M158, 213NW735.

Instruction failing to require absence of reasonable doubt as a prerequisite to the final inference of guilt is cured by context stating explicitly that all elements of the offense must be established beyond a reasonable doubt. 171M222, 213NW920.

Where a proposition involving one of the defenses is once correctly stated, with its conditions and qualifica-

tions, it is not ordinarily necessary for each of the conditions and qualifications to be restated every time the defense itself is subsequently referred to in the instructions. 171M380, 214NW265.

In prosecution for murder in the third degree by killing one with an automobile, evidence held not to require an instruction that defendant should be acquitted if he was so drunk that he did not know what he was doing. 171M414, 214NW280.

In liquor prosecution, instruction that prior conviction of defendant's witness was received merely for the purpose of bearing on his credibility, was proper. 171M515, 213NW923.

In the absence of a request, error cannot be predicated on failure to charge as to a lesser offense. 171M515, 213NW923.

Giving of cautionary instruction regarding danger of convicting on the evidence of the prosecutrix alone rested in the discretion of the court, especially in absence of request for such an instruction. 171M515, 213NW923.

Accused held not prejudiced by charge of court that information charged defendant with first degree grand larceny, when only second degree offense was properly alleged, the jury finding defendant guilty "as charged." 172M139, 214NW785.

An inadvertent statement in the charge must be called to the court's attention. 172M139, 214NW785.

If defendant desired a further explanation of any matters, he should have made a request to that effect. 173M208, 215NW206.

Defects in charge not called to the court's attention at the time are not of a character to call for a new trial. 173M567, 218NW112.

In prosecution for adultery refusal of court to instruct that admission or confession by one paramour was not evidence against the other, the two being tried together, was error. 175M218, 220NW563.

Where it is in fact present, it is not error to instruct that there is evidence to corroborate an accomplice. 176M175, 222NW906.

The charge is to be considered in its entirety. 181M303, 232NW335. See Dun. Dig. 9781(26).

Failure to define the crime with which defendant was charged is disapproved. 181M566, 233NW307. See Dun. Dig. 2479.

Instruction, as to character testimony, held not reversible error. *State v. Weis*, 186M342, 243NW135. See Dun. Dig. 2479.

Where general charge adequately covers every element of crime, defendant in criminal case is not entitled to complete separate charge as to each element of crime charged as defined by statute. *State v. Weis*, 186M342, 243NW135. See Dun. Dig. 2479.

Instruction relative to testimony of prosecutrix given in preliminary examination, and received upon trial for purpose of impeachment, held not error. *State v. Weis*, 186M342, 243NW135.

Reference by court to testimony of witness as to a statement made by accused to witness, in which court said that statement claimed to have been made had not been denied, neither had it been proven, was without prejudice where such statement had not been expressly denied by accused. *State v. Lynch*, 192M534, 257NW278. See Dun. Dig. 2479.

Instruction clearly pointing out essential elements of crime which jury must find state had proved beyond a reasonable doubt held not erroneous as attempting to direct a verdict of guilty. *Id.* See Dun. Dig. 2479.

Defendant was not entitled to instructions, where record was devoid of evidence to warrant them. *State v. Puent*, 193M175, 269NW372. See Dun. Dig. 2479.

In prosecution of tavern owner, acts and omissions of defendant's servants contributed to minor's delinquency, and court did not err in refusing to submit that question as a fact issue. *State v. Sobelman*, 199M232, 271NW484. See Dun. Dig. 4924.

Statement of court when jury returned to court room to ask if they might agree to disagree that "things have got to be looked at in a practical way of life, is this young man guilty or isn't he in your best judgment" held not objectionable as reference to degree of proof required. *State v. Henspeter*, 199M359, 271NW700. See Dun. Dig. 2479.

Charge as a whole is to be considered in determining whether error is prejudicial. *State v. Oslund*, 199M604, 273NW76. See Dun. Dig. 2479.

In prosecution of motorist for second degree manslaughter, no error prejudicial to defendant resulted from instruction defining all of different degrees of homicide in order to explain nature of manslaughter, as distinguished from murder. *State v. Warren*, 201M369, 276NW655. See Dun. Dig. 2479.

Instruction that law does not permit the taking of a human life to repel a mere trespass as in this case was erroneous as in effect telling jury that law of self defense was not applicable, and was erroneous where there was evidence that deceased at time he was shot was approaching defendant in a threatening manner with a pitchfork. *State v. Klym*, 204M57, 282NW655. See Dun. Dig. 2479.

3. Charge on lesser offenses.

Where entire course of trial not only indicates but compels conclusion that only offense involved was that of sodomy, court did not err in refusing to submit lesser offenses of indecent assault and assault in third degree.

State v. Nelson, 199M86, 271NW114. See Dun. Dig. 2486.

4%. Presumption of innocence.

Clause in instruction that presumption of innocence is for benefit of innocent person and not intended as a shield for guilty, was improper. State v. Bauer, 189M280, 249NW40. See Dun. Dig. 2479n, 28.

5. Requests for instructions.

Charge of court defining crime of driving automobile while intoxicated in the words of the statute held sufficient. 176M164, 222NW909.

It is not error to refuse a request to charge, where the general charge, or other requests given, fairly cover the same subject. 176M349, 223NW452.

It is bad practice to allude to the fact that instructions given have been asked for by one of the parties. 181M374, 232NW624. See Dun. Dig. 9776(13).

Instruction that state must establish beyond a reasonable doubt that the defendant was guilty of attempted grand larceny in first degree as set forth in the statute and "as charged in the indictment" was sufficient where elements of the crime were set up in the indictment and no request was made for more particular definitions and no exception was taken to the charge as given. State v. Smith, 192M237, 255NW326, 2479, 3734.

Failure to instruct jury in grand larceny prosecution that defendant might be found guilty of petit larceny does not call for a new trial in absence of a request for such instruction. State v. Cohen, 196M39, 263NW922. See Dun. Dig. 2479.

In prosecution for driving while intoxicated, there was no improper qualification of requested instruction of which defendant could complain where counsel stated that court had failed to comment on defendant's condition, and court then told jury that defendant's condition after this wreck is a matter for your consideration together with all the other evidence in the case, counsel making no further suggestion or objection and taking no exception to any part of the charge, and there being no request by either party for any charge. State v. Winberg, 196M135, 264NW578. See Dun. Dig. 2479.

Where there is no exception taken to charge in a criminal case, no motion for a new trial, and no request for further instructions, alleged error in charge cannot be assigned as error in this court. State v. Bram, 197M471, 267NW383. See Dun. Dig. 2479a.

Where at close of court's charge it inquired of counsel if there were anything it had overlooked and was answered in the negative, defendant is not in a position to urge failure to charge on some specific theory of defense. State v. Rowe, 280M172, 280NW646. See Dun. Dig. 2479 (26).

It was not error to refuse requested instructions given in substance by the court. State v. Winkels, 204M466, 283NW763. See Dun. Dig. 2479, 9777.

10713. Jury—How and where kept.

Misconduct of bailiff in informing jury that unless they agreed before midnight they would be kept until morning, held not ground for reversal. 175M174, 220NW547.

Failure to provide separate room for women held not ground for new trial on ground that woman was not well and verdict was coerced. 176M604, 224NW144.

That women jurors were, on failure of jury to agree, provided with separate sleeping accommodations at a hotel for the night in the custody of a woman bailiff, held not error. 181M303, 232NW335. See Dun. Dig. 7112.

10713-1. Same—Preceding section applicable only where jury fails to agree.

176M604, 224NW144; note under §10713.

10720. Polling jury—Further deliberation, when.

175M573, 222NW277; note under §10705.

Polling of jury is for purpose of ascertaining for a certainty that each juror agrees upon verdict, and not to determine whether verdict presented was reached by quotient process. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 9822.

10721. Reception of verdict.

Verdict is not vitiated by failure to read it to the jury as recorded. 178M564, 227NW893.

Jury held not guilty of misconduct in bringing in a verdict while one of jurors claimed to be sick. State v. Geary, 184M387, 239NW158. See Dun. Dig. 2476.

10722. Insanity, etc., of defendant.

Statute directing district court not to try a person for crime while he is in a state of insanity, imposes a duty on, but does not go to jurisdiction of, the court, and failure to comply with the statute is no ground for collateral attack, as by habeas corpus, on judgment of conviction. State v. Utecht, 203M448, 281NW775. See Dun. Dig. 2476a.

10723. Acquitted on ground of insanity—Release from state institutions.—Whenever during the trial of any person on an indictment, or information, such person shall be found to have been, at the date of the offense alleged in said indictment, insane, an idiot, or an imbecile and is acquitted on that grounds, the jury or the court, as the case may be, shall so state in the

verdict, or upon the minutes, and the court shall thereupon, forthwith, commit such person to the proper state hospital or asylum for safe-keeping and treatment; and whenever in the opinion of such jury or court such person, at said date, had homicidal tendencies, the same shall also be stated in said verdict or upon said minutes and said court shall thereupon forthwith commit such person to the hospital for the dangerous insane for safe-keeping and treatment; and in either case such person shall be received and cared for at said hospital or asylum to which he is thus committed.

The person so acquitted shall be liberated from such hospital or asylum upon the order of the court committing him thereto, whenever there is presented to said court the certificate in writing of the Superintendent of the hospital or asylum where such person is confined, certifying that in the opinion of such superintendent such person is wholly recovered and that no person will be endangered by his discharge.

Provided, that if the superintendent of the hospital or asylum fails or refuses to furnish such certificate at the request of the person committed, then said person may petition the said court for his release, and hearing on such petition shall be had before the court upon and after service of such notice as the court shall direct.

If, at such hearing, the evidence introduced convinces the court that the person so confined has wholly recovered and that no person will be endangered by his discharge, then the court shall order his discharge and release from said hospital or asylum, and he shall then be so discharged and released.

Provided, further, that if at such hearing the evidence introduced convinces the court that such person has not wholly recovered, but that no person will be endangered by his release on parole from such hospital or asylum, and a proper and suitable person is willing to take such committed person on parole, and to furnish a home for him and care for and support him, and furnishes a satisfactory bond in such amount and with such terms and conditions as the court may fix, then said court may order the release of such confined person from said hospital or asylum on parole and for such time and upon such terms and conditions as the court may determine and order, and thereupon such person shall be so released from said hospital or asylum and placed on parole with the person named by the court in its order.

Provided, that nothing herein shall be construed as preventing the transfer of any person from one institution to another by the order of the board of control, as it may deem necessary. (R. L. '05, §5376; '07, c. 358, §1; G. S. '13, §9218; Apr. 25, 1931, c. 364.)

State v. District Court, 185M396, 241NW39; note under §9493, note 19.

This act is not invalid as imposing an administrative duty upon the court. State v. District Court, 185M396, 241NW39. See Dun. Dig. 1592.

The statute makes mandatory the discharge upon presentation of a certificate of the superintendent of the hospital that "in the opinion of such superintendent such person is wholly recovered and that no person will be endangered by his discharge." State v. District Court, 185M396, 241NW39. See Dun. Dig. 4523a.

Laws 1931, c. 364, establishes the exclusive statutory procedure for the release of a patient who has been committed as the result of his acquittal of a criminal charge on the ground of insanity. It is for the benefit of those committed before, as well as of those committed after, the enactment of the law. State v. District Court, 185M396, 241NW39.

10724. Hearing on punishment.

No conviction for perjury for untrue answers to questions after plea of guilty. 171M246, 213NW900.

10725. Dismissal of cause—Record of reasons for.

Where a motion to dismiss is denied after plaintiff first rests, and defendant then proceeds to introduce evidence in his defense, sufficiency of evidence is to be determined by a consideration of all evidence in case. State v. Traver, 198M237, 269NW393. See Dun. Dig. 2477a.

CALENDAR

10727. Issues, how disposed of—Time for trial.

That attorney with consent of court and without objection by defendant, assisted county attorney, was no ground for new trial. 176M305, 223NW141.

CHALLENGING JURORS

10733. Challenge to individual juror.

2. Preliminary examination.

Court rightly refused to permit parties to instruct and examine each prospective juror in law of case to be tried. State v. Bauer, 189M280, 249NW40. See Dun. Dig. 5252.

3. When challenge may be made.

Answer of juror held not so untrue as to give accused right to new trial on ground that he was thereby prevented from peremptorily challenging juror. 176M604, 224NW144.

No objection can be taken to any incompetency in a juror, existing at time he was called, after he is accepted and sworn, if fact was known to party and he was silent; and, even if not discovered until after verdict, cause of challenge, such as non-residence of juror, will not per se constitute ground for a new trial. State v. Olson, 195M493, 263NW437. See Dun. Dig. 2489.

6. Review.

Denial of the challenge of a juror cannot be reviewed on appeal. 171M380, 214NW266.

APEALS AND WRITS OF ERROR

10747. Removal to supreme court.

The denial by the trial judge of the challenge of a juror for cause cannot be reviewed on appeal. 171M380, 214NW266.

Motion for a new trial in a criminal case must be heard by the trial court before the expiration of the time to appeal from the judgment, and an appeal from an order denying such motion cannot be taken more than a year after such judgment is rendered. 174M194, 218NW887.

A violation of a city ordinance is an offense against the city and a right of appeal may be denied. 175M222, 220NW611.

Where defendant acquiesces in a judgment of conviction, or when he complies in whole or in part therewith, there is a waiver of the right of review. 175M222, 220NW611.

An order in a criminal case, made on defendant's failure to plead after disallowance of his demurrer to the information, found him guilty, but directed him to appear at a later date for sentence. Held, not appealable, not being a final judgment imposing sentence and to be enforced without further judicial action. State v. Putzler, 183M423, 236NW765. See Dun. Dig. 2491(70), (71), (72), (74).

Appeals in criminal cases can be taken only from an order denying motion for a new trial or from the final judgment of conviction. State v. Putzler, 183M423, 236NW765. See Dun. Dig. 2491(69).

An accused cannot appeal from the verdict of the jury. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 2491(70).

A motion to vacate a judgment entered in a criminal case upon a plea of guilty and to permit a defendant to enter a plea of not guilty is not a motion for a new trial, and order denying it is not appealable. State v. Newman, 188M461, 247NW576. See Dun. Dig. 2491.

10748. Stay of proceeding.

2. Notice of appeal.

Notices of appeal in criminal cases to be effective must be served on the attorney general. State v. Newman, 188M461, 247NW576. See Dun. Dig. 2494(99).

10751. Bill of exceptions.

State v. Smith, 192M237, 255NW826; note under §10712, note 5.

Trial court properly amended the proposed settled case by making it comply with the facts as they occurred upon the trial. 171M515, 213NW923.

Where information does not allege true name of purchaser of alcoholic liquor, the defendant cannot complain thereof for the first time on appeal. State v. Viering, 175M475, 221NW681.

Denial of new trial on ground of newly discovered evidence consisting of affidavit of witness, who testified on the trial as to the identity of defendant, that he was not certain of such identity, held not abuse of discretion. 181M203, 232NW111. See Dun. Dig. 7131.

There can be no reversal in a criminal case for alleged misconduct of prosecuting attorney, without a record of conduct claimed to be prejudicial and objection thereto, with an exception if needed. State v. Hankins, 193M375, 258NW578. See Dun. Dig. 2479a, 2500.

Statement of court that there was testimony conflicting with certain testimony of the accused, if not technically correct, held such an inadvertence as should have been called to its attention at time so that it could have been corrected. State v. Winberg, 196M135, 264NW578. See Dun. Dig. 2500.

Where there is no exception taken to charge in a criminal case, no motion for a new trial, and no request for further instructions, alleged error in charge cannot be assigned as error in this court. State v. Bram, 197M471, 267NW383. See Dun. Dig. 2479a.

Failure to object to testimony in reference to defendant's attempted intimacy with another woman precludes consideration of its admissibility on appeal. State v. Rowe, 280M172, 280NW646. See Dun. Dig. 2496.

10752. Proceedings in Supreme Court.

1. In general.

See also notes under §10648. Admission of incompetent evidence held not prejudicial in criminal prosecution. State v. Irish, 183M49, 235NW625. See Dun. Dig. 2490(47).

Misconduct of counsel in asking improper question held not to require new trial. 171M158, 213NW735.

Exclusion of evidence held without prejudice. 171M222, 213NW920.

On appeal from an order denying a new trial, made before defendant was sentenced, the point that the sentence was excessive cannot be raised. 172M139, 214NW785.

Where sister of prosecutrix in a prosecution for carnally knowing a female child under the age of 13 was a witness and during cross-examination, the father of prosecutrix made a demonstration in the court room and the court admonished the jury to disregard it, there was nothing requiring a new trial. 172M372, 215NW514.

Court cannot interfere as to matters of fact. 173M391, 217NW343.

That attorney with consent of court and without objection by defendant, assisted county attorney, was no ground for new trial. 176M305, 223NW141.

Reception of evidence. 178M439, 227NW497.

A plea of guilty does not preclude a defendant from raising, for the first time on appeal, the question of whether or not the complaint, information, or indictment charges a public offense. State v. Parker, 183M588, 237NW409. See Dun. Dig. 2491.

Assignments of error that court erred in failing to give certain instruction, although he agreed to give them in substance, were not considered by supreme court where settled case showed no request to charge, no action thereon by the court, and no agreement by the court in reference thereto. State v. Winberg, 196M135, 264NW578. See Dun. Dig. 2498.

Statements made by court to defendant after he had been tried and convicted, but before sentence was imposed, should not be considered on questions of prejudice and bias. State v. Davis, 197M381, 267NW210. See Dun. Dig. 2473.

Where the verdict was of murder in second degree, but evidence sustains conviction only in third degree, supreme court has power to direct entry of judgment accordingly. State v. Jackson, 198M111, 268NW924. See Dun. Dig. 2501.

3. New trial.

174M194, 218NW887.

Exclusion of evidence by court held to cure error in its admission. 173M543, 217NW683.

Rulings upon offers to prove defendant's disposition and reputation held not to require reversal. 176M349, 233NW452.

Stating that the acts mentioned would constitute the crime instead of stating that they would constitute the offense of an attempt to commit the crime, with which defendant was charged, was a mere inadvertence and not prejudicial. 178M69, 225NW925.

Where conviction for contempt is right, but the penalty imposed exceeds that authorized, defendant should not be relieved from proper punishment, but be sentenced. 173M158, 226NW188.

Permitting jury to attend theatrical performance, held not to require new trial. 179M301, 229NW99.

A second motion for a new trial, based upon the same grounds stated in a prior denied motion, cannot be heard without first obtaining permission of the court. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 2489a.

Inadvertent language used in the charge cannot be assigned as error for a new trial when it was not called to the attention of the court for correction upon the trial. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 2479a.

Motion for a new trial on the ground of newly discovered evidence was insufficient, in that the exhibits attached were not put in such form as to constitute legal proof of the things which they purported to show. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 2490.

A new trial should be granted only in those cases where substantial rights of accused have been so violated as to make it reasonably clear that a fair trial was not had. State v. Nuser, 199M315, 271NW811. See Dun. Dig. 2490.

4. Misconduct of counsel.

179M301, 229NW99.

179M502, 229NW801.

180M221, 230NW639.

Remarks of prosecuting attorney held not prejudicial. 175M607, 222NW280.

Misconduct of prosecuting attorney in cross-examining defendant with respect to other charges of crime, held to require new trial. 176M442, 223NW769.

Constant insinuation that accused was connected with other crimes, held to require new trial. *State v. Klashorn*, 177M363, 225NW278.

Defendant could not urge that county attorney was guilty of misconduct in pursuing a line of cross-examination to which defendant not only made no objection but in effect consented. 178M69, 225NW925.

Where defendant selects his own attorney, misconduct of such attorney is ground for new trial only in exceptional cases; and failure to call defendant as witness, and submission of case without argument, held not to require new trial. 180M435, 231NW12.

There can be no reversal in a criminal case for alleged misconduct of prosecuting attorney, without a record of conduct claimed to be prejudicial and objection thereto, with an exception if needed. *State v. Hankins*, 193M375, 258NW578. See Dun. Dig. 2479a, 2500.

Whether misconduct of counsel is sufficient ground for a new trial is primarily for trial court. *State v. Olson*, 195M507, 263NW437. See Dun. Dig. 2478.

Supreme court must rely a great deal on judgment of lower court as to whether statements of county attorney are prejudicial. *State v. Zemple*, 196M159, 264NW587. See Dun. Dig. 7102.

Improper argument by county attorney to jury was without prejudice, where it was stopped by court who stated that it should be disregarded. *State v. Puent*, 198M175, 269NW372. See Dun. Dig. 2478.

Remarks of prosecuting attorney held not prejudicial. *State v. Bean*, 199M16, 270NW918. See Dun. Dig. 2490.

In determining whether wrongful remarks of prosecuting attorney requires a new trial, court must credit jury with exercising good judgment and not being swayed by every imprudent remark of counsel. *State v. Hefelinger*, 200M268, 274NW234. See Dun. Dig. 2478.

Whether a new trial shall result because of misconduct of prosecuting attorney is, in large measure, discretionary with trial court. *Id.* See Dun. Dig. 2489.

5. Newly discovered evidence.

180M450, 231NW225.

181M28, 231NW411.

Motion for new trial on grounds of newly discovered evidence held properly denied. 173M420, 217NW489.

Newly discovered evidence held not of nature likely to change the result. 173M567, 218NW112.

Alleged newly discovered evidence held not to require new trial. 176M305, 223NW141.

New trial was properly refused where alleged newly discovered evidence was cumulative and diligence was not shown. *State v. Kosek*, 186M119, 242NW473. See Dun. Dig. 7130.

Cumulative newly discovered evidence, not of character that would probably produce different result, did not require new trial. *State v. Weis*, 186M342, 243NW135. See Dun. Dig. 7130, 7131.

An order denying a motion for a new trial on the ground of newly discovered evidence in a criminal case will not be reversed except for abuse of discretion. *State v. Quinn*, 192M88, 255NW488. See Dun. Dig. 2500, 7131.

Court held not to have abused its discretion in a criminal case in denying new trial on ground of newly discovered evidence, consisting of statements made by state witness contradictory of his testimony at the trial. *Id.* See Dun. Dig. 2489.

Motion for new trial for newly discovered evidence was properly denied, where it consisted of affidavit, discredited by a subsequent affidavit of the same person and containing nothing new. *State v. Chick*, 192M539, 257NW280. See Dun. Dig. 7129.

There can be no reversal because of denial of a motion for a new trial, upon ground of newly discovered evidence, unless it is made to appear that it was an abuse of discretion to deny motion. *State v. Hankins*, 193M375, 258NW578. See Dun. Dig. 7123.

6. Reception of evidence.

There could be no prejudice from the fact that the jury learned that accused had claimed and been accorded a legal right against compulsory incrimination in trial of codefendant. 176M562, 223NW917.

No reversible error for failure to hear oral testimony on motion for new trial. 176M604, 224NW144.

Admission of evidence of other crime to show intent, etc., is within discretion of trial court and supreme court will not interfere except in cases of abuse of such discretion. *State v. Voss*, 192M127, 255NW843. See Dun. Dig. 2500.

In prosecution for arson for burning wife's house, there was no prejudicial error in admitting in evidence partly burned matches, two candles tied together, and neck of broken glass jar, though they had no probative value whatever as to origin of second fire following a former one, and though there was some change in condition in exhibits between time they were found and time they were introduced in evidence. *State v. Zemple*, 196M159, 264NW587. See Dun. Dig. 2490, 3251.

Cross-examination and extent thereof rests in sound discretion of trial court. *State v. Omodt*, 198M165, 269NW360. See Dun. Dig. 10318.

Where information for manslaughter charged that defendant was intoxicated while driving and state introduced in evidence a bottle of liquor found on running board of defendant's car in support thereof, no prejudicial error resulted where state failed to produce other credible evidence in support of charge and bottle was

stricken from evidence with proper instructions to jury to disregard it. *State v. Puent*, 198M175, 269NW372. See Dun. Dig. 2490.

Questions of prosecuting attorney made while cross-examining defendant carrying insinuations that defendant had obtained money by false pretenses at other times, though improper were not prejudicial. *State v. Nuser*, 199M315, 271NW811. See Dun. Dig. 2490.

Exclusion of evidence which could not have been of much help to accused was not reversible error. *State v. Poelaert*, 200M30, 273NW641. See Dun. Dig. 2490.

A ruling sustaining an objection to questions calculated to bring out testimony that defendant's attorney offered to produce defendant within 24 hours in case he was indicted, in order to rebut the state's evidence of flight, held without prejudice to defendant. *State v. Rowe*, 280M172, 280NW646. See Dun. Dig. 2464.

7. Misconduct of or respecting jury.

Failure to provide separate room for women held not to require new trial. 176M604, 224NW144.

Answer of juror on voir dire as to relation to county attorney held not ground for new trial. 176M604, 224NW144.

New trial will not be granted on affidavit of a juror that he misunderstood charge. *State v. Cater*, 190M485, 252NW421. See Dun. Dig. 7109.

No objection can be taken to any incompetency in a juror, existing at time he was called, after he is accepted and sworn, if fact was known to party and he was silent; and, even if not discovered until after verdict, cause of challenge, such as non-residence of juror, will not per se constitute ground for a new trial. *State v. Olson*, 195M493, 263NW437. See Dun. Dig. 2490.

Remarks of court in ruling on objections to testimony and that counsel should proceed, or get along, held not erroneous in view of the record. *State v. Winberg*, 196M135, 264NW578. See Dun. Dig. 2489.

8. Recalling case sent down.

Supreme court, after a remittitur is regularly sent down in a criminal case, has no power to recall the same for the purpose of entertaining an application for rehearing. *State v. Waddell*, 191M475, 254NW627. See Dun. Dig. 2501.

10754. Defendant committed, when, etc.

174M194, 218NW887.

Where the verdict was of murder in second degree, but evidence sustains conviction only in third degree, supreme court has power to direct entry of judgment accordingly. *State v. Jackson*, 198M111, 268NW924. See Dun. Dig. 2501.

10756. Certifying proceedings.

174M66, 218NW234.

Constitutionality of statute properly certified to court. 173M221, 217NW108.

District court has no jurisdiction in civil cases to certify questions to the supreme court. *Newton v. M.*, 185M189, 240NW470. See Dun. Dig. 282.

JUDGMENTS AND EXECUTION THEREOF

10757. Judgment on conviction—Judgment roll.

Statute directing district court not to try a person for a crime while he is in a state of insanity, imposes a duty on, but does not go to jurisdiction of, the court, and failure to comply with statute is no ground for collateral attack, as by habeas corpus, on judgment of conviction. *State v. Utecht*, 203M448, 281NW775. See Dun. Dig. 4132.

INDETERMINATE SENTENCES AND PAROLES

10765. Term of sentence.—Whenever any person is convicted of any felony or crime committed after the passage of this act, punishable by imprisonment in the state prison or state reformatory, except treason or murder in the first or second degree as defined by law, the court in imposing sentence shall not fix a definite term of imprisonment, but may fix in said sentence the maximum term of such imprisonment, and shall sentence every such person to the state reformatory or to the state prison, as the case may require, and the person sentenced shall be subject to release on parole and to final discharge by the board of parole as hereinafter provided, but imprisonment under such sentence shall not exceed the maximum term fixed by law or by the court, if the court has fixed the maximum term, provided that if a person be sentenced for two or more such separate offenses sentence shall be pronounced for each offense, and imprisonment thereunder may equal, but shall not exceed the total of the maximum terms, fixed by law or by the court, if the court has fixed the maximum term for such separate offenses, which total shall, for the purpose of this act, be construed as one continuous term of imprisonment. And provided further that where one is convicted of

a felony or crime that is punishable by imprisonment in the state prison or state reformatory or by fine or imprisonment in the county jail, or both, the court may impose the lighter sentence if it shall so elect. The power of the court to fix the maximum term of imprisonment shall extend to indeterminate sentences imposed under Laws 1927, Chapter 236 [§§9931 to 9931-4]. ('11, c. 298, §1; G. S. '13, §9267; '17, c. 319, §1; Apr. 20, 1931, c. 222, §1.)

Time runs on sentence while in hospital for insane. 176M572, 224NW156.

Trial court may fix maximum term of imprisonment though defendant was convicted for a second offense for which penalty is prescribed by §9931 prior to 1927 amendment. 179M532, 229NW787.

Judge of district court has no power to commute sentence passed upon prisoner who has been committed to penal institution. Op. Atty. Gen., Aug. 23, 1933.

Judge has power to fix a maximum sentence of less than life for robbery of a bank. Op. Atty. Gen., Nov. 25, 1933.

Two concurrent sentences should be considered as one continuous term rather than two separate terms as respects prison records. Op. Atty. Gen. (342h), Apr. 4, 1935.

This section should be applied whether a number of commitments were received at the same time or a second sentence was imposed after a part of first sentence had been served and for a crime committed while prisoner was on parole under his first sentence. Op. Atty. Gen. (341k-10), Apr. 19, 1937.

10766. Parole board.—A board having power to parole and discharge prisoners confined in the state prison, state reformatory or state reformatory for women is hereby created, to be known and designated as "State Board of Parole." Said board shall be composed of a chairman and two other members, who shall be appointed by the governor with the advice and consent of the senate and who, except as hereinafter provided, shall hold office for a term of six years from the first Monday in January next after such appointments are made and until their successors be appointed and qualified, provided that immediately or as soon as practicable after the passage of this act said board shall be appointed to hold office from July first next after such appointments are made, the chairman until the first Monday in January 1937, one member until the first Monday in January 1935, and one member until the first Monday in January 1933. Not more than two members of said board shall belong to the same political party. In case of a vacancy it shall be filled for the unexpired term in which such vacancy occurs as herein provided for original appointments. Said board shall keep a record of all its proceedings and to that end may designate one of its members to act as secretary, or may require the performance of the duties of that office by any parole agent or any other person in its employ. ('11, c. 298, §3; G. S. '13, §9269; '13, c. 280, §1; '21, c. 56, §1; Laws 1929, c. 23; Apr. 14, 1931, c. 161, §1.)

State board of parole continued by Act Apr. 22, 1939, c. 431, Art. 6, §6, ante §3199-106.

10767. Present law not changed.—The board of parole constituted under the provisions of this act shall be deemed a continuation of the board of parole constituted under the provisions of law in force at the time of the passage thereof, and all matters and proceedings pending before the board of parole as constituted before the passage of this act shall be carried on and completed by the board as constituted hereunder. (G. S. '13, §9270; '13, c. 280, §2; '21, c. 56, §2; Apr. 14, 1931, c. 161, §2.)

10768. Registers and records.—The State Board of Parole shall have a seal, keep a record of all its acts relating to each of the separate penal institutions and the persons confined in, removed and committed thereto or paroled or discharged therefrom and the Chairman of said Board shall furnish a copy of the acts of the said Board of Parole in reference to each of the penal institutions to the Board of Control and also to each of the penal institutions of its acts relating to that institution. The State Board of Parole shall also keep a complete record of all persons placed on probation to said Board and duly enter discharges and revocations of orders staying sentences of such

persons upon its records, and biennially report to the Governor regarding all the activities of the said Board. ('11, c. 298, §4; G. S. '13, §9271; Apr. 5, 1935, c. 110, §1.)

10769. Chairman of board—salary—compensation of members.—The salary of the chairman of said state board of parole shall be the sum of \$4500.00 per annum, payable as hereinafter provided. Each of the other members of said board shall receive as compensation the sum of \$15.00 per day for each day actually spent in the discharge of his official duties, including the duties of secretary. In addition to the compensation so provided, each of the members of said board shall be reimbursed for all expenses paid or incurred by him in the performance of his official duties. Said compensation and said expenses shall be paid out of the revenue fund in the same manner as the salaries and expenses of other state officers are paid. All of the other expenses of the state board of parole shall be audited and allowed by the state board of control and paid out of the funds appropriated for the maintenance of the penal institutions of the state in such proportions as the state board of control shall determine. Said board of parole shall furnish such estimates of anticipated expenses and requirements as the state board of control may from time to time require. ('11, c. 298, §5; G. S. '13, §9272; Apr. 14, 1931, c. 161, §3.)

A member of board of parole attending prison congress in another state under authority from board was entitled to compensation of \$15.00 per day and traveling expenses. Op. Atty. Gen., Oct. 20, 1932.

10770. Powers of board—Limitations.—The said State Board of Parole may parole any person sentenced to confinement in the state prison or state reformatory, provided that no convict serving a life sentence for murder shall be paroled until he has served thirty-five years, less the diminution which would have been allowed for good conduct had his sentence been for 35 years, and then only by the unanimous consent in writing of the members of the Board of Pardons. Upon being paroled and released, such convicts shall be and remain in the legal custody and under the control of the State Board of Parole subject at any time to be returned to the state prison, the state reformatory or the state reformatory for women and the parole rescinded by such Board, when the legal custody of such convict shall revert to the warden or superintendent of the institution. The written order of the Board of Parole, certified by the Chairman of said Board, shall be sufficient to any peace officer or state parole and probation agent to retake and place in actual custody any person on parole or probation to the State Board of Parole, but any probation or parole agent may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce discipline, take and detain a parolee or probationer to the State Board of Parole and bring such person before the Board of Parole for its action. Paroled persons, and those on probation to the State Board of Parole, may be placed within or without the boundaries of the state at the discretion of the said Board and the limits fixed for such persons may be enlarged or reduced according to their conduct.

In considering applications for parole or final release said board shall not be required to hear oral argument from any attorney or other person not connected with the prison or reformatory in favor of or against the parole or release of any prisoners, but it may institute inquiries by correspondence, taking testimony or otherwise, as to the previous history, physical or mental condition, and character of such prisoner, and to that end shall have authority to require the attendance of the warden of the state prison or the superintendent of the state reformatory or the state reformatory for women and the production of the records of said institutions and to compel the attendance of witnesses, and each member of said board is hereby authorized to administer oaths to witnesses for

every such purpose. ('11, c. 298, §6; G. S. '13, §9273; Apr. 14, 1931, c. 161, §4; Apr. 5, 1935, c. 110, §2.)

Prisoner on medical reprieve is not entitled to hospital and medical services at expense of state. Op. Atty. Gen. (341j), Dec. 21, 1936.

10770-1. Parole of prisoners.—The state board of parole is hereby authorized and empowered to grant to any prisoner in the state prison, state reformatory or state reformatory for women, a temporary parole under guard, not exceeding three days, to any point within the state, upon payment of the expenses of such prisoner and guard. (Act Mar. 9, 1929, c. 70.)

10772. Credits for prisoners.

A resident of Minnesota imprisoned in the reformatory for a felony continues to be a resident of Minnesota but is not a citizen until restored as provided in this section and sec. 10773. Op. Atty. Gen., Apr. 7, 1933.

10773. Duty of board—Final discharge.

Op. Atty. Gen., Apr. 7, 1933; note under §10772.

10775. Supervision by board—agents.—Said board of parole as far as possible, shall exercise supervision over paroled and discharged convicts and when deemed necessary for that purpose, may appoint state agents, fix their salaries and allow them traveling expenses. It may also appoint suitable persons in any part of the state for the same purpose. Every such agent or person shall perform such duties as said board may prescribe in behalf of or in the supervision of prisoners paroled or discharged from the state prison, state reformatory, or other public prison in the state, including assistance in obtaining employment and the return of paroled prisoners, and in addition thereto shall, when so directed by the state board of control, investigate the circumstances and conditions of the dependents of prisoners of the state penal institutions and report their findings and recommendations to the warden and superintendent of the respective institutions and to the state board of control. Such agents and such persons shall hold office at the will of the board of parole and the person so appointed shall be paid reasonable compensation for the services actually per-

formed by them. Each shall be paid from the current expense fund of the institution or institutions for whose benefit he was appointed. ('11, c. 298, §10; G. S. '13, §9277; Apr. 14, 1931, c. 161, §5.)

10777. Rules governing paroles, etc.

A member of board of parole attending prison congress in another state under authority from the board was entitled to compensation of \$15.00 per day and traveling expenses. Op. Atty. Gen., Oct. 20, 1932.

Where prisoner violated his parole on Dec. 16, 1933, and parole board did not convene until Jan. 25, 1934, when parole was rescinded and warrant issued, prisoner was entitled to have time between Dec. 16, and Jan. 25, credited on his sentence, in absence of any rule or regulation applicable to the circumstances set forth by board of parole. Op. Atty. Gen. (341l-1), Mar. 2, 1935.

10778-1. Governor may enter into reciprocal agreement.—The governor of the state of Minnesota is hereby authorized and empowered to enter into compacts and agreements with other states through their duly constituted authorities, in reference to reciprocal supervision of persons on parole or probation and for the reciprocal return of such persons to the contracting states for violation of the terms of their parole or probation. (Act Apr. 24, 1935, c. 257.)

Preamble to act.

Whereas, The Congress of the United States of America has, by law, given consent to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies;

Reciprocal and retaliatory legislation. 21MinnLawRev 371.

BOARD OF PARDONS

10780. Pardons—Reprieves—Unanimous vote.

Where a conditional pardon has been granted, burden of proof of performance of condition rests upon him who relies upon effectiveness of pardon. *State v. Barnett*, 193M336, 258NW508. See Dun. Dig. 2449, 4942, 7296a.

Where a prisoner is released on a conditional commutation of sentence, but is later returned on a commitment, board of pardons may not revoke original commutation so as to require prisoner to serve out remainder of original sentence, but prisoner should receive credit on original sentence for period of time up to breach of condition of commutation. Op. Atty. Gen. (341l-1), August 29, 1939.

CHAPTER 105

State Prison and State Reformatory

STATE PRISON

10787. Location and management.

State board of control abolished and functions and powers transferred to director of public institutions by Act Apr. 22, 1939, c. 431, Art. 6, §§3, 4, ante §§3199-103, 3199-104.

Prisoners in penitentiary should not be requested or compelled to waive negligence of doctor or surgeon as condition of treatment. Op. Atty. Gen. (341h), Nov. 20, 1934.

Prisoner may use funds received from adjusted compensation certificates to purchase land if discipline of institution is not affected. Op. Atty. Gen. (342b), May 19, 1936.

10796. Clothing and food—Money on discharge.

Prisoner on medical reprieve is not entitled to hospital and medical services at expense of state. Op. Atty. Gen. (341j), Dec. 21, 1936.

A convict is entitled to items specified each time he is discharged or released. Op. Atty. Gen. (91c-1), April 6, 1939.

10807. Communication with convicts.

Communications which are withheld from inmate and retained in files must be delivered to him upon his discharge from institution. Op. Atty. Gen. (598a), Sept. 4, 1934.

10808. Diminution of sentence.

Laws 1933, c. 329, providing for termination of sentences between March and November does not prevent release at other times during year by reason of good conduct. Op. Atty. Gen., Aug. 25, 1933.

10812. Sale of binding twine.

Laws 1931, c. 340, fixes maximum price of machinery sold for 1931 and 1932.

10815. State prison may manufacture machinery.

—The State Board of Control is hereby authorized, empowered, and directed to establish, construct, equip, maintain and operate, at the State Prison, at Stillwater, a factory for the manufacture of hay rakes, hay loaders, mowers, grain harvesters and binders, corn harvesters and binders and corn cultivators, and the extra parts thereof and, if the board deems it advisable, cultivators of all kinds, culti-packers, manure spreaders, ploughs, rotary hoes, and the extra parts thereof and rope and ply goods of all kinds and for that purpose to employ, and make use of the labor of prisoners kept in said prison, at any time available therefor and as largely as may be, and such but only such skilled laborers as in the judgment of the said Board of Control and the Warden of the State Prison may be necessary for the feasible and successful and profitable employment of the said prisoners therein therefor, and for the purposes of, and to give full effect to, this act, said Board of Control may use all of, or any part of, not exceeding two hundred fifty thousand dollars of the existing state prison revolving fund created by and existing under Chapter 151 of the General Laws of 1909 (Section 9291-9294, General Statutes 1913, sections 10790-10793, Mason's Minn. Stat. 1927) but provided further that said State Board of Control and the said Warden of the Prison shall, at all times, in the line of manufacturing herein authorized and directed, employ and make use of prison labor to the largest extent feasible.