1938 Supplement

To

Mason's Minnesota Statutes

1927

(1927 to 1938)

(Superseding Mason's 1931, 1934, and 1936 Supplements)

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

Edited by

WILLIAM H. MASON, Editor-in-Chief

W. H. MASON, JR.
R. O. MASON
J. S. O'BRIEN
H. STANLEY HANSON
R. O. MASON, JR.

Assistant Editors

MASON PUBLISHING CO.
SAINT PAUL, MINNESOTA
1938

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

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

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

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

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

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

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

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

CHAPTER 104
Criminal Procedure

SEARCH WARRANTS

10537. When issued.

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

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

If an intoxicating liquor inspector is rightfully within a place where non-intoxicating liquors are sold, he may seize intoxicating liquor for purpose of using same for evidence in a prosecution, but he may not search premises for intoxicating liquors, and in such case a search warrant is not necessary. Op. Atty. Gen. (218f), Feb. 5, 1935.

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

10540. Property seized—How kept and disposed of.—Whenever, any officer, in the execution of a search warrant, shall find any stolen property, or seize any other things for which search is allowed by law, the same shall be safely kept by direction of the court or magistrate, so long as may be necessary for the purpose of being produced as evidence on any trial, and then the stolen property shall be returned to the owner thereof, and the other things seized destroyed under the direction of the court or magistrate. Any money found in gambling devices when seized shall be paid into the county treasury, or, if such gambling devices are seized by a police officer of a municipality, such money shall be paid into the treasury of such municipality. (R. L. '05, §5199; G. S. '13, §9036; Apr. 13, 1929, c. 177.)

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

Fact that liquor was unlawfully taken from possession of defendant does not prevent its use in evidence against him. State v. Kaasa, 198M181, 269NW365. See Dun. Dig. 2468i, 3239.

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

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

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

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

EXTRADITION

10542. Warrant of extradition, service, etc.

½. In general.

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

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

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

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

3. Who is a fugitive from justice.

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

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

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

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

4. Proof that party demanded is a fugitive.

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

5. The crime charged.

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

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

6. Requisition papers.

Whether there was a compliance with Georgia statutes as regarded prerequisites for issuance of requisition

warrant was a matter for the governor of that state, and a matter not reviewable by the courts of this state. 178M368, 227NW176.

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

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

7. The warrant.

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

11. Review by courts.

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

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

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

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

10543. Fugitive from another state arrested, when.

A demand for extradition complies with the federal statute when it clearly shows that a criminal charge is pending in the demanding state, even though the papers are insufficient as a criminal pleading under the laws of this state. State ex rel. King v. Wall, 181M456, 232 NW788. See Dun. Dig. 3706.

10544. May give recognizance, when.

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

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

PROCEEDINGS TO PREVENT CRIME

10548. Conservators of the peace.

Injunction may be brought against places selling liquor illegally. Op. Atty. Gen. (494b-21), Apr. 30, 1936.

ARRESTS

10566. Defined—By whom made—Aiding officer.

By pleading not guilty to a complaint filed in a justice court, charging defendant with petit larceny, he submitted himself to jurisdiction of court; and there was no error in denying motion to withdraw plea in order that defendant might question legality of arrest. State v. Henspeter, 199M359, 271NF700. See Dun. Dig. 2443, 2444.

Deputy sheriff residing outside of village may make arrest within village for violation of its ordinances, fees of sheriff being paid by village, but village has no authority to compensate deputy in addition to fees prescribed. Op. Atty. Gen., May 26, 1932.

Mayor and councilmen of city of St. Peter have full powers of all peace officers in maintaining the peace and are not limited to exercise of such authority to times of riots and public disturbances. Op. Atty. Gen. (847), Aug. 8, 1934.

10570. Without warrant, when—Break door, etc.

Threat to shoot an officer if he takes property under replevin papers is a misdemeanor under §10431 and the officer may arrest the offender without a warrant. 177M307, 225NW148.

Whether officer failed to take prisoner before magistrate within a reasonable time held for jury. 177M307, 225NW148.

If restraint after receiving warrant was illegal, prisoner had a right of action for false imprisonment, irrespective of his release. 177M307, 225NW148.

Where an officer arrests a person without a warrant, the burden rests upon the officer to plead and prove justification. Otherwise the arrest is prima facie unlawful. Evans v. J., 182M282, 234NW292. See Dun. Dig. 512, 3729(91).

In action for false imprisonment, whether the plaintiff was drunk at the time of arrest held for jury. Evans v. J., 182M282, 234NW292. See Dun. Dig. 3732a(1).

Whether the sheriff detained the plaintiff in the county jail for unreasonable time before bringing her before magistrate or obtaining warrant held question for jury. Evans v. J., 182M282, 234NW292. See Dun. Dig. 517, 3732a(1).

Whether the sheriff of the county directed or authorized the constable to make the arrest was under the evidence, a question of fact for the jury. Evans v. J., 182M282, 234NW292. See Dun. Dig. 512, 3732a(1).

10575–1. Arrests any place in state—When allowed.

Any peace officer, such as a constable, may make an arrest anywhere in the state for an offense committed in his local jurisdiction. Op. Atty. Gen., Nov. 22, 1929.

A village constable or other peace officer can make an arrest anywhere in state only for an offense committed within village limits. Op. Atty. Gen., Dec. 21, 1933.

EXAMINATION OF OFFENDERS—COMMITMENT—BAIL

10577. Proceedings on complaint—Warrant.

1. Nature of proceeding.

The preliminary examination referred in §10666 is that provided for by §§10577 to 10587. 175M508, 221NW900.

4. Waiver.

Where defendant, when arraigned in district court, stood mute and did not call court's attention to state's failure to file formal complaint against him and to hold a preliminary examination, objections to district court's jurisdiction were thereby waived. State v. Puent, 198M 175, 269NW372. See Dun. Dig. 2431.

5. The complaint.

An objection that a criminal complaint is void for duplicity must be taken at or before trial, or it will be considered as waived. 175M222, 220NW611.

A justice has no authority to issue a subpœna requiring the appearance of a witness until the complaint has been signed and an action is pending before him. Op. Atty. Gen., Aug. 5, 1930.

6. The examination.

Testimony taken by a committing magistrate under §10577 need not be reduced to writing or certified and returned to clerk of district court under §10592. State v. District Court, 192M620, 257NW340. See Dun. Dig. 2438.

10579. Offender may give recognizance, etc.

Defendant held to have broken his bond by failing to appear on the day that his case was called for trial, though he appeared at a later date and during the term and entered a plea of guilty. U. S. v. Pleason (DC-Minn) 26F(2d)104.

10585. Examination—Rights of accused.

An automobile belonging to the victim of an assault while in custody of the law is subject to the order of the magistrate before whom the proceeding is pending. Op. Atty. Gen., Feb. 3, 1932.

A photographer who takes photographs for the state in investigating a criminal case is an employee or agent of the state, and plates in his hands are no more subject to examination or production in behalf of the defendant than in the hands of the sheriff or county attorney. Op. Atty. Gen., Feb. 3, 1932.

10586. Witnesses kept separate—Testimony, how taken.

County cannot pay reporter for taking testimony at preliminary hearing. Op. Atty. Gen. (129), Apr. 20, 1937.

10587. Prisoner discharged, when—Offenses not bailable.

Accused in a criminal case has no right to compel the production at preliminary examination of evidence obtained by the state in the course of its investigation. Op. Atty. Gen., Feb. 3, 1932.

Court commissioner has authority to fix bail of one charged with an assault in the first degree. Op. Atty. Gen., Feb. 3, 1932.

10588. Bail—Commitment.

½. In general.

This section has no application to bail money given to a United States court commissioner. Moerke. 184M314, 238NW690. See Dun. Dig. 724b.

2. Bail.

Applications for bail should be addressed to district court after return of magistrate is filed in district court, if not sooner. Op. Atty. Gen., Apr. 3, 1929.

10592. Certifying testimony.

The court, not the jury, has the benefit of knowledge disclosed by testimony certified by magistrate in the files of the case in the office of the clerk of the trial court. State v. Irish, 183M49, 235NW625. See Dun. Dig. 2438(8).

Testimony taken by a committing magistrate under §10577 need not be reduced to writing or certified and returned to clerk of district court under §10592. State v. District Court, 192M620, 257NW340. See Dun. Dig. 2438.

It is not necessary for a justice of the peace to make a return to the clerk of the district court of a prelim-

inary hearing where the defendant is discharged and not bound over. Op. Atty. Gen., Dec. 19, 1931.

10593. Proceedings on default.
Defendant held to have broken his bond by failing to appear on the day that his case was called for trial, though he appeared at a later date and during the term and entered a plea of guilty. U. S. v. Pleason (DC-Minn) 26F(2d)104.

10595. Action on recognizance—Not barred, when.
U. S. v. Pleason (DC-Minn) 26F(2d)104.

10598. Application for bail—Justification.
Op. Atty. Gen., Apr. 3, 1929; note under §10588.

10599. Surrender of principal—Notice to sheriff.
Right of surety to recapture principal in another state. 16MinnLawRev197.

10602-4. Corporate bonds authorized in criminal cases.—Any defendant required to give a bond, recognizance or undertaking to secure his appearance in any criminal case in any court of record, may, if he so elects, give a surety bond, recognizance or undertaking executed by a corporation authorized by law to execute such bonds, recognizances or undertakings, provided, that the amount of the bond, recognizance or undertaking as fixed by the court must be the same regardless of the kind of bond, recognizance or undertaking given. (Act Apr. 25, 1931, c. 386, §1.)

GRAND JURIES

10603. Members—Quorum.
Grand jurors are not entitled to extra compensation for committee meetings or for investigation when no quorum is present. Op. Atty. Gen. (260b), Apr. 30, 1937.

10622. Evidence—For defendant.
1. In general.
A witness before a grand jury may not refuse to answer questions because they have not been ruled upon by the court or because they seem to relate only to an offense, the prosecution of which is barred by a statute of limitation. 177M200, 224NW838.

Defendant is not entitled to have an indictment quashed simply because grand jury declined to call a witness on his behalf, whom he had requested them to call, even though an earlier grand jury, with testimony of designated witness before them, had refused to indict. State v. Lane, 195M587, 263NW608. See Dun. Dig. 4422.

Date of alleged larceny of money by employee withdrawing from bank account should be alleged as first act during six months' period, so that subsequent acts during period could be proved. Op. Atty. Gen., Feb. 2, 1933.

2. Accused as witness.
Where, after a complaint is filed against defendant in municipal court charging him with a felony and a warrant is issued thereon, but, before hearing thereon, he is subpœnaed to appear before grand jury and compelled to give evidence as to facts upon which said charge is based, his constitutional right not to be compelled in any criminal case to be a witness against himself is violated. Defendant is entitled to have an information thereafter filed against him on such charge, by county attorney in district court, set aside. State v. Corteau, 198M433, 270NW144. See Dun. Dig. 10337.

10625. Matters inquired into.
A witness before a grand jury may not refuse to answer questions because they have not been ruled upon by the court or because they seem to relate only to an offense, the prosecution of which is barred by a statute of limitation. 177M200, 224NW838.

10637. Indictment—How found and indorsed—Names of witnesses.
A county attorney has not the power to institute a prosecution where the grand jury has once passed upon the evidence and returned a no-bill without first obtaining a court order in advance. Op. Atty. Gen., Oct. 19, 1931.

Where the grand jury has actually considered a specific charge and returned no-bill, the matter may be submitted to another jury again only by direction of the district court. Op. Atty. Gen., Oct. 19, 1931.

4. Indorsing names of witnesses.
It was not fatal that names of some who appeared before grand jury were not endorsed on indictment, already containing names of 23 witnesses. State v. Waddell, 187M191, 245NW140. See Dun. Dig. 4358.

Aside from what is required by statute, it is not necessary for state to furnish defendant with names of persons it intends to call as witnesses and it was not error for trial court to deny defendant's motion to require state to do so. State v. Poelaert, 273NW641. See Dun. Dig. 4358.

10638. Indictment presented, filed, and recorded.
It is not proper in district court to include in one file several charges against the same defendant, even though these charges arise out of the same transaction. Op. Atty. Gen., April 28, 1931.

INDICTMENTS

10639. Contents.
Pendency of a proceeding for preliminary examination in municipal and justice court does not prevent the finding of an indictment by the grand jury. 175M607, 222 NW280.

Indictment charging maintenance of a liquor nuisance, held sufficient. 177M278, 225NW20.

4. The charging part.
State cannot be expected to draft such an indictment as will disclose all of its evidence. State v. Nuser, 199 M315, 271NW811. See Dun. Dig. 4384.

Putting a person in fear of injury should be expressly alleged in a robbery indictment if it is desired to introduce evidence thereon. Op. Atty. Gen., Dec. 15, 1931.

4½. Joinder of offenses.
Where partners in a store are robbed, and robber takes money from the persons of each and from the store till, three offenses are committed, and there should be three separate indictments. Op. Atty. Gen., Dec. 15, 1931.

Where two or more persons are robbed at the same time, a separate offense is committed as to each and separate indictments are necessary. Op. Atty. Gen., Dec. 15, 1931.

14. Essenital elements to be alleged.
An indictment should be so worded as to charge particular offense of which complaint is made in order that accused will be apprised of nature of charge. State v. Nuser, 199M315, 271NW811. See Dun. Dig. 4360.

18. Following language of statute or ordinance.
Indictment charging that defendant did "ask, agree to receive, and receive" a bribe, was not duplicitous or repugnant. 178M437, 227NW497.

An indictment or information is sufficient if it sets forth in language of statute elements of offense intended to be punished. State v. Omodt, 198M165, 269NW360. See Dun. Dig. 4377, 4379.

10641. To be direct and certain.
1. Allegations must be direct.
Indictment charging maintenance of a liquor nuisance, held sufficient. 177M278, 225NW20.

2. Matters of inducement.
All matters of inducement which are necessary in order to show that act charged is a criminal offense must be stated in indictment or information. State v. Bean, 199M16, 270NW918. See Dun. Dig. 4375.

Averments in way of inducements set forth in indictment held not to render indictment double. Id. See Dun. Dig. 4413.

3. Certainty.
Indictment charging that defendant did "ask, agree to receive, and receive" a bribe, was not duplicitous or repugnant. 178M437, 227NW497.

4. Bill of particulars.
It is only when offense is of a general nature and charge is in general terms that prosecution may be required to file a specification of particular acts relied upon to sustain charge. State v. Poelaert, 273NW641. See Dun. Dig. 4401.

10642. Fictitious name.
Misnomer of defendant in criminal complaint and warrant may be corrected by amendment, and is an irregularity which is waived by plea to indictment or information after waiver or examination in municipal court. 179M53, 228NW437.

10643. Different counts.
An information could not join an assault inflicting grievous bodily harm with an assault with intent to rob. Op. Atty. Gen. (494a-1), Dec. 26, 1935.

10644. Time, how stated.
An information may be amended on trial, and such an amendment may consist of changing the date of the commission of the crime. State v. Irish, 183M49, 235NW 625. See Dun. Dig. 4374(01).

10645. Erroneous allegation as to person injured.
Alleged variances between the proofs and the facts alleged concerning ownership of the stolen goods and the place from which they were stolen were not material. 172M139, 214NW785.

10646. Words of statute need not be followed.
Where indictment charged extortion by threat to expose another to disgrace by accusing him of operating a gambling house, proof that money was extorted by threat to arrest him for operating such house, held not a material variance. 179M439, 229NW558.

10647. Tests of sufficiency.
Indictment charging maintenance of a liquor nuisance, held sufficient. 177M278, 225NW20.

(4).
Indictments charging that offense occurred in a given county, without going further, are upheld. State v.

Putzier, 183M423, 236NW765. See Dun. Dig. 4373(43), (44), (45).

(5).

An information may be amended on trial, and such an amendment may consist of changing the date of the commission of the crime. State v. Irish, 183M49, 235NW 625. See Dun. Dig. 4374(01).

10648. Formal defects disregarded.

See also notes under §10752.

Information alleging the stealing of men's clothing in the nighttime without alleging that it was taken from a building, charged grand larceny in the second degree, and not grand larceny in the first degree. 172 M139, 214NW785.

There was no fatal variance where information charged carrying of a revolver and proof showed weapon to be an automotic pistol. 176M238, 222NW 925.

Indictment charging maintenance of a liquor nuisance, held sufficient. 177M278, 225NW20.

Rule of variance is not strictly applied. Proof of crediting amount not variance from allegation of receiving money as bribe. 178M437, 227NW497.

Reception of evidence. Id.

Testimony of a conspirator that he and his associates committed other offenses, held not prejudicial error where the commission of the offense for which the prosecution was had was undisputed. 179M439, 229NW558.

An information may be amended on trial, and such an amendment may consist of changing the date of the commission of the crime. State v. Irish, 183M49, 235NW 625. See Dun. Dig. 4430(01).

While a deputy public examiner should not have been interrogated as a witness for the state on direct examination concerning statements made by defendant in response to a subpoena, the examination did not go far enough along that line to prejudice defendant, both the statements in question and their truth having been established by other evidence. State v. Stearns, 184M 452, 238NW895. See Dun. Dig. 10337-10343.

There being no question of authenticity of indictment, and none as to its substance, misnomer of deceased in minutes of grand jury, held immaterial. State v. Waddell, 187M191, 245NW140. See Dun. Dig. 4355.

Assertion by the county attorney that "state tells you" defendant is guilty, disapproved; but held without prejudice. State v. Waddell, 187M191, 245NW140. See Dun. Dig. 2478.

In prosecution for unlawful possession of intoxicating liquor, failure to strike testimony of policeman that caramel coloring found on premises was used for coloring moonshine, held not reversible error. State v. Olson, 187M527, 246NW117. See Dun. Dig. 4945.

Clause in instruction that presumption of innocence is for benefit of innocent person and not intended as a shield for guilty, was improper but not prejudicial. State v. Bauer, 189M280, 249NW40. See Dun. Dig. 4365.

Exclusion of evidence was not prejudicial where facts were shown by other evidence. State v. Scott, 190M462, 252NW225. See Dun. Dig. 2490.

While it may have been improper for county attorney, in opening to jury, to suggest that defendant had expressed a desire formally to plead guilty, there was no prejudice to defendant because he voluntarily, as witness in his own behalf, explained fully incident referred to, without denial or qualification by state. State v. Cater, 190M485, 252NW421. See Dun. Dig. 2478, 2500.

Where evidence leaves no doubt of defendant's guilt, alleged errors with no adverse effect on defendant's substantial or constitutional rights will not be considered on appeal. State v. MacLean, 192M96, 255NW821. See Dun. Dig. 416.

A new trial in criminal cases should be granted cautiously and only for substantial error. State v. Barnett, 193M336, 258NW508. See Dun. Dig. 2490.

Admission of testimony as to conversation had with deceased after performance of illegal operation held not prejudicial error, since defendant was in no way mentioned in conversation testified to. State v. Zabrocki, 194M346, 260NW507. See Dun. Dig. 2490.

Misconduct of jury in visiting building from which property was charged to have been stolen without order of court or notice to defendant held not prejudicial where inspection could not have influenced verdict. State v. Simenson, 195M258, 262NW638. See Dun. Dig. 2475.

Where misconduct of jury is urged as ground for a new trial, duty to determine whether such misconduct may have been prejudicial to complaining party rests primarily upon trial court, and if court can determine with reasonable certainty that misconduct did not affect result, verdict should stand. Id. See Dun. Dig. 2500.

Accused should be given a copy of amended indictment, as well as a copy of the original, but failure to do so was not prejudicial or jurisdictional where accused knew what amendment was and opposed motion to amend. State v. Heffelfinger, 197M173, 266NW751. See Dun. Dig. 2441, 4430.

Court may allow amendments of indictments as to matters of substance, even though period of limitations has run against offense, provided original indictment was returned from grand jury within required time. Id. See Dun. Dig. 2419a, 4430.

Section is constitutional. Id. See Dun. Dig. 4365, 4430.

Section 10692 has no application where demurrer had not been sustained at time amendments were offered. Id. See Dun. Dig. 4430.

An indictment which would not be good as against a demurrer may be amended. Id.

Purpose of amendment to this section was to liberalize power of court with respect to indictments to minimize insubstantial defects, and it should be construed to carry out that purpose. Id.

Court may in its discretion allow amendments of an indictment or information both as to form and substance. State v. Omodt, 198M165, 269NW360. See Dun. Dig. 4430.

An indictment charging a violation of the state prohibition laws may be amended by including an allegation of a prior conviction. Op. Atty. Gen., Dec. 5, 1929.

10651. Indictment for libel.

In a prosecution for criminal libel, where indictment charges that libelous matter was published of and concerning a person or persons named, it need not otherwise state extrinsic facts to show that language used applied to person or persons named in indictment as being libeled. Such extrinsic facts are to be shown by evidence at trial. State v. Cramer, 193M344, 258NW525. See Dun. Dig. 4384.

Where a libelous article charges a named voluntary unincorporated association of persons with wrongdoing, libel applies to the members of such association, although not specifically named in the article. Id. See Dun. Dig. 4360.

Where an indictment for libel sufficiently charges that libelous language tended to and did expose persons named therein as having been libeled, to hatred, contempt, ridicule, and obloquy, and caused them to be shunned and avoided, a further but insufficient charge as to injury to business and occupation of such persons may be disregarded as surplusage. Id. See Dun. Dig. 4364.

10654. Compounding felony indictable.

Complaint held not bad for duplicity, and evidence held to support conviction. 181M106, 231NW804.

10655. Limitation.

Prosecution of guardian of incompetent for grand larceny in embezzling money, held not barred by limitations. State v. Thang, 188M224, 246NW891. See Dun. Dig. 2419a.

Where information clearly shows that time within which statute permits offense to be prosecuted has elapsed, absent any allegation avoiding operation of statute, information is demurrable. State v. Tupa, 194M 488, 260NW875. See Dun. Dig. 4416.

Defendant did not waive statute of limitations by pleading guilty after his demurrer to information had been overruled. Id. See Dun. Dig. 4418.

Court may allow amendments of indictments as to matters of substance, even though period of limitations has run against offense, provided original indictment was returned from grand jury within required time. State v. Heffelfinger, 197M173, 266NW751. See Dun. Dig. 2419a, 4430.

Statute of limitations held not to have run against prosecution for embezzlement. State v. Chisholm, 198M 241, 269NW463. See Dun. Dig. 2419a.

Limitations begin to run in an embezzlement case from the time of the actual conversion of the money or property, even though the crime is not discovered, except in the case of guardians as to which limitations starts to run from the time when a demand and failure to pay occur. Op. Atty. Gen., Jan. 11, 1932.

Where an indictment for an offense other than murder was dismissed some 10 years after it was returned, a subsequent indictment is barred by limitations. Op. Atty. Gen., Mar. 23, 1933.

Limitations run from date of embezzlement in ordinary case. Op. Atty. Gen. (605a-13), Mar. 6, 1936.

Limitations ran against prosecution for larceny of a pen from a building, though identity of thief was not known until after expiration of period. Op. Atty. Gen. (605a-13), Apr. 1, 1936.

10659. Death ensuing in another county—Prosecution.

Venue in abortion cases involving accomplices. Op. Atty. Gen. (133b-3), Oct. 15, 1935.

10662. Larceny by clerks, agents, etc.

Statute permits conviction of larceny by embezzlement for any taking within stated six-month period from time charged in information or indictment, but it does not exclude otherwise relevant evidence of doings of accused outside of six-month period. State v. Cater, 190M485, 252NW421. See Dun. Dig. 3007.

Statute of limitation held not to have run against prosecution for embezzlement. State v. Chisholm, 198M241, 269NW463. See Dun. Dig. 2419a.

Where a salesman has been taking small amounts at various times over a period of six months, he may be charged with and convicted of grand larceny of the total amount taken. Op. Atty. Gen. (494b-20), Feb. 19, 1935.

10663. Evidence of ownership.

Evidence held to sustain conviction. 175M607, 222NW 280.

INFORMATIONS

10664. Powers of district court.
175M508, 221NW900; note under §10666.

10665. Information shall state, what—Etc.
Information alleging the stealing of men's clothing in the nighttime, without alleging that it was taken from a building, charged second degree and not first degree larceny. 172M139, 214NW785.
An information may be amended on trial, and such an amendment may consist of changing the date of the commission of the crime. State v. Irish, 183M49, 235NW 625. See Dun. Dig. 4430.

10666. Preliminary examination.
Prosecution under §9931-2, permitting increased punishment of habitual criminals, may be initiated by information though a sentence of imprisonment for more than 10 years may result. 175M508, 221NW900.
This section has no application to the procedure under §4 of Laws 1927, c. 236 (§9931-3) and is not repealed by that act. 175M508, 221NW900.
The preliminary examination referred to in this section is that provided for by §§10577 to 10587. 175M508, 221NW900.
Pendency of a proceeding for preliminary examination in municipal or justice court does not prevent the finding of an indictment by the grand jury. 175M607, 222 NW280.
The court, not the jury, has the benefit of knowledge disclosed by the files of the case in the office of the clerk of the trial court as to evidence on preliminary examination. State v. Irish, 183M49, 235NW625. See Dun. Dig. 2431.
Where defendant, when arraigned in district court, stood mute and did not call court's attention to state's failure to file formal complaint against him and to hold a preliminary examination, objections to district court's jurisdiction were thereby waived. State v. Puent, 198M 175, 269NW372. See Dun. Dig. 2431.

10667. Court may direct filing of information, when—Plea—etc.—That in all cases where a person charged with a criminal offense shall have been held to the district court for trial by any court or magistrate, and in all cases where any person shall have been committed for trial and is in actual confinement or in jail by virtue of an indictment or information pending against him, the court having trial jurisdiction of such offense or of such indictment or information or proceedings shall have the power at any time, whether in term or vacation, upon the application of the prisoner in writing, stating that he desires to plead guilty to the charge made against him by the complaint, indictment or information, or to a lesser degree of the same offense to direct the county attorney to file an information against him for such offense, if any indictment or information had not been filed, and upon the filing of such information and of such application, the court may receive and record a plea of guilty to offense charged in such indictment or information, or to a lesser degree of the same offense and cause judgment to be entered thereon and pass sentence on such person pleading guilty, and such proceedings may be had either in term time or in vacation, at such place within the judicial district where the crime was committed as may be designated by the court.

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

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

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

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

This section shall not apply to cases where the punishment for the offense to which the prisoner desires to plead guilty is imprisonment for life in the state's prison. ('05, c. 231, §5; '09, c. 398; '13, c. 65, §1; G. S. '13, §9162; '25, c. 136, §1; Apr. 17, 1935, c. 194, §1.)
175M508, 221NW900; note under §10666.
Where defendant wishes to plead guilty, county attorney has authority to file an information against him in all cases where punishment is less than life imprisonment. Op. Atty. Gen. (494b-17), Apr. 25, 1935.
Information may be filed in all cases where punishment is less than life. Op. Atty. Gen. (494a-1), Oct. 11, 1935.

ARRAIGNMENT OF DEFENDANT

10669. Presence of defendant.
See §10705.

10678. Defendant informed of his right to counsel.
It is not the duty of a justice of the peace to advise the defendant that he is entitled to have assistance of counsel in a defense in a prosecution under a city ordinance. 175M222, 220NW611.
Right of defendant to appeal after plea of guilty in municipal court. Op. Atty. Gen., Dec. 9, 1930.

10679. Arraignment—How made.
Record establishes that defendant was accorded his statutory and constitutional rights of proper arraignment and notice of charge brought against him. State v. Barnett, 193M336, 258NW508. See Dun. Dig. 2439a, 4354.
Accused should be given a copy of amended indictment, as well as a copy of the original, but failure to do so was not prejudicial or jurisdictional where accused knew what amendment was and opposed motion to amend. State v. Heffelfinger, 197M173, 266NW751. See Dun. Dig. 2441, 4430.

10681-1. Defense of alibi—Application by county attorney.—Upon application of the county attorney, the district court in which any criminal proceeding is pending, may require the defendant to file with the court notice of intention to claim an alibi, which notice shall specify the county or municipality in which the defendant claims to have been at the time of the commission of the alleged offense, and upon failure to file such notice the trial court may in its discretion exclude evidence of an alibi in the trial of the case. (Act Apr. 17, 1935, c. 194, §3.)

10682. Crimes of corporations, etc.
A cooperative creamery association may be prosecuted for violation of state dairy and food law, and employee thereof violating law may also be prosecuted, but officers of corporation should not be taken into custody by officer serving summons, corporation, and not officers, being prosecuted. Op. Atty. Gen. (494b-10), Jan. 8, 1935.

SETTING ASIDE INDICTMENT

10685. Grounds—Waiver of objections.
1. Under subd. 1.
Defendant was not entitled to have an indictment quashed simply because grand jury declined to call a

witness on his behalf, whom he had requested them to call, even though an earlier grand jury, with testimony of designated witness before them, had refused to indict. State v. Lane, 195M587, 263NW608. See Dun. Dig. 4422.

DEMURRERS

10690. Grounds of demurrer.

1. In general.

Where information clearly shows that time within which statute permits offense to be prosecuted has elapsed, absent any allegation avoiding operation of statute, information is demurrable. State v. Tupa, 194 M488, 260NW875. See Dun. Dig. 2419a.

Defendant did not waive statute of limitations by pleading guilty after his demurrer to information had been overruled. Id. See Dun. Dig. 2419a.

10692. Proceedings on allowance—Defendant, when charged.

This statute has no application to amendment of substance offered under §10648 before any demurrer to indictment had been sustained. State v. Heffelfinger, 197 M173, 266NW751. See Dun. Dig. 4430.

PLEAS

10695. Pleas to indictment—Oral, etc.

Plea of former jeopardy cannot be presented by motion on affidavits, but must be urged by formal plea, the issues of fact in which must be tried by jury. 180M439, 231NW6.

A plea of guilty does not preclude a defendant from raising, for the first time on appeal, the question of whether or not the complaint, information, or indictment charges a public offense. State v. Parker, 183M 588, 237NW409. See Dun. Dig. 2491.

10696. Plea of guilty.

A plea of guilty if withdrawn by leave of the court is not admissible upon the trial of the substituted plea of not guilty. 173M293, 217NW351.

Where plea of guilty, sentence and judgment are set aside, it is error on trial to require defendant to state on cross-examination what he said before the presiding judge after his plea preliminary to sentence. 174M590, 219NW926.

10697. Plea of not guilty—Evidence under.

By pleading not guilty to a complaint filed in a justice court, charging defendant with petit larceny, he submitted himself to jurisdiction of court; and there was no error in denying motion to withdraw plea in order that defendant might question legality of arrest. State v. Henspeter, 199M359, 271NW700. See Dun. Dig. 2443, 2444.

10699. Indictment for offense of different degrees.

Plea of former jeopardy, that a man shall not be brought into danger of his life or limb for same offense more than once, is established maxim of common law and constitution as a fundamental right of and a safeguard to accused, and protection afforded is not against peril of second punishment, but against being again tried for same offense. State v. Fredlund, 273NW353. See Dun. Dig. 2425.

A plea of former jeopardy will not be sustained where it appears that in one transaction two distinct crimes were committed. Id.

It is identity of offense, and not of act, which is referred to in constitutional guarantee against putting a person twice in jeopardy. Where two or more persons are injured in their persons, though it be by a single act, yet, since consequences affect, separately, each person injured, there is a corresponding number of distinct offenses, as in separate prosecutions for homicide where two persons in same automobile were killed. Id. See Dun. Dig. 2426.

Where facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at same time, a prosecution to final judgment for stealing some of articles will bar a subsequent prosecution for stealing any of articles taken at same time, and same rule applies where acquittal or conviction of a greater offense necessarily includes a lesser one. Id.

Before a defendant may avail himself of plea of former jeopardy it is necessary for him to show that present prosecution is for identical act and that crime both in law and in fact were settled by first prosecution. Id. See Dun. Dig. 2427a.

Multiple consequences of a single criminal act. 21 MinnLawRev505.

CHANGE OF VENUE

10701. Place of trial—Change of venue.

1. Place of trial.

Threats of criminal prosecution and exposure to disgrace made in one county, which frightened the threatened person into the payment of money in another county, sustain a conviction of extortion in the latter county. State v. McKenzie, 182M513, 235NW274. See Dun. Dig. 2423, 3701.

Venue of prosecution for obtaining money by fraudulent checks was properly laid in county where bank suffering loss was located. State v. Scott, 190M462, 252 NW225. See Dun. Dig. 2423.

Evidence sustains jury's finding that an insurance policy was "issued" by defendant in Ramsey county, and as such the offense charged in indictment was properly triable there. State v. Bean, 199M16, 270NW918. See Dun. Dig. 2423.

Prosecution for embezzlement by one making collections in various counties should be had in county of his place of business. Op. Atty. Gen., July 28, 1932.

As regards venue of larceny prosecution, county, where collector of money made actual misappropriation, is proper place for trial, though money was collected in another county and demand made for it in still another county. Op. Atty. Gen., Nov. 3, 1933.

A man may be guilty of desertion of wife and child in a county where he has never been actually present, but family must have had valid reason for moving to such county, as affecting venue of prosecution. Op. Atty. Gen., Nov. 7, 1933.

Where party living in Stearns County employed man living in Meeker County to haul stock to South St. Paul and trucker was to account to shipper for sale price in Stearns County but failed to do so, and demand was made upon trucker at his abode to account for the funds, venue of prosecution for larceny would lie in Meeker County. Op. Atty. Gen. (494b-20), May 9, 1934.

Where traveling salesman collected money and failed to immediately send it in to employer, venue of crime was where collection was made and not county of salesman's residence or place of employment. Op. Atty. Gen. (605a-24), Apr. 25, 1935.

Venue in abortion cases involving accomplices. Op. Atty. Gen. (133b-3), Oct. 15, 1935.

Where pursuant to wire from man in H. County liberty bonds were mailed by resident of our county to H. County, and afterwards owner was informed that bonds had been sold and money invested, where, as a matter of fact money was appropriated, venue of prosecution was in H. County. Op. Atty. Gen. (605a-24), Oct. 15, 1935.

A husband deserting wife and children in county where he has an established home must be prosecuted in that county, and not in county into which wife subsequently moved, in absence of some subsequent conduct amounting to desertion in the new county. Op. Atty. Gen. (840a-1), Dec. 28, 1936.

3. Change of venue.

Mere fact that newspapers aroused the public against the perpetrator of the crime in question held not to require a change of venue. 171M414, 214NW280.

Court did not abuse discretion in denying change of venue in murder prosecution. State v. Waddell, 187M191, 245NW140. See Dun. Dig. 2422.

Where two or more persons conspire together to do an unlawful act, anything said, done, or written by one conspirator in furtherance of the common purpose is admissible against all of them. State v. Binder, 190M 305, 251NW665. See Dun. Dig. 2460, n. 73.

Declarations of an alleged conspirator are not competent evidence as against another conspirator until existence of conspiracy has been established by other competent evidence. Id. See Dun. Dig. 2460.

ISSUES AND MODE OF TRIAL

10705. Issue of fact—How tried—Appearance in person.—An issue of fact arises: (1) Upon a plea of not guilty; or (2) upon a plea of former conviction or acquittal of the same offense. Except where defendant waives a jury trial, every issue of fact shall be tried by a jury of the county in which the indictment was found or information filed, unless the action shall have been removed by order of court as provided in sections 10701-10704. If the defendant shall waive a jury trial, such waiver shall be in writing signed by him in open court after he has been arraigned and has had opportunity to consult with counsel and shall be filed with the clerk. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial. If the charge against the accused be a misdemeanor, the trial may be had in the absence of the defendant, if he shall appear by counsel; but, if it be for a felony or gross misdemeanor, he shall be personally present. (R. L. '05, §5358; G. S. '13, §9200; Apr. 17, 1935, c. 194, §2.)

1. In general.

Plea of former jeopardy cannot be presented by motion on affidavits, but must be urged by formal plea, the issues of fact in which must be tried by jury. 180 M439, 231NW6.

Though a defendant in a criminal case is entitled to a verdict of twelve jurors, yet, where he waives that right and agrees to accept a verdict of eleven jurors, he cannot later object. State v. Zabrocki, 194M346, 260NW507. See Dun. Dig. 5236(55).

It was not error to admit in evidence a conversation had between defendant and two of employees of owner of store from which goods were taken, it appearing from

that conversation that defendant admitted her guilt in language free from doubt, conversation having taken place immediately after theft of goods which were found upon defendant's person hidden from view under her coat. State v. Tremont, 196M36, 263NW907. See Dun. Dig. 2462.

In prosecution for arson for burning wife's house, there was no prejudicial error in admitting in evidence partly burned matches, two candles tied together, and neck of broken glass jar, though they had no probative value whatever as to origin of second fire following a former one, and though there was some change in condition in exhibits between time they were found and time they were introduced in evidence. State v. Zemple, 196M159, 264NW587. See Dun. Dig. 517b, 3251.

Where goods are found in possession of defendant and others who are not shown to have any connection with crime charged, and it is not shown that still others did not also have access to place wherein goods were kept, defendant's possession is not exclusive and does not raise an inference of guilt sufficient to convict defendant of crime of burglary. State v. Zoff, 196M382, 265NW34. See Dun. Dig. 5496.

Whether a new trial shall result because of misconduct of prosecuting attorney is, in large measure, discretionary with trial court. State v. Heffelfinger, 274 NW234. See Dun. Dig. 2489.

2. Presence of accused.

Accused at liberty on bail may waive right of being present when verdict is returned. 175M573, 222NW277.

Where court fails to require bailiff to notify defendant's attorney of the return of a verdict, the remedy for this nonobservance of the practice should be a motion for a new trial, and not a motion to set aside the verdict, which would mean an acquittal. 175M573, 222NW 277.

Accused at liberty on bail did not waive right to be present when verdict was received. 177M283, 225NW82.

3. Evidence.

Admission in evidence of a revolver found in defendant's desk six weeks after the commission of the crime of robbery of which he was accused, held error. 181M 566, 233NW307. See Dun. Dig. 2458, 8490.

Admission of license plates found in a car in defendant's possession held improper in prosecution for robbery. 181M566, 233NW307. See Dun. Dig. 2458, 8490.

Evidence of defendant's association with others who were criminals was improperly admitted. 181M566, 233 NW307. See Dun. Dig. 2458.

Fact that evidence of sales introduced to show that sale in question was in courts of successive sales of like securities relates to sales made more than three years before indictment was immaterial. State v. Robbins, 185M202, 240NW456. See Dun. Dig. 2459.

Evidence of other sales is admissible to show that sale upon which conviction is sought was made in the course of repeated and successive sales of like securities. State v. Robbins, 185M202, 240NW456. See Dun. Dig. 2459.

There was no substantial error in robbery prosecution relative to production of dairy which, it was suggested, would corroborate claim of alibi, nor in respect of proof as to gun found in possession of defendant. State v. Stockton, 186M33, 242NW344.

In prosecution for perjury it was error to receive in evidence names of jurors in prosecution for grand larceny in second degree in which defendant in perjury case testified for defendant; and likewise to receive verdict finding him guilty. State v. Olson, 186M45, 242NW 348. See Dun. Dig. 7475a.

Flight of accused after his arrest and when on bail is a circumstance which may be considered, not as a presumption of guilt, but as something for jury, and as suggestive of consciousness of guilt; and same is true of attempt to escape or resistance to arrest or passing under assumed name. State v. McTague, 190M449, 252NW446. See Dun. Dig. 2464.

In prosecution of attorney for forgery of client's name to release, letters written by attorney after it was apparent that he was in trouble over the matter were properly excluded as self-serving. State v. MacLean, 192M96, 255NW821. See Dun. Dig. 2468b.

General rule is that a person charged with the commission of a crime may object to evidence that he has committed other crimes, but exceptions to this rule permit evidence of another crime as his chosen motive for the commission of the crime; if it shows a criminal intent; if it shows guilty knowledge; if it identifies the defendant; if it is a part of a common system, scheme or plan embracing the crime charged; or if it shows the capacity, skill or means to do the act charged, or if it characterizes the possession of stolen goods. State v. Voss, 192M127, 255NW843. See Dun. Dig. 2459.

In prosecution for conspiracy to assault against one not present at time of assault, evidence that defendant was member of racketeering gang and had made threats against complaining witness was admissible. State v. Barnett, 193M336, 258NW508. See Dun. Dig. 541, 2468.

State was properly permitted to show defendant's flight immediately after finding of indictment against him. Id. See Dun. Dig. 2464, 2467, 2468.

It was not error to admit evidence tending to show a disposition by defendant as a witness in his own behalf, to withhold truth or conceal facts. Such evidence did not become inadmissible because it may have suggested defendant's guilt of other crimes. State v. Hankins, 193 M375, 258NW578. See Dun. Dig. 2459.

A paper charging defendant with conduct unbecoming a member of church, signed by an officer of church, held inadmissible in prosecution for rape. State v. Wulff, 194M271, 260NW515. See Dun. Dig. 2458.

Proof beyond a reasonable doubt is not required for conviction for violation of a city ordinance. City of St. Paul v. K., 194M386, 260NW357. See Dun. Dig. 2449(71).

In a prosecution for receiving stolen property, evidence that defendant, shortly prior to offense charged, had received other stolen property from the same parties was admissible to prove guilty knowledge. State v. Gifis, 195M276, 262NW637. See Dun. Dig. 2459.

In prosecution of mother of girl having a baby which defendant threw into fire, evidence that defendant's daughter made statement respecting a baby being born into the world without clothes, and that she would have married a certain person if she had known she was pregnant, was inadmissible as hearsay. State v. Voges, 197 M85, 266NW265. See Dun. Dig. 3286.

Evidence of other crimes is admissible if it tends directly or corroboratively to prove a guilty intent of commission of wrong charged or some essential element thereof. State v. Omodt, 198M165, 269NW360. See Dun. Dig. 2459, 3798a.

A new trial will not be granted for refusal to dismiss when state rested if evidence as finally brought into case warrants conviction. Id. See Dun. Dig. 2477a.

Cross-examination and extent thereof rests in sound discretion of trial court. Id. See Dun. Dig. 10318.

In presecution under an ordinance same degree of proof is not required as for violation of statute under an indictment or information. City of St. Paul v. M., 198M229, 269NW408. See Dun. Dig. 6806.

Whether a confession was made under such circumstances as to render it admissible in evidence is a question for determination of trial court, and its action will not be reversed on appeal unless manifestly contrary to evidence. State v. Nelson, 199M86, 271NW114. See Dun. Dig. 2462.

Proof of criminal intent is unnecessary where statute makes commission of prohibited act a punishable offense. State v. Sobelman, 199M232, 271NW484. See Dun. Dig. 2409.

Questions of prosecuting attorney made while cross-examining defendant carrying insinuations that defendant had obtained money by false pretenses at other times, though improper, were not prejudicial. State v. Nuser, 199M315, 271NW811. See Dun. Dig. 2459.

Court might doubt value of opinion of woman that one charged with driving while intoxicated had only two drinks, where evidence showed that she also had two highballs. City of Duluth v. L., 199M470, 272NW389. See Dun. Dig. 3322b.

In a prosecution for driving a car while intoxicated, refusal to permit defendant to testify that it was his custom to hire drivers, being at most an offer of proof on a collateral issue, though defendant claimed that he was not driving car at time of alleged offense and so testified. Id. See Dun. Dig. 3241.

In criminal prosecution defendants may offer evidence of good reputation. State v. Oslund, 199M604, 273NW76. See Dun. Dig. 2458.

A defendant in a bastardy proceeding is entitled to prove good character as to chastity and morality. Id.

Fact that there might have been some inconsistency in testimony of state's witnesses or even fact that two or more witnesses for state differ in their testimony does not preclude a conviction. State v. Poelaert, 273NW641. See Dun. Dig. 2455a.

In view of defendant's testimony and other evidence in case, including his written statement, there was no error in court's refusal to require a deputy fire marshal to produce original notes taken by him prior to execution by defendant of statement drawn up by deputy from notes. Id. See Dun. Dig. 3233.

After a defendant in jail has employed counsel, it is unethical for county attorney or sheriff or deputies to try to obtain a statement from the defendant in absence of his attorney. On Atty. Gen. (121b-7), Mar. 1, 1937.

Hearsay—statements of facts against penal interests. 21MinnLawRev181.

4. Jury trial.

One prosecuted for violation of a village ordinance is not entitled to a jury trial and city is not liable for jury fees. Op. Atty. Gen. (605a-11), Feb. 25, 1935.

10706. Continuance—Defendant committed, when.

Refusal of continuance on account of absence of witness held not an error. 173M567, 218NW112.

Granting of continuance in prosecution for violation of a city ordinance is largely a matter within discretion of court, and granting a continuance of only one day was not abuse of discretion to a defendant who had more than a week to prepare for trial and to find alleged witness. City of Duluth v. L., 199M470, 272NW389. See Dun. Dig. 1715.

10709. Juror may testify, when—View.

It was misconduct on part of jury to visit and inspect building from which property was charged to have been stolen without order of court or any notice to defendant. State v. Simenson, 195M258, 262NW638. See Dun. Dig. 2475.

10710. Questions of law and fact, how decided.

It was error to charge that the only issue was whether defendant was guilty of robbery in the first degree or of an attempt to commit such robbery, it being within province of jury to return not guilty verdict though contrary to law and evidence. State v. Corey, 182M48, 233NW590.

1. Province of court and jury generally.

Credibility of testimony of a paid detective in a prosecution for unlawful sale of intoxicating liquor was for the jury. State v. Nickolay, 184M526, 239NW226. See Dun. Dig. 2477(80).

Credibility and weight of testimony is peculiarly for the jury and in absence of substantial error, court will not interfere. State v. Chick, 192M539, 257NW280. See Dun. Dig. 2477, 2490.

Where a motion to dismiss is denied after plaintiff first rests, and defendant then proceeds to introduce evidence in his defense, sufficiency of evidence is to be determined by a consideration of all evidence in case. State v. Traver, 198M237, 269NW393. See Dun. Dig. 2477a.

Whether a confession was made under such circumstances as to render it admissible in evidence is a question for determination of trial court, and its action will not be reversed on appeal unless manifestly contrary to evidence. State v. Nelson, 199M86, 271NW114. See Dun. Dig. 2501.

10711. Order of argument.

Some allowances must be made for rhetorical flights and vigorous arraignment of attempted defenses. 171 M414, 214NW280.

Misconduct of county attorney could not be predicated on his reference to defendant's companions as "the mob" where no exception was taken. 173M232, 217NW104.

Where there was evidence of finding of weapon at time of defendant's arrest it was legitimate argument for county attorney to suggest the switching or changing of weapons between companions in crime. 173M232, 217NW104.

Conduct of prosecuting attorney in referring to court's failure to admit incompetent evidence held not reversible error. 173M305, 217NW120.

Comments of the prosecuting attorney upon defendant's association with "murderers and thieves" upon evidence improperly admitted held prejudicial. 181M566, 233NW307. See Dun. Dig. 2478.

Alleged misconduct of prosecuting attorney held not to call for a new trial where trial court was not asked to take any action. State v. Geary, 184M387, 239NW158. See Dun. Dig. 2478, 2490.

Prosecuting attorney held not guilty of misconduct as intimating that one charged with manslaughter in driving an automobile was intoxicated. State v. Geary, 184 M387, 239NW158. See Dun. Dig. 2478.

Statement by prosecuting attorney in argument as to a matter not shown by evidence held not prejudicial. State v. Geary, 184M387, 239NW158. See Dun. Dig. 2478.

There can be no reversal in a criminal case for alleged misconduct of prosecuting attorney, without a record of conduct claimed to be prejudicial and objection thereto, with an exception if needed. State v. Hankins, 193M375, 258NW578. See Dun. Dig. 2479a, 2500.

Allusion to fact that defendant did not take stand was harmless in view of strong evidence of guilt. State v. Zemple, 196M159, 264NW587. See Dun. Dig. 2490.

Prosecuting attorney is not forbidden in an argument to state his opinion as to conclusions or inferences which human minds may reasonably draw from evidence. State v. Heffelfinger, 274NW234. See Dun. Dig. 2478.

10712. Charge of court.

1. In general.

Charge in bank robbery prosecution held not objectionable as warranting a conviction for violation of liquor laws. 171M158, 213NW735.

Instruction failing to require absence of reasonable doubt as a prerequisite to the final inference of guilt is cured by context stating explicitly that all elements of the offense must be established beyond a reasonable doubt. 171M222, 213NW920.

Where a proposition involving one of the defenses is once correctly stated, with its conditions and qualifications, it is not ordinarily necessary for each of the conditions and qualifications to be restated every time the defense itself is subsequently referred to in the instructions. 171M380, 214NW265.

In prosecution for murder in the third degree by killing one with an automobile, evidence held not to require an instruction that defendant should be acquitted if he was so drunk that he did not know what he was doing. 171M414, 214NW280.

In liquor prosecution, instruction that prior conviction of defendant's witness was received merely for the purpose of bearing on his credibility, was proper. 171 M515, 213NW923.

In the absence of a request, error cannot be predicated on failure to charge as to a lesser offense. 171M515, 213 NW923.

Giving of cautionary instruction regarding danger of convicting on the evidence of the prosecutrix alone rested in the discretion of the court, especially in absence of request for such an instruction. 171M515, 213NW923.

Accused held not prejudiced by charge of court that information charged defendant with first degree grand larceny, when only second degree offense was properly alleged, the jury finding defendant guilty "as charged." 172M139, 214NW785.

An inadvertent statement in the charge must be called to the court's attention. 172M139, 214NW785.

If defendant desired a further explanation of any matters, he should have made a request to that effect. 172 M208, 215NW206.

Defects in charge not called to the court's attention at the time are not of a character to call for a new trial. 173M567, 218NW112.

In prosecution for adultery refusal of court to instruct that admission or confession by one paramour was not evidence against the other, the two being tried together, was error. 175M218, 220NW563.

Where it is in fact present, it is not error to instruct that there is evidence to corroborate an accomplice. 176 M175, 222NW906.

The charge is to be considered in its entirety. 181M 303, 232NW335. See Dun. Dig. 9781(26).

Failure to define the crime with which defendant was charged is disapproved. 181M566, 233NW307. See Dun. Dig. 2479.

Instruction, as to character testimony, held not reversible error. State v. Weis, 186M342, 243NW135. See Dun. Dig. 2479.

Where general charge adequately covers every element of crime, defendant in criminal case is not entitled to complete separate charge as to each element of crime charged as defined by statute. State v. Weis, 186M342, 243NW135. See Dun. Dig. 2479.

Instruction relative to testimony of prosecutrix given in preliminary examination, and received upon trial for purpose of impeachment, held not error. State v. Weis, 186M342, 243NW135.

Reference by court to testimony of witness as to a statement made by accused to witness, in which court said that statement claimed to have been made had not been denied, neither had it been proven, was without prejudice where such statement had not been expressly denied by accused. State v. Lynch, 192M534, 257NW278. See Dun. Dig. 2479.

Instruction clearly pointing out essential elements of crime which jury must find state had proved beyond a reasonable doubt held not erroneous as attempting to direct a verdict of guilty. Id. See Dun. Dig. 2479.

Defendant was not entitled to instructions, where record was devoid of evidence to warrant them. State v. Puent, 198M175, 269NW372. See Dun. Dig. 2479.

In prosecution of tavern owner, acts and omissions of defendant's servants contributed to minor's delinquency, and court did not err in refusing to submit that question as a fact issue. State v. Sobelman, 199M232, 271NW 484. See Dun. Dig. 4924.

Statement of court when jury returned to court room to ask if they might agree to disagree that "things have got to be looked at in a practical way of life, is this young man guilty or isn't he in your best judgment" held not objectionable as reference to degree of proof required. State v. Henspeter, 199M359, 271NW700. See Dun. Dig. 2479.

Charge as a whole is to be considered in determining whether error is prejudicial. State v. Oslund, 199M604, 273NW76. See Dun. Dig. 2479.

3. Charge on lesser offenses.

Where entire course of trial not only indicates but compels conclusion that only offense involved was that of sodomy, court did not err in refusing to submit lesser offenses of indecent assault and assault in third degree. State v. Nelson, 199M86, 271NW114. See Dun. Dig. 2486.

4½. Presumption of innocence.

Clause in instruction that presumption of innocence is for benefit of innocent person and not intended as a shield for guilty, was improper. State v. Bauer, 189M280, 249NW40. See Dun. Dig. 2479n, 28.

5. Requests for instructions.

Charge of court defining crime of driving automobile while intoxicated in the words of the statute held sufficient. 176M164, 222NW909.

It is not error to refuse a request to charge, where the general charge, or other requests given, fairly cover the same subject. 176M349, 223NW452.

It is bad practice to allude to the fact that instructions given have been asked for by one of the parties. 181M 374, 232NW624. See Dun. Dig. 9776(13).

Instruction that state must establish beyond a reasonable doubt that the defendant was guilty of attempted grand larceny in first degree as set forth in the statute and "as charged in the indictment" was sufficient where elements of the crime were set up in the indictment and no request was made for more particular definitions and no exception was taken to the charge as given. State v. Smith, 192M237, 255NW826, 2479, 3734.

Failure to instruct jury in grand larceny prosecution that defendant might be found guilty of petit larceny does not call for a new trial in absence of a request for such instruction. State v. Cohen, 196M39, 263NW922. See Dun. Dig. 2479.

In prosecution for driving while intoxicated, there was no improper qualification of requested instruction of which defendant could complain where counsel stated that court had failed to comment on defendant's condition, and court then told jury that defendant's condition after this wreck is a matter for your consideration together with all the other evidence in the case, counsel

making no further suggestion or objection and taking no exception to any part of the charge, and there being no request by either party for any charge. State v. Winberg, 196M135, 264NW578. See Dun. Dig. 2479.

Where there is no exception taken to charge in a criminal case, no motion for a new trial, and no request for further instructions, alleged error in charge cannot be assigned as error in this court. State v. Bram, 197M471, 267NW383. See Dun. Dig. 2479a.

10713. Jury—How and where kept.

Misconduct of bailiff in informing jury that unless they agreed before midnight they would be kept until morning, held not ground for reversal. 175M174, 220NW 547.

Failure to provide separate room for women held not ground for new trial on ground that woman was not well and verdict was coerced. 176M604, 224NW144.

That women jurors were, on failure of jury to agree, provided with separate sleeping accommodations at a hotel for the night in the custody of a woman bailiff, held not error. 181M303, 232NW335. See Dun. Dig. 7112.

10713-1. Same—Preceding section applicable only where jury fails to agree.

176M604, 224NW144; note under §10713.

10720. Polling jury—Further deliberation, when.

175M573, 222NW277; note under §10705.

Polling of jury is for purpose of ascertaining for a certainty that each juror agrees upon verdict, and not to determine whether verdict presented was reached by quotient process. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 9822.

10721. Reception of verdict.

Verdict is not vitiated by failure to read it to the jury as recorded. 178M564, 227NW893.

Jury held not guilty of misconduct in bringing in a verdict while one of jurors claimed to be sick. State v. Geary, 184M387, 239NW158. See Dun. Dig. 2476.

10723. Acquitted on ground of insanity—Release from state institutions.—Whenever during the trial of any person on an indictment, or information, such person shall be found to have been, at the date of the offense alleged in said indictment, insane, an idiot, or an imbecile and is acquitted on that grounds, the jury or the court, as the case may be, shall so state in the verdict, or upon the minutes, and the court shall thereupon, forthwith, commit such person to the proper state hospital or asylum for safe-keeping and treatment; and whenever in the opinion of such jury or court such person, at said date, had homicidal tendencies, the same shall also be stated in said verdict or upon said minutes and said court shall thereupon forthwith commit such person to the hospital for the dangerous insane for safe-keeping and treatment; and in either case such person shall be received and cared for at said hospital or asylum to which he is thus committed.

The person so acquitted shall be liberated from such hospital or asylum upon the order of the court committing him thereto, whenever there is presented to said court the certificate in writing of the Superintendent of the hospital or asylum where such person is confined, certifying that in the opinion of such superintendent such person is wholly recovered and that no person will be endangered by his discharge.

Provided, that if the superintendent of the hospital or asylum fails or refuses to furnish such certificate at the request of the person committed, then said person may petition the said court for his release, and hearing on such petition shall be had before the court upon and after service of such notice as the court shall direct.

If, at such hearing, the evidence introduced convinces the court that the person so confined has wholly recovered and that no person will be endangered by his discharge, then the court shall order his discharge and release from said hospital or asylum, and he shall then be so discharged and released.

Provided, further, that if at such hearing the evidence introduced convinces the court that such person has not wholly recovered, but that no person will be endangered by his release on parole from such hospital or asylum, and a proper and suitable person is willing to take such committed person on parole, and to furnish a home for him and care for and support him, and furnishes a satisfactory bond in such amount and with such terms and conditions as the court may fix, then said court may order the release of such confined person from said hospital or asylum on parole and for such time and upon such terms and conditions as the court may determine and order, and thereupon such person shall be so released from said hospital or asylum and placed on parole with the person named by the court in its order.

Provided, that nothing herein shall be construed as preventing the transfer of any person from one institution to another by the order of the board of control, as it may deem necessary. (R. L. '05, §5376; '07, c. 358, §1; G. S. '13, §9218; Apr. 25, 1931, c. 364.)

State v. District Court, 185M396, 241NW39; note under §9498, note 19.

This act is not invalid as imposing an administrative duty upon the court. State v. District Court, 185M396, 241NW39. See Dun. Dig. 1592.

The statute makes mandatory the discharge upon presentation of a certificate of the superintendent of the hospital that "in the opinion of such superintendent such person is wholly recovered and that no person will be endangered by his discharge." State v. District Court, 185M396, 241NW39. See Dun. Dig. 4523a.

Laws 1931, c. 364, establishes the exclusive statutory procedure for the release of a patient who has been committed as the result of his acquittal of a criminal charge on the ground of insanity. It is for the benefit of those committed before, as well as of those committed after, the enactment of the law. State v. District Court, 185M396, 241NW39.

10724. Hearing on punishment.

No conviction for perjury for untrue answers to questions after plea of guilty. 171M246, 213NW900.

10725. Dismissal of cause—Record of reasons for.

Where a motion to dismiss is denied after plaintiff first rests, and defendant then proceeds to introduce evidence in his defense, sufficiency of evidence is to be determined by a consideration of all evidence in case. State v. Traver, 198M237, 269NW393. See Dun. Dig. 2477a.

CALENDAR

10727. Issues, how disposed of—Time for trial.

That attorney with consent of court and without objection by defendant, assisted county attorney, was no ground for new trial. 176M305, 223NW141.

CHALLENGING JURORS

10733. Challenge to individual juror.

2. Preliminary examination.

Court rightly refused to permit parties to instruct and examine each prospective juror in law of case to be tried. State v. Bauer, 189M280, 249NW40. See Dun. Dig. 5252.

3. When challenge may be made.

Answer of juror held not so untrue as to give accused right to new trial on ground that he was thereby prevented from peremptorily challenging juror. 176M604, 224NW144.

No objection can be taken to any incompetency in a juror, existing at time he was called, after he is accepted and sworn, if fact was known to party and he was silent; and, even if not discovered until after verdict, cause of challenge, such as non-residence of juror, will not per se constitute ground for a new trial. State v. Olson, 195M493, 263NW437. See Dun. Dig. 2489.

6. Review.

Denial of the challenge of a juror cannot be reviewed on appeal. 171M380, 214NW265.

APPEALS AND WRITS OF ERROR

10747. Removal to supreme court.

The denial by the trial judge of the challenge of a juror for cause cannot be reviewed on appeal. 171M 380, 214NW265.

Motion for a new trial in a criminal case must be heard by the trial court before the expiration of the time to appeal from the judgment, and an appeal from an order denying such motion cannot be taken more than a year after such judgment is rendered. 174M194, 218NW 887.

A violation of a city ordinance is an offense against the city and a right of appeal may be denied. 175M222, 220NW611.

Where defendant acquiesces in a judgment of conviction, or when he complies in whole or in part therewith, there is a waiver of the right of review. 175M222, 220 NW611.

An order in a criminal case, made on defendant's failure to plead after disallowance of his demurrer to the information, found him guilty, but directed him to appear at a later date for sentence. Held, not appealable, not being a final judgment imposing sentence and to be

enforced without further judicial action. State v. Putzier, 183M423, 236NW765. See Dun. Dig. 2491(70), (71), (72), (74).

Appeals in criminal cases can be taken only from an order denying motion for a new trial or from the final judgment of conviction. State v. Putzier, 183M423, 236 NW765. See Dun. Dig. 2491(69).

An accused cannot appeal from the verdict of the jury. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 2491(70).

A motion to vacate a judgment entered in a criminal case upon a plea of guilty and to permit a defendant to enter a plea of not guilty is not a motion for a new trial, and order denying it is not appealable. State v. Newman, 188M461, 247NW576. See Dun. Dig. 2491.

10748. Stay of proceeding.

2. Notice of appeal.

Notices of appeal in criminal cases to be effective must be served on the attorney general. State v. Newman, 188M461, 247NW576. See Dun. Dig. 2494(99).

10751. Bill of exceptions.

State v. Smith, 192M237, 255NW826; note under §10712, note 5.

Trial court properly amended the proposed settled case by making it comply with the facts as they occurred upon the trial. 171M515, 213NW923.

Where information does not allege true name of purchaser of alcoholic liquor, the defendant cannot complain thereof for the first time on appeal. State v. Viering, 175M475, 221NW681.

Denial of new trial on ground of newly discovered evidence consisting of affidavit of witness, who testified on the trial as to the identity of defendant, that he was not certain of such identity, held not abuse of discretion. 181M203, 232NW111. See Dun. Dig. 7131.

There can be no reversal in a criminal case for alleged misconduct of prosecuting attorney, without a record of conduct claimed to be prejudicial and objection thereto, with an exception if needed. State v. Hankins, 193M375, 258NW578. See Dun. Dig. 2479a, 2500.

Statement of court that there was testimony conflicting with certain testimony of the accused, if not technically correct, held such an inadvertence as should have been called to its attention at time so that it could have been corrected. State v. Winberg, 196M135, 264NW578. See Dun. Dig. 2500.

Where there is no exception taken to charge in a criminal case, no motion for a new trial, and no request for further instructions, alleged error in charge cannot be assigned as error in this court. State v. Bram, 197M 471, 267NW383. See Dun. Dig. 2479a.

10752. Proceedings in Supreme Court.

1. In general.

See also notes under §10648.

Admission of incompetent evidence held not prejudicial in criminal prosecution. State v. Irish, 183M49, 235NW625. See Dun. Dig. 2490(47).

Misconduct of counsel in asking improper question held not to require new trial. 171M158, 213NW735.

Exclusion of evidence held without prejudice. 171M 222, 213NW920.

On appeal from an order denying a new trial, made before defendant was sentenced, the point that the sentence was excessive cannot be raised. 172M139, 214NW 785.

Where sister of prosecutrix in a prosecution for carnally knowing a female child under the age of 18 was a witness and during cross-examination, the father of prosecutrix made a demonstration in the court room and the court admonished the jury to disregard it, there was nothing requiring a new trial. 172M372, 215NW 514.

Court cannot interfere as to matters of fact. 173M391, 217NW343.

That attorney with consent of court and without objection by defendant, assisted county attorney, was no ground for new trial. 176M305, 223NW141.

Reception of evidence. 178M439, 227NW497.

A plea of guilty does not preclude a defendant from raising, for the first time on appeal, the question of whether or not the complaint, information, or indictment charges a public offense. State v. Parker, 183M 588, 237NW409. See Dun. Dig. 2491.

Assignments of error that court erred in failing to give certain instruction, although he agreed to give them in substance, were not considered by supreme court where settled case showed no request to charge, no action thereon by the court, and no agreement by the court in reference thereto. State v. Winberg, 196M135, 264NW 578. See Dun. Dig. 2498.

Statements made by court to defendant after he had been tried and convicted, but before sentence was imposed, should not be considered on questions of prejudice and bias. State v. Davis, 197M381, 267NW210. See Dun. Dig. 2473.

Where the verdict was of murder in second degree, but evidence sustains conviction only in third degree, supreme court has power to direct entry of judgment accordingly. State v. Jackson, 198M111, 268NW924. See Dun. Dig. 2501.

3. New trial.

174M194, 218NW887.

Exclusion of evidence by court held to cure error in its admission. 173M543, 217NW683.

Rulings upon offers to prove defendant's disposition and reputation held not to require reversal. 176M349, 223NW452.

Stating that the acts mentioned would constitute the crime instead of stating that they would constitute the offense of an attempt to commit the crime, with which defendant was charged, was a mere inadvertence and not prejudicial. 178M69, 225NW925.

Where conviction for contempt is right, but the penalty imposed exceeds that authorized, defendant should not be relieved from proper punishment, but be resentenced. 178M158, 226NW188.

Permitting jury to attend theatrical performance, held not to require new trial. 179M301, 229NW99.

A second motion for a new trial, based upon the same grounds stated in a prior denied motion, cannot be heard without first obtaining permission of the court. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 2489a.

Inadvertent language used in the charge cannot be assigned as error for a new trial when it was not called to the attention of the court for correction upon the trial. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 2479a.

Motion for a new trial on the ground of newly discovered evidence was insufficient, in that the exhibits attached were not put in such form as to constitute legal proof of the things which they purported to show. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 2490.

A new trial should be granted only in those cases where substantial rights of accused have been so violated as to make it reasonably clear that a fair trial was not had. State v. Nuser, 199M315, 271NW811. See Dun. Dig. 2490.

4. Misconduct of counsel.

179M301, 229NW99.

179M502, 229NW801.

180M221, 230NW639.

Remarks of prosecuting attorney held not prejudicial. 175M607, 222NW280.

Misconduct of prosecuting attorney in cross-examining defendant with respect to other charges of crime, held to require new trial. 176M442, 223NW769.

Constant insinuation that accused was connected with other crimes, held to require new trial. State v. Klashtorni, 177M363, 225NW278.

Defendant could not urge that county attorney was guilty of misconduct in pursuing a line of cross-examination to which defendant not only made no objection but in effect consented. 178M69, 225NW925.

Where defendant selects his own attorney, misconduct of such attorney is ground for new trial only in exceptional cases; and failure to call defendant as witness, and submission of case without argument, held not to require new trial. 180M435, 231NW12.

There can be no reversal in a criminal case for alleged misconduct of prosecuting attorney, without a record of conduct claimed to be prejudicial and objection thereto, with an exception if needed. State v. Hankins, 193M375, 258NW578. See Dun. Dig. 2479a, 2500.

Whether misconduct of counsel is sufficient ground for a new trial is primarily for trial court. State v. Olson, 195M507, 263NW437. See Dun. Dig. 2478.

Supreme court must rely a great deal on judgment of lower court as to whether statements of county attorney are prejudicial. State v. Zemple, 196M159, 264NW587. See Dun. Dig. 7102.

Improper argument by county attorney to jury was without prejudice, where it was stopped by court who stated that it should be disregarded. State v. Puent, 198 M175, 269NW372. See Dun. Dig. 2478.

Remarks of prosecuting attorney held not prejudicial. State v. Bean, 199M16, 270NW918. See Dun. Dig. 2490.

In determining whether wrongful remarks of prosecuting attorney requires a new trial, court must credit jury with exercising good judgment and not being swayed by every imprudent remark of counsel. State v. Heffelfinger, 274NW234. See Dun. Dig. 2478.

Whether a new trial shall result because of misconduct of prosecuting attorney is, in large measure, discretionary with trial court. Id. See Dun. Dig. 2489.

5. Newly discovered evidence.

180M450, 231NW225.

181M28, 231NW411.

Motion for new trial on grounds of newly discovered evidence held properly denied. 173M420, 217NW489.

Newly discovered evidence held not of nature likely to change the result. 173M567, 218NW112.

Alleged newly discovered evidence held not to require new trial. 176M305, 223NW141.

New trial was properly refused where alleged newly discovered evidence was cumulative and diligence was not shown. State v. Kosek, 186M119, 242NW473. See Dun. Dig. 7130.

Cumulative newly discovered evidence, not of character that would probably produce different result, did not require new trial. State v. Weis, 186M342, 243NW 135. See Dun. Dig. 7130, 7131.

An order denying a motion for a new trial on the ground of newly discovered evidence in a criminal case will not be reversed except for abuse of discretion.

State v. Quinn, 192M88, 255NW488. See Dun. Dig. 2500, 7131.

Court held not to have abused its discretion in a criminal case in denying new trial on ground of newly discovered evidence, consisting of statements made by state witness contradictory of his testimony at the trial. Id. See Dun. Dig. 2489.

Motion for new trial for newly discovered evidence was properly denied, where it consisted of affidavit, discredited by a subsequent affidavit of the same person and containing nothing new. State v. Chick, 192M539, 257NW 280. See Dun. Dig. 7129.

There can be no reversal because of denial of a motion for a new trial, upon ground of newly discovered evidence, unless it is made to appear that it was an abuse of discretion to deny motion. State v. Hankins, 193M375, 258NW578. See Dun. Dig. 7123.

6. Reception of evidence.

There could be no prejudice from the fact that the jury learned that accused had claimed and been accorded a legal right against compulsory incrimination in trial of codefendant. 176M562, 223NW917.

No reversible error for failure to hear oral testimony on motion for new trial. 176M604, 224NW144.

Admission of evidence of other crime to show intent, etc., is within discretion of trial court and supreme court will not interfere except in cases of abuse of such discretion. State v. Voss, 192M127, 255NW843. See Dun. Dig. 2500.

In prosecution for arson for burning wife's house, there was no prejudicial error in admitting in evidence partly burned matches, two candles tied together, and neck of broken glass jar, though they had no probative value whatever as to origin of second fire following a former one, and though there was some change in condition in exhibits between time they were found and time they were introduced in evidence. State v. Zemple, 196M159, 264NW587. See Dun. Dig. 2490, 3251.

Cross-examination and extent thereof rests in sound discretion of trial court. State v. Omodt, 198M165, 269 NW360. See Dun. Dig. 10318.

Where information for manslaughter charged that defendant was intoxicated while driving and state introduced in evidence a bottle of liquor found on running board of defendant's car in support thereof, no prejudicial error resulted where state failed to produce other credible evidence in support of charge and bottle was stricken from evidence with proper instructions to jury to disregard it. State v. Fuent, 198M175, 269NW372. See Dun. Dig. 2490.

Questions of prosecuting attorney made while cross-examining defendant carrying insinuations that defendant had obtained money by false pretenses at other times, though improper were not prejudicial. State v. Nuser, 199M315, 271NW811. See Dun. Dig. 2490.

Exclusion of evidence which could not have been of much help to accused was not reversible error. State v. Foelaert, 273NW641. See Dun. Dig. 2490.

7. Misconduct of or respecting jury.

Failure to provide separate room for women held not to require new trial. 176M604, 224NW144.

Answer of juror on voir dire as to relation to county attorney held not ground for new trial. 176M604, 224 NW144.

New trial will not be granted on affidavit of a juror that he misunderstood charge. State v. Cater, 190M485, 252NW421. See Dun. Dig. 7109.

No objection can be taken to any incompetency in a juror, existing at time he was called, after he is accepted and sworn, if fact was known to party and he was silent; and, even if not discovered until after verdict, cause of challenge, such as non-residence of juror, will not per se constitute ground for a new trial. State v. Olson, 195M493, 263NW437. See Dun. Dig. 2490.

Remarks of court in ruling on objections to testimony and that counsel should proceed, or get along, held not erroneous in view of the record. State v. Winberg, 196M 135, 264NW578. See Dun. Dig. 2489.

8. Recalling case sent down.

Supreme court, after a remittitur is regularly sent down in a criminal case, has no power to recall the same for the purpose of entertaining an application for rehearing. State v. Waddell, 191M475, 254NW627. See Dun. Dig. 2501.

10754. Defendant committed, when, etc.

174M194, 218NW887.

Where the verdict was of murder in second degree, but evidence sustains conviction only in third degree, supreme court has power to direct entry of judgment accordingly. State v. Jackson, 198M111, 268NW924. See Dun. Dig. 2501.

10756. Certifying proceedings.

174M66, 218NW234.

Constitutionality of statute properly certified to court. 173M221, 217NW108.

District court has no jurisdiction in civil cases to certify questions to the supreme court. Newton v. M., 185 M189, 240NW470. See Dun. Dig. 282.

INDETERMINATE SENTENCES AND PAROLES

10765. Term of sentence.—Whenever any person is convicted of any felony or crime committed after the passage of this act, punishable by imprisonment in the state prison or state reformatory, except treason or murder in the first or second degree as defined by law, the court in imposing sentence shall not fix a definite term of imprisonment, but may fix in said sentence the maximum term of such imprisonment, and shall sentence every such person to the state reformatory or to the state prison, as the case may require, and the person sentenced shall be subject to release on parole and to final discharge by the board of parole as hereinafter provided, but imprisonment under such sentence shall not exceed the maximum term fixed by law or by the court, if the court has fixed the maximum term, provided that if a person be sentenced for two or more such separate offenses sentence shall be pronounced for each offense, and imprisonment thereunder may equal, but shall not exceed the total of the maximum terms, fixed by law or by the court, if the court has fixed the maximum term for such separate offenses, which total shall, for the purpose of this act, be construed as one continuous term of imprisonment. And provided further that where one is convicted of a felony or crime that is punishable by imprisonment in the state prison or state reformatory or by fine or imprisonment in the county jail, or both, the court may impose the lighter sentence if it shall so elect. The power of the court to fix the maximum term of imprisonment shall extend to indeterminate sentences imposed under Laws 1927, Chapter 236 [§§9931 to 9931-4]. ('11, c. 298, §1; G. S. '13, §9267; '17, c. 319, §1; Apr. 20, 1931, c. 222, §1.)

Time runs on sentence while in hospital for insane. 176M572, 224NW156.

Trial court may fix maximum term of imprisonment though defendant was convicted for a second offense for which penalty is prescribed by §9931 prior to 1927 amendment. 179M532, 229NW787.

Judge of district court has no power to commute sentence passed upon prisoner who has been committed to penal institution. Op. Atty. Gen., Aug. 28, 1933.

Judge has power to fix a maximum sentence of less than life for robbery of a bank. Op. Atty. Gen., Nov. 25, 1933.

Two concurrent sentences should be considered as one continuous term rather than two separate terms as respects prison records. Op. Atty. Gen. (342h), Apr. 4, 1935.

This section should be applied whether a number of commitments were received at the same time or a second sentence was imposed after a part of first sentence had been served and for a crime committed while prisoner was on parole under his first sentence. Op. Atty. Gen. (341k-10), Apr. 19, 1937.

10766. Parole board.—A board having power to parole and discharge prisoners confined in the state prison, state reformatory or state reformatory for women is hereby created, to be known and designated as "State Board of Parole." Said board shall be composed of a chairman and two other members, who shall be appointed by the governor with the advice and consent of the senate and who, except as hereinafter provided, shall hold office for a term of six years from the first Monday in January next after such appointments are made and until their successors be appointed and qualified, provided that immediately or as soon as practicable after the passage of this act said board shall be appointed to hold office from July first next after such appointments are made, the chairman until the first Monday in January 1937, one member until the first Monday in January 1935, and one member until the first Monday in January 1933. Not more than two members of said board shall belong to the same political party. In case of a vacancy it shall be filled for the unexpired term in which such vacancy occurs as herein provided for original appointments. Said board shall keep a record of all its proceedings and to that end may designate one of its members to act as secretary, or may require the performance of the duties of that office by any parole agent or any other person in its employ. ('11, c. 298, §3; G. S. '13, §9269; '13, c. 280, §1; '21, c. 56, §1; Laws 1929, c. 23; Apr. 14, 1931, c. 161, §1.)

10767. Present law not changed.—The board of parole constituted under the provisions of this act shall be deemed a continuation of the board of parole con-

stituted under the provisions of law in force at the time of the passage thereof, and all matters and proceedings pending before the board of parole as constituted before the passage of this act shall be carried on and completed by the board as constituted hereunder. (G. S. '13, §9270; '13, c. 280, §2; '21, c. 56, §2; Apr. 14, 1931, c. 161, §2.)

10768. Registers and records.—The State Board of Parole shall have a seal, keep a record of all its acts relating to each of the separate penal institutions and the persons confined in, removed and committed thereto or paroled or discharged therefrom and the Chairman of said Board shall furnish a copy of the acts of the said Board of Parole in reference to each of the penal institutions to the Board of Control and also to each of the penal institutions of its acts relating to that institution. The State Board of Parole shall also keep a complete record of all persons placed on probation to said Board and duly enter discharges and revocations of orders staying sentences of such persons upon its records, and biennially report to the Governor regarding all the activities of the said Board. ('11, c. 298, §4; G. S. '13, §9271; Apr. 5, 1935, c. 110, §1.)

10769. Chairman of board—salary—compensation of members.—The salary of the chairman of said state board of parole shall be the sum of $4500.00 per annum, payable as hereinafter provided. Each of the other members of said board shall receive as compensation the sum of $15.00 per day for each day actually spent in the discharge of his official duties, including the duties of secretary. In addition to the compensation so provided, each of the members of said board shall be reimbursed for all expenses paid or incurred by him in the performance of his official duties. Said compensation and said expenses shall be paid out of the revenue fund in the same manner as the salaries and expenses of other state officers are paid. All of the other expenses of the state board of parole shall be audited and allowed by the state board of control and paid out of the funds appropriated for the maintenance of the penal institutions of the state in such proportions as the state board of control shall determine. Said board of parole shall furnish such estimates of anticipated expenses and requirements as the state board of control may from time to time require. ('11, c. 298, §5; G. S. '13, §9272; Apr. 14, 1931, c. 161, §3.)

A member of board of parole attending prison congress in another state under authority from board was entitled to compensation of $15.00 per day and traveling expenses. Op. Atty. Gen., Oct. 20, 1932.

10770. Powers of board—Limitations.—The said State Board of Parole may parole any person sentenced to confinement in the state prison or state reformatory, provided that no convict serving a life sentence for murder shall be paroled until he has served thirty-five years, less the diminution which would have been allowed for good conduct had his sentence been for 35 years, and then only by the unanimous consent in writing of the members of the Board of Pardons. Upon being paroled and released, such convicts shall be and remain in the legal custody and under the control of the State Board of Parole subject at any time to be returned to the state prison, the state reformatory or the state reformatory for women and the parole rescinded by such Board, when the legal custody of such convict shall revert to the warden or superintendent of the institution. The written order of the Board of Parole, certified by the Chairman of said Board, shall be sufficient to any peace officer or state parole and probation agent to retake and place in actual custody any person on parole or probation to the State Board of Parole, but any probation or parole agent may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce discipline, take and detain a parolee or probationer to the State Board of Parole and bring such person before the Board of Parole for its action. Paroled persons, and those on probation to the State Board of Parole, may be placed within or without the boundaries of the state at the discretion of the said Board and the limits fixed for such persons may be enlarged or reduced according to their conduct.

In considering applications for parole or final release said board shall not be required to hear oral argument from any attorney or other person not connected with the prison or reformatory in favor of or against the parole or release of any prisoners, but it may institute inquiries by correspondence, taking testimony or otherwise, as to the previous history, physical or mental condition, and character of such prisoner, and to that end shall have authority to require the attendance of the warden of the state prison or the superintendent of the state reformatory or the state reformatory for women and the production of the records of said institutions and to compel the attendance of witnesses, and each member of said board is hereby authorized to administer oaths to witnesses for every such purpose. ('11, c. 298, §6; G. S. '13, §9273; Apr. 14, 1931, c. 161, §4; Apr. 5, 1935, c. 110, §2.)

Prisoner on medical reprieve is not entitled to hospital and medical services at expense of state. Op. Atty. Gen. (341j), Dec. 21, 1936.

10770-1. Parole of prisoners.—The state board of parole is hereby authorized and empowered to grant to any prisoner in the state prison, state reformatory or state reformatory for women, a temporary parole under guard, not exceeding three days, to any point within the state, upon payment of the expenses of such prisoner and guard. (Act Mar. 9, 1929, c. 70.)

10772. Credits for prisoners.

A resident of Minnesota imprisoned in the reformatory for a felony continues to be a resident of Minnesota but is not a citizen until restored as provided in this section and sec. 10773. Op. Atty. Gen., Apr. 7, 1933.

10773. Duty of board—Final discharge.

Op. Atty. Gen., Apr. 7, 1933; note under §10772.

10775. Supervision by board—agents.—Said board of parole as far as possible, shall exercise supervision over paroled and discharged convicts and when deemed necessary for that purpose, may appoint state agents, fix their salaries and allow them traveling expenses. It may also appoint suitable persons in any part of the state for the same purpose. Every such agent or person shall perform such duties as said board may prescribe in behalf of or in the supervision of prisoners paroled or discharged from the state prison, state reformatory, or other public prison in the state, including assistance in obtaining employment and the return of paroled prisoners, and in addition thereto shall, when so directed by the state board of control, investigate the circumstances and conditions of the dependents of prisoners of the state penal institutions and report their findings and recommendations to the warden and superintendent of the respective institutions and to the state board of control. Such agents and such persons shall hold office at the will of the board of parole and the person so appointed shall be paid reasonable compensation for the services actually performed by them. Each shall be paid from the current expense fund of the institution or institutions for whose benefit he was appointed. ('11, c. 298, §10; G. S. '13, §9277; Apr. 14, 1931, c. 161, §5.)

10777. Rules governing paroles, etc.

A member of board of parole attending prison congress in another state under authority from the board was entitled to compensation of $15.00 per day and traveling expenses. Op. Atty. Gen., Oct. 20, 1932.

Where prisoner violated his parole on Dec. 16, 1933, and parole board did not convene until Jan. 25, 1934, when parole was rescinded and warrant issued, prisoner was entitled to have time between Dec. 16, and Jan. 25, credited on his sentence, in absence of any rule or regulation applicable to the circumstances set forth by board of parole. Op. Atty. Gen. (341l-1), Mar. 2, 1935.

10778–1. Governor may enter into reciprocal agreement.—The governor of the state of Minnesota is hereby authorized and empowered to enter into compacts and agreements with other states through their

duly constituted authorities, in reference to reciprocal supervision of persons on parole or probation and for the reciprocal return of such persons to the contracting states for violation of the terms of their parole or probation. (Act Apr. 24, 1935, c. 257.)

Preamble to act.

Whereas, The Congress of the United States of America has, by law, given consent to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies;

Reciprocal and retaliatory legislation. 21MinnLawRev 371.

BOARD OF PARDONS

10780. Pardons—Reprieves—Unanimous vote.

Where a conditional pardon has been granted, burden of proof of performance of condition rests upon him who relies upon effectiveness of pardon. State v. Barnett, 193M336, 258NW508. See Dun. Dig. 2449, 4942, 7296a.

CHAPTER 105

State Prison and State Reformatory

STATE PRISON

10787. Location and management.

Prisoners in penitentiary should not be requested or compelled to waive negligence of doctor or surgeon as condition of treatment. Op. Atty. Gen. (341h), Nov. 20, 1934.

Prisoner may use funds received from adjusted compensation certificates to purchase land if discipline of institution is not affected. Op. Atty. Gen. (342b), May 19, 1936.

10796. Clothing and food—Money on discharge.

Prisoner on medical reprieve is not entitled to hospital and medical services at expense of state. Op. Atty. Gen. (341j), Dec. 21, 1936.

10807. Communication with convicts.

Communications which are withheld from inmate and retained in files must be delivered to him upon his discharge from institution. Op. Atty. Gen. (598a), Sept. 4, 1934.

10808. Diminution of sentence.

Laws 1933, c. 329, providing for termination of sentences between March and November does not prevent release at other times during year by reason of good conduct. Op. Atty. Gen., Aug. 25, 1933.

10812. Sale of binding twine.

Laws 1931, c. 340, fixes maximum price of machinery sold for 1931 and 1932.

10815. State prison may manufacture machinery. —The State Board of Control is hereby authorized, empowered, and directed to establish, construct, equip, maintain and operate, at the State Prison, at Stillwater, a factory for the manufacture of hay rakes, hay loaders, mowers, grain harvesters and binders, corn harvesters and binders and corn cultivators, and the extra parts thereof and, if the board deems it advisable, cultivators of all kinds, culti-packers, manure spreaders, ploughs, rotary hoes, and the extra parts thereof and rope and ply goods of all kinds and for that purpose to employ, and make use of the labor of prisoners kept in said prison, at any time available therefor and as largely as may be, and such but only such skilled laborers as in the judgment of the said Board of Control and the Warden of the State Prison may be necessary for the feasible and successful and profitable employment of the said prisoners therein therefor, and for the purposes of, and to give full effect to, this act, said Board of Control may use all of, or any part of, not exceeding two hundred fifty thousand dollars of the existing state prison revolving fund created by and existing under Chapter 151 of the General Laws of 1909 (Section 9291-9294, General Statutes 1913, sections 10790-10793, Mason's Minn. Stat. 1927) but provided further that said State Board of Control and the said Warden of the Prison shall, at all times, in the line of manufacturing herein authorized and directed, employ and make use of prison labor to the largest extent feasible.

And said Board of Control and said Warden of the said Prison are hereby authorized, directed and instructed to establish in and throughout all parts of this State where there is use and demand for such manufactured products as are referred to herein, and binding twines, and ropes and ply goods of all kinds, local selling agencies therefor, and to contract with such agencies to furnish thereto for the local sale thereof, the farm machinery the manufacture of which is authorized by this act and the extra parts thereof, f. o. b. the said factory, at the actual cost of the production thereof, plus five per cent of the actual cost thereof; including a charge of not to exceed twenty-seven cents per hour for labor of each prisoner employed; and the said local agencies so contracted with are hereby authorized in the resale thereof to their actual customers therefor, to charge advance prices equaling twenty per cent of the prices charged them for said machines (plus actual freight charges), but not a greater profit thereon, and the contracts entered into with said agencies shall be so worded as to obligate them to be diligent in the prosecution of the sales of the said machines to the customers therefor. ('07, c. 49, §1; G. S. '13, §9315; '13, c. 141, §1; '23, c. 294, §1; '27, c. 172; Apr. 24, 1929, c. 348.)

Laws 1931, c. 340 and Laws 1933, c. 342, fixes the price of machinery and parts manufactured under this section for the years 1931 to 1934, inclusive.

10816. Sale of machines.

Laws 1931, c. 340, fixes maximum prices for 1931 and 1932.

Machinery may be sold at higher prices outside of state than in state. Op. Atty. Gen., Feb. 8, 1934.

10821. Moneys, how used—Forfeiture.

Prisoner may use funds received from adjusted compensation certificates to purchase land if discipline of institution is not affected. Op. Atty. Gen. (342b), May 19, 1936.

10824. Sentence—Term of imprisonment.

Superintendent of reformatory has no right to refuse acceptance of prisoners sentenced to his institution contrary to law. Op. Atty. Gen., Feb. 6, 1933.

STATE REFORMATORY

Where judge sentenced one to a year in prison but indicated that prisoner should be given credit for time spent in jail, superintendent of reformatory may give such credit. Op. Atty. Gen. (341k-10), Apr. 12, 1934.

10826. Expense of sheriff in conveying convicts.

No provision is made for compensation when sheriff uses his own automobile in transporting prisoner to state prison or state reformatory, but sheriff is entitled to allowance of amount equivalent to railroad fare for himself, prisoner and guards. Op. Atty. Gen., July 6, 1932.

Where juvenile was bound over to district court by juvenile court of same county and was committed to state training school at Red Wing by district court, expenses of transportation must be paid by county. Op. Atty. Gen. (345d), Apr. 16, 1937.

10827. Register of convicts.

Any record concerning inmate other than those herein provided are subsequent to discretion of authority. Op. Atty. Gen. (342h), Apr. 4, 1935.

10834–1. State reformatory employees to have same salary as other penal institutions.—That the salaries of officers and employees at the Minnesota State Reformatory at St. Cloud, Minnesota, be increased so as to place them upon the same salary schedule and basis of pay as that of officers and employees at the Minnesota State Prison at Stillwater, Minnesota, and the State Board of Control is hereby authorized and directed so to do. (Act Apr. 15, 1935, c. 183, §2.)

Sec. 3 of Act Apr. 15, 1935, cited, provides that the act shall take effect from its passage.

FEMALE CONVICTS

10838. Discharge—Clothing—Money.

This section applies only to state reformatories for men and board of control has authority to determine