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CHAPTER 104

CRIMINAL PROCEDURE

SEARCH WARRANTS

5196. 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. (7080)

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).

5197. 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. (7081)

5198. 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. (7082)

5199. 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. (7083)

22-245.

EXTRADITION

5200. 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. ('03 c. 140)

5201
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5201. 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 offence 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. (7085)

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 intendment, 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. Genl. 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). 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 (66-291, 68+1089; 38-243, 36+462). Requirement that requisition papers contain copy of indictment or affidavit imperative (84-237, 87+770; 34-115, 24+354). 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).

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 offence—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 offence 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 (84-237, 87+770). Every presumption will be entertained by courts in favor of regularity of governor's action (84-237, 87+770).

5202. 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. (7086)

5203. 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. (7087)

5204. 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 § 5203. 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. (7088)

5205. 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 to 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. (7089)

5206. 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. (7090)

PROCEEDINGS TO PREVENT CRIME

5207. 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. (7091)

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

5208. 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. (7092)

5209. 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. (7093)

5210. 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. (7094, 7095)

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

5211. 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. (7096)

74-242, 76+1129.

5212. 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. (7097)

5213. Discharge—Complainant liable for costs, when—If, upon examination, it shall not appear that there is just cause to fear that any such offence 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. (7098)

5214. 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. (7099)

74-242, 76+1129.

5215. 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. (7100)

5216. 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. (7101)

5217. 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. (7102)

5218. 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. (7103)

5219. 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. (7104)

5220. Recognizances transmitted to district court—Every recognizance taken in pursuance of § 5219 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. (7105)

5221. 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. (7106)

5222. 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. (7107)

5223. 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. (7108)

5224. 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. (7109)

ARRESTS

5225. 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. (7110-7112)

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

5226. 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. (7113)

5227. 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 in-

form the defendant that he is acting under the authority of a warrant, and shall show him the warrant if so required. (7114-7116)

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).

5228. 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. (7117-7119)

5229. 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. (7120, 7121)

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). Where a felony has been committed although not in the presence of an officer he may arrest without a warrant (68-509, 71+687).

5230. 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 offence, or shall be pursued immediately after an escape. (7122, 7123)

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

5231. 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. (7124, 7125)

5232. 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. (7126)

16-431, 387.

5233. 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. (7127, 7128)

5234. 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. (7129-7131)

16-431, 387.

EXAMINATION OF OFFENDERS—COMMITMENT—BAIL

5235. 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. (7132)

Court commissioners are committing magistrates under this chapter (64-226, 66+969; 28-455, 10+778).

5236. 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. (7133)

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 (71-28, 73+626; 33-23, 21+847).

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).

5237. 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. (7134)

5238. 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. (7135, 1736)

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

5239. 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 hereinafter directed. (7137)

5240. 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. (7138, 7139)

5241. 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. (7140; '99 c. 301 s. 1)

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).

5242. 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. (7141)

Surety may pay and be discharged (§ 5252; 36-406, 31+359).

5243. 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. (7142)

5244. 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. (7143, 7144)

5245. 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. (7145, 7146)

5246. 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. (7147, 7148)

1. **Discharge**—Discharge not a bar to a subsequent prosecution for same offence (37-407, 34+737; 37-405, 34+748; 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.

5247. 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. Whenever 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. (7149; '99 c. 301 ss. 2-4)

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 (§ 4003; 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 (§ 4786; 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). Application of statute defined (70-199, 72+1067).

5248. 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. (7150, 7151, 7154)

18-398, 359.

5249. 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. (7152, 7153)

5250. 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. (7155)

5251. Certifying testimony—All examinations and recognizances taken by any magistrate under 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 made, or said recognizance taken, and shall be filed in said court; and, if such magistrate shall neglect or refuse to return the same, he may be compelled forth-

with by rule of court, and in case of disobedience may be proceeded against by attachment as for contempt. (7156)

See 1905 c. 179

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). Depositions of witnesses on an examination are not generally competent evidence in an action for malicious prosecution (10-350, 277).

5252. 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. (7157, 7158)

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

5253. 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. (7159)

89-426, 430, 94+1093.

5254. 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 offence of which appellant was convicted, the court may award him such sum as he may be entitled to out of such forfeiture. (7160, 7161)

5255. 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. (7162)

5256. Application for bail—Justification—Whenever a party in custody shall desire to give bail, the offence beingailable, 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. (7163, 7164)

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

5257. 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. (7165, 7166)

5258. 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. (7167)

5259. 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. (7168)

5260. Examination before justice—Removal—Whenever any person charged with a criminal offence 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. (7169; '99 c. 159)

General statute as to change of venue not applicable (37-407, 34+737).

GRAND JURIES

5261. Defined—Quorum—A grand jury is a body of men 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 offences 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 be present. (7170, 7187)

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).

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5262. When to be drawn—Who liable—A grand jury shall be drawn for every term of the district court in each county, provided that, in counties containing not more than twenty-five thousand inhabitants, whenever it shall be made to appear to the judge of such court that there are no matters to be presented to such grand jury not properly cognizable before a justice of the peace, he may by order direct that no grand jury be summoned for such term, and in counties of less than fifteen thousand inhabitants no grand jury shall be summoned for any such term unless at least fifteen days before the first day thereof the judge shall file with the clerk an order directing the summoning of such grand jury; but nothing herein shall be so construed as to prevent the issue of a special venire for a grand jury as provided by law. Every qualified voter shall be liable to be drawn as a grand juror, except as hereinafter provided. (7171, 7172)

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).

5263. Exemptions—Disqualifications—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, one miller to each gristmill, 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 stationary 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. (7173; '95 c. 309; '97 c. 352 s. 3)

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).

5264. 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. (7174, 7175)

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). 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).

5265. 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 11 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 six days before the sitting thereof, shall summon the persons named in such venire to attend such court as grand jurors, by giving personal notice to each person, or leaving written notice at his place of residence, 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. (7176, 7177; '99 c. 12)

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5266. 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. (7178)

5267. 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. (7179, 7180)

5268. Grounds of excuse—Record—The court shall not excuse from service upon either the 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. The name of each person so excused, with the ground thereof, shall be entered by the clerk among the proceedings of the court, preserved, and open to inspection by all parties. (7181, 7182)

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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).

5269. 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. (7183, 7184)

5270. 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. (7185, 7186)

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).

5271. Challenge—Any person held to answer a charge for a public offence 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. (7188)

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). 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 impaneling 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 (19-484, 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).

5272. 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. (7189)

See § 5271 Note 2.

5273. 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. (7190-7192)

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). See note to § 5271.

5274. 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. (7193-7195)

5275. 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 §§ 5278-5288, 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. (7196-7198)

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

5276. Jury to retire—Clerk—Duties—The grand jury shall then retire to a private room and inquire into the offences 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. (7199, 7200)

5277. 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. (7201)

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):

5278. 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. (7204, 7205)

5279. Powers of grand jury—The grand jury shall inquire into all public offences 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 offence, they shall find an indictment against him; but, if they only believe that he is probably guilty, they shall proceed by presentment. (7202, 7203)

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).

5280. 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. (7206-7209)

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).

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).

5281. 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. (7210)

5282. 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. (7211)

5283. 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. (7212)

5284. 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. (7213)

5285. 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. (7214)

5286. 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. (7215)

27-280, 6+791, 7+144; 17-241, 218; 59-259, 61+138; 56-129, 57+455.

5287. 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. (7216)

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

5288. 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. (7217)

5289. 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. (7218-7222)

5290. 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. (7223)

5291. 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. (7224, 7225)

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5292. Bench warrant—Issuance—If the court shall think that the facts stated in the presentment constitute a public offence 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: (7226, 7227)

5293. 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. (7228, 7229)

5294. 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. (7230, 7231)

5295. 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. (7232-7234)

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. 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).

5296. 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. (7235-7237)

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). See note to § 5295.

INDICTMENTS

5297. 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. (7238)

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 offence in commencement an irregularity merely (66-309, 68+1096; 22-67). 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 offence 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 offence, 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 (§ 5316; 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

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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 (§ 4758; 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 (§ 5304; 48-466, 51+474; 77-296, 79+1007; 38-368, 37+587). If an indictment states fully, directly and clearly acts constituting a public offence it is immaterial in what form of words the acts are alleged (38-368, 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 offence such intent must be directly alleged (5-13, 1; 66-309, 68+1096; 27-309, 7+264).

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 (§ 5302; 26-526, 6+339; 65-230, 68+11; 23-569. 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" (§ 5305; 26-526, 6+339; 13-370, 343). 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; 26-526, 6+339; 45-128, 47+541; 65-230, 68+11; 41-50, 42+602; 23-569). A special statutory limitation applies to embezzlement (§ 5320).

14. Essential elements to be alleged—Every essential element of the offence must be alleged directly and certainly. No allegation may be omitted if without it a criminal offence would not be described (82-317, 84+1015; 29-134, 12+353; 5-13, 1; 27-309, 7+264; 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).

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 (88-171, 92+541; 29-78, 11+233; 86-418, 90+786; 71-399, 73+1091).

17. **Facts and not conclusions of law**—An indictment must allege facts and not conclusions of law (76-211, 78+1042; 71-399, 73+1091. See Note 10 supra).

18. **Following language of statute or ordinance**—An indictment charging an offence in the language of the statute is ordinarily sufficient (22-271; 22-311; 41-41, 42+543; 11-154, 95; 38-368, 37+587; 23-549; 36-62, 30+305; 48-466, 51+474; 76-211, 78+1042; 77-128, 79+656; 26-526, 6+339; 88-262, 92+976; 71-399, 73+1091; 29-142, 12+455; 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 (22-311). 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. See § 5304). 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 negative exceptions or provisos found in the enacting clause of the statute on which it is based (19-93, 65; 67-10, 69+474; 70-12, 72+732; 82-317, 84+1015; 90-526, 97+131; 12-476, 378. 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 "Fou-rai," 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 "Kurkwiski" 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. See § 5300).

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 (31-207, 17+344; 3-438, 325; 27-309, 7+264; 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). See § 5303.

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 (29-142, 12+455; 31-207, 17+344; 30-522, 16+406; 16-109, 99; 91-365, 98+190; 84-357, 87+935). 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). And by statute such means may be alleged in the alternative (§ 5301). 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; 23-549; 22-67; 17-72, 50; 80-314, 83+182; 26-148, 1+1054; 71-399, 73+1091), 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 offences, 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 (59-147, 60+1088; 29-78, 11+233).

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).

5298. 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.
(7239)

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5299. 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. (7241)

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 (66-309, 68+1096; 65-121, 67+798; 82-448, 85+229; 79-388, 82+650; 91-365, 98+190; 88-175, 92+965). 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 (29-142, 12+455; 25-368; 31-207, 17+344; 74-409, 77+223; 82-448, 85+229; 22-311; 91-365, 98+190). 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" (§ 5305; 22-67; 59-514, 61+677; 66-309, 68+1096; 81-134, 139, 83+512; 25-66). The offence charged must be described with sufficient certainty to identify it (26-90, 1+821; 25-368), 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; 65-121, 67+798; 12-490, 393), and to "the particular circumstances of the offence charged when they are necessary to constitute a complete offence" (§ 5299; 19-93, 65; 79-388, 82+650; 66-309, 68+1096; 29-142, 12+455). 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. See § 5297 Note 24). Ordinarily the rule is not applicable to time (§ 5297 Note 13), means (29-142, 12+455; 22-514), matters not essentially descriptive of the offence (22-514), matters of mere inducement (See Note 2 supra), and obscene matters (See § 5297 Note 30). The rule of certainty does not require the pleading of evidence (§ 5297 Note 16), and does not forbid the use of technical terms (§ 5297 Note 10). It requires that the name of the person injured should be stated (§ 5297 Note 22). To be certain, allegations must be direct (See Note 1 supra). Ordinarily an indictment is sufficiently certain if it follows the language of the statute (See § 5297 Note 22).

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).

5300. 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. (7242)

See § 5297 Note 21.

5301. 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

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indictment may contain several counts, describing it as of different classes or kinds. (7243)

Different degrees (13-121, 112). Alternative statement of means (22-238; 73-140, 76+33; 29-142, 12+455). Doubt as to class (13-121, 112). See § 5343 Note 3.

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5302. 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. (7244)

26-526, 6+339; 23-569; 65-230, 68+11. See § 5297 Note 13.

05 5303 - 231

5303. 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. (7245)

3-438, 325; 27-309, 7+264; 50-123, 52+275; 83-432, 86+419; 86-432, 90+1108. See § 5297 Note 22.

05 5304 - 231

5304. 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. (7246)

38-368, 37+587; 48-466, 51+474; 77-296, 79+1007. See § 5297 Note 9.

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5305. Tests of sufficiency—The indictment shall be sufficient if it can be understood therefrom:

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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. (7247)

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). 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).

05 5306 - 231

5306. 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. (7248)

Statute applied (22-67; 13-370, 343; 38-368, 37+587; 50-128, 52+387; 17-76, 54; 86-206, 90+398). This and other statutory provisions (§§ 5297, 5304, 5305) were enacted to free criminal pleading of the excessive technicality, formality and tautology of the common law. They should be construed liberally (38-368, 37+587; 66-309, 68+1096; 4-345, 261). 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 (47-559, 50+691; 50-128, 52+387; 22-311; 79-94, 99, 81+750). 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 (66-309, 68+1096; 82-448, 85+229; 12-490, 393).

5307. 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. (7249)

05 5307
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5308. 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. (7250)

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27-521, 8+758.

5309. 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. (7251)

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5310. 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. (7252)

05 5310
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5311. 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. (7253)

05 5311
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74-409, 77+223.

5312. 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. (7254)

5313. 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. (7255)

5314. 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. (7256)

4-325, 241.

5315. Offences on public conveyances—Jurisdiction—The route traversed by any railway car, coach, train, or public conveyance, and the lake or steam 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. (7257)

5316. 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. (7258)

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

5317. 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 offence may be prosecuted in either county. (7259)

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

5318. 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. (7260)

5319. 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, (7261)

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

5320. 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. (7262)

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

5321. 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 offence 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. (7263)

50-123, 52+275.

ARRAIGNMENT OF DEFENDANT

5322. 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. (7264-7266)

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).

5323. 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. (7267, 7268, 7272)

5324. 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.
(7269)

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

5325. 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." (7270)

5326. 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." (7271)

5327. 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. (7273)

5328. 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. (7274)

5329. 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. (7275)

5330. 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. (7276)

5331. 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. (7277)

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5332. 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 indorsements 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. (7278)

Defective copy of indictment (13-341, 315; 54-359, 56+50).

5333. 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. (7279, 7280)

5334. 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. (7281, 7282)

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).

5335. 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. ('95 c. 217)

5336. 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. ('95 c. 217)

5337. 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. ('95 c. 217)

SETTING ASIDE INDICTMENT

5338. 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 § 5285.

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. (7283, 7284)

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

2. **Under Subd. 2**—56-129, 57+455. See § 5295.

3. **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).

4. **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 impaneled and sworn the defendant was in jail (13-132, 125); 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 (§ 5306).

5. **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).

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

5339. 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 dis-

charged 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. (7285-7287)

5340. 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. (7288)

66-294, 69+25.

5341. 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 § 5339. An order to set aside an indictment as provided in this chapter shall be no bar to a future prosecution for the same offence. (7289, 7290)

DEMURRERS

5342. 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. (7291, 7292)

5343. 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 §§ 5297-5300, as qualified by § 5305, 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. (7293)

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). An indictment is not insufficient because of 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 (§ 5306).

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).

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 (§ 5343; 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 (§ 5345; 13-121, 112; 19-271, 230).

7. **Statutory exceptions**—The statute authorizes certain exceptions to the general rule against duplicity (§ 5301).

8. **Indictments held double**—Against a justice of the peace for neglect of duty, charging several acts of omission and commission (14-36, 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).

9. **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, 225); 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).

5344. 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. (7294-7296)

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

5345. 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. (7297, 7298)

The allowance of an amendment, or direction for resubmission 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 32-537, 21+746; 17-241, 218). 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 (22-271; 2-224, 187; 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 decision 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).

5346. 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. (7299, 7300)

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).

5347. Objections taken by demurrer—Whenever the objections specified in § 5343 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. (7301)

Objections held waived (10-223, 178; 90-526, 97+131; 21-47, 49; 27-521, 525, 8+758). 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 (66-309, 68+1096; 26-388, 5+970).

PLEAS

5348. 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" (7302-7304)

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).

5349. 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. (7305, 7306)

5350. 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. (7307, 7308)

5351. 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. (7309, 7310)

88-171, 92+541. See Const. art. 1 § 7.

5352. 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. (7311)

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

5353. Refusal to plead—If the defendant shall refuse to answer an indictment by demurrer or plea, a plea of not guilty shall be entered. (7312)

CHANGE OF VENUE

5354. 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. (7313)

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).

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 (16-282, 249; 13-341, 315; 15-344, 277; 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).

5355. 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. (7314; '02 c. 31)

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

5356. 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. (7315, 7316)

5357. 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. (7317)

15-344, 277.

ISSUES AND MODE OF TRIAL

5358. 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 §§ 5354-5357. 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. (7318-7320)

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 (60-90, 61+907; 24-87). 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).

5359. 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. (7321, 7322)

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; 88-269, 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).

5360. 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. (6267, 7323)

43-325, 45+614.

5361. 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. (7326-7328)

5362. 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. (7329, 7330)

Granting view discretionary (19-271, 230).

5363. 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. (7331)

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 (14-385, 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 13-341, 315; 10-223, 178; 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 (69-508, 72+799, 975; 62-7, 64+51; 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).

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).

5364. 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. (7332)

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

5365. 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. (7333)

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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 (47-47, 49+404; 16-109, 99). 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).

5366. Jury—How kept while deliberating—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 any one of their number unless by order of court, nor listen to their deliberations; and they shall be returned into court when agreed, or when so ordered by the court. (7334)

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; 105+265). After submission the jury cannot be permitted to separate until their discharge (3-444, 329; 16-178, 157; 41-104, 42+786; 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+786).

5367. 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. (7335)

5368. 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. (7336)

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).

5369. 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. (7337)

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).

5370. 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. (7338)

5371. 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. (7339)

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 (56-78, 57+325; 45-521, 48+401); 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 (41-285, 43+5; 21-382); of simple larceny, on an indictment for larceny from the person (26-381, 4+615; 8-220, 190); 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). On an indictment for burglary a party cannot be convicted of the crime of larceny (47-425, 50+472).

5372. 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. (7340)

5373. 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. (7341)

12-434, 319.

5374. 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. (7342)

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

5375. Insanity, etc., of defendant—Whenever any person subject to trial, sentence, or punishment for a crime shall be found to be in such a state of idiocy, imbecility, lunacy, or insanity as to be incapable of understanding the proceedings or making his defence, the court may commit him to the hospital for the insane for safe-keeping and treatment; and the officers of such hospital shall receive and care for such person until he shall have recovered from such idiocy, imbecility, lunacy, or insanity, and then surrender him to the court or officer from whom he was received. (7343)

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5376. Acquittal on ground of insanity—When any person indicted for an offence shall be, on trial, acquitted by the jury by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, it may order him to be committed to a hospital for the insane for safe-keeping and treatment, or to prison, or may give him into the care of his friends, if they shall give satisfactory bond, conditioned that he shall be well and securely kept; otherwise he shall be discharged. (7344)

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2-123, 99.

5377. 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. (7345)

5378. Dismissal of indictment—Reasons to be entered—The court may, either of its own motion or upon the application of the prosecuting officer, and in furtherance of justice, order an action, after indictment, to be dismissed; but in that case the reasons for the dismissal shall be set forth in the order, and entered upon the minutes. (7346)

CALENDAR

5379. 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. (7347)

5380. 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. (7348, 7349)

5381. 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. (7350)

CHALLENGING JURORS

5382. 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. (7351, 7352)

5383. 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. (7353-7355)

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 "crim-

inal" 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).

5384. 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. (7356, 7357)

73-150, 75+1127.

5385. 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. (7358-7360)

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).

5386. 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. (7361, 7362)

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).

5387. 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 offence 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 offence

the state shall be entitled to three, and the defendant to five, peremptory challenges. (7363, 7364; '03 c. 196)

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; *Lerum v. Geving*, Filed Feby. 9, 1906).

5388. 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. (7365, 7366)

5389. 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. (7367)

5390. 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. (7368)

5391. 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. (7369)

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

2. Subd. 1—20-313, 271, 295.

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).

4. Subd. 6—18-82, 65; 19-484, 418.

5392. Challenge for actual bias—A challenge for actual bias may be taken for the cause mentioned in § 5390 subd. 2, and for no other cause. (7370)

5393. 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. (7371)

5394. Challenge—Statement of cause—Exception—In a challenge for implied bias, one or more of the causes stated in § 5391 shall be alleged; in a challenge for actual bias, the cause stated in § 5390 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 §§ 5383, 5384, 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. (7372, 7373)

A challenge for "actual bias" is sufficient; it is not necessary to state the nature of the bias or to recite § 5390 (73-150, 75+1127).

5395. 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. (7374-7376; '99 c. 26)

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 resworn for every challenge (12-538, 448).

5396. 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. (7377-7379)

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; *Antletz v. Smith*, Filed Jan. 26, 1906). 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).

5397. 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. (7380)

5398. 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. (7381, 7382)

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; 73-150, 75+1127; 61-412, 63+1040; 77-198, 79+682; 80-314, 83+182; 88-262, 92+976).

5399. 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. (7383, 7384)

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

5400. 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. (7385)

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+638).

5401. 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. (7386)

1. **Stay**—There is no stay except as expressly ordered (24-362). A stay, even in a capital case, is a matter of discretion (38-368, 37+587; 62-114, 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).

5402. 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. (7387, 7388)

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).

5403. 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. (7389)

16-75, 64.

5404. 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. (7390)

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 (23-291; 26-6, 46+445; 22-238). 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).

5405. Proceedings in supreme court—No assignment 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. (7391)

104+971, 976. See note to § 5407.

5406. Recognizance—If upon appeal or writ of error a party shall be admitted to bail, he may recognize to the state in such sum as the judge shall order, with sufficient sureties, for his personal appearance before the supreme court at the then next term thereof, and to enter and prosecute his exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior; and the judge, in his discretion, may allow any person charged with any offence not punishable with death so to recognize. (7392)

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

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5407. 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. (7393)

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 (104+822).

5408. 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. (7394)

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).

5409. 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. (7395, 7396)

JUDGMENTS AND EXECUTION THEREOF

5410. 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. (7398)

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).

5411. 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 pris-

oned 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. (7399)

5412. Capital cases—Record and statement for governor—Executive warrant—Whenever any person shall be convicted of a crime for which sentence of death shall be awarded against him, the judge of the court in which such conviction was had shall immediately thereafter transmit to the governor by mail a statement of the conviction and judgment, and of the testimony given at the trial; and the clerk of such court, as soon as may be, shall deliver to the sheriff of the county a certified copy of the entire record of the conviction and sentence, which the sheriff shall forthwith transmit to the governor, who shall fix a day for the execution of the sentence. Sentence of death shall not be executed upon such convict until a warrant is issued by the governor, under the seal of the state, with a copy of the record thereto annexed, commanding the sheriff to cause the execution to be done upon the day so fixed by him; and the sheriff shall thereupon cause to be executed the judgment and sentence of the law upon such convict. (7400, 7401)

Sustained (38-368, 37+587; 40-65, 41+459; 137 U. S. 483).

5413. 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. (7402)

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).

5414. 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. (7403)

5415. 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. (7404)

5416. 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. (7405)

5417. 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. (7406)

5418. Governor may delay warrant, when—If it shall appear to the satisfaction of the governor that any convict under sentence of death has become insane, the warrant for his execution may be delayed; or, if it has been issued, the execution thereof may be respited from time to time, so long as the governor shall think proper; and, if any female convict under sentence of death shall be quick with child, the governor shall forbear to issue a warrant for her execution, or, if such warrant has been issued, the execution thereof shall be respited until it shall appear to the satisfaction of the governor that she is no longer quick with child. (7407)

5419. Punishment by death—Return of warrant—The mode of inflicting the punishment of death shall in all cases be hanging by the neck until the person is dead. Whenever such punishment shall be inflicted upon any convict in obedience to a warrant from the governor, the sheriff of the county shall be present at the execution, unless prevented by sickness or other casualty, and have such military guard as he shall deem proper. As soon as may be after such execution, he shall return the warrant to the governor, with a statement under his hand of his doings thereon, and shall also file in the office of the clerk of the court in which the conviction was had an attested copy of the warrant and statement aforesaid, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence. (7408, 7409)

5420. Time and place of execution—The warrant of execution shall be executed before the hour of sunrise of the day designated therein, and within the walls of the jail, in all cases where the jail is so constructed that it can be conveniently done therein, but, when not so constructed, then within an inclosure higher than the gallows, which shall exclude the view of persons outside, and which shall be prepared for that purpose under the direction of the sheriff, in the immediate vicinity of the jail, or, if there be no jail in the county, at some convenient place at the county seat, selected by the sheriff. (7410)

Sustained (137 U. S. 483).

5421. Who may visit prisoner—After the issue of the warrant for execution by the governor, the prisoner shall be kept in solitary confinement, and the following persons, and none other, shall be allowed to visit him: The sheriff and his deputies, the prisoner's counsel, any priest or clergyman the prisoner may select, and the members of his immediate family. (7411)

5422. Witnesses to execution—Newspaper publication—The following persons, and none other, may be present at the execution: The sheriff and his assistants, the clergyman or priest in attendance upon the prisoner, and such other persons as the prisoner may designate, not exceeding three in number, a physician or surgeon to be selected by the sheriff, and such other persons, not exceeding six in number, as he may designate, but no person so admitted shall be a newspaper reporter or representative. No account of the details of such execution, beyond the statement of the fact that such convict was, on the day in question, duly executed according to law, shall be published in any newspaper. Every person who shall violate or omit to comply with any provision of this section and §§ 5419-5421 shall be guilty of a misdemeanor. (7412, 7413)

Sustained (137 U. S. 483).

5423. 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. (7414)

BOARD OF PARDONS

5424. 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. ('97 c. 23 s. 1)

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

5425. 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. ('97 c. 23 s. 2)

5426. 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. ('97 c. 23 ss. 2, 3)

5427. 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. ('97 c. 23 s. 4)

5428. 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. ('97 c. 23 s. 5)

5429. 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 workhouse may be granted by said board without notice. ('97 c. 23 s. 6)

5430. Records—Seal—Additional powers—Clerk—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 governor's private secretary, or, in his absence, the executive clerk, shall be the clerk of the board, and shall keep the records and perform the duties herein required of him, and such other duties as the board may prescribe, without other compensation. The records and all files shall be kept and preserved in the office

of the governor, and shall be open to public inspection at all reasonable times. ('97 c. 23 ss. 5, 7, 8)

5431. 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. ('97 c. 23 ss. 8, 9)

CHAPTER 105

STATE PRISON AND STATE REFORMATORY

STATE PRISON

5432. Location and management—The state prison shall be continued at its present site in Stillwater for the confinement and reformation of convicts, and be under the general management of the board of control. (7449)

07 5433 49

5433. Contractors not to be employed—Compensation—No prison contractor or his agent or employee, and no person directly or indirectly interested in any business carried on therein, shall hold office or employment in said prison. Nor shall any officer or employee therein be directly or indirectly interested in any contract, purchase or sale for or on account of the prison, or receive any compensation for services performed for or on behalf of any contractor, or for his services other than that prescribed by law. And no official or employee shall receive any gift from a prisoner therein, or any money or other consideration for services rendered or to be rendered to him. Every contractor, his agent or employee, violating any provision of this section, shall be thereafter barred from obtaining any contract for labor in said prison, and every officer or employee violating the same shall be discharged, and thereafter disqualified from holding any position therein. (7469, 7470; '95 c. 154 s. 16)

09 5434 241

5434. Visitors—Fees—The members of the state board of control, the governor, lieutenant governor, members of the legislature, state officers, and regularly authorized ministers of the gospel may visit the prisoners at pleasure, but no other persons, without special permission of the warden, under rules prescribed by said board. A moderate fee may be required of visitors, other than those allowed to visit at pleasure. Such fees shall be used to defray the expenses of ushers for conducting such visitors, for the maintenance of the prison library, the prison band, and other entertainments of the inmates. (7473, 7487)

09 5435 304

5435. Clothing and food—Money on discharge—Convicts shall be supplied with substantial, wholesome food in sufficient quantities, and bedding and clothing of coarse material. Upon discharge the warden, at the expense of the state, shall furnish each convict released with one good, serviceable suit of clothing and underclothing, and, when released between October 1 and March 31 following, with a good, serviceable overcoat; and he shall pay to each convict, when released, twenty-five dollars in money drawn from the current expense fund. (7474, 7475; '97 c. 243)

5436. Commitment papers—Duty of clerk and officer—The clerk of every court by which a criminal shall be sentenced to the state prison or state reformatory shall furnish the officer or person having such criminal in charge a record containing a copy of the indictment and plea, the name and residence of the judge presiding, of the jurors, and of the witnesses sworn on the trial,