1941 Supplement

To

Mason's Minnesota Statutes, 1927

and

Mason's 1940 Supplement

Containing the text of the acts of the 1941 and 1943 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 Law Review Articles and digest of all common law decisions.

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CHAPTER 103

Miscellaneous Crimes

10452. Drunkenness—Successive offenses; etc.
Power of justice of the peace to suspend a sentence must be exercised at the time of imposition. There is no power to suspend on conviction for a third offense. Op. Atty. Gen. (266b-21), Nov. 6, 1941.
An officer with a warrant may arrest a man for drunkenness in his own home, but cannot arrest him without a warrant and merely on verbal complaint of wife. Op. Atty. Gen. (785b), Dec. 3, 1942.
Temporary reprieve to do farm work on condition that prisoner lead a law abiding life was violated by becoming intoxicated and he was not entitled to credit on his sentence. Op. Atty. Gen. (328a-9), Sept. 22, 1943.

UNIFORM NARCOTIC DRUG ACT

10455-4. Definitions.
Adopted by Alaska, 1943.
The purpose of act was to parallel and supplement federal laws. People v. Gennaro, 26NYS(2d)336, 261AppDiv 533.

10455-11. Application of act.—Except as otherwise in this act specifically provided, this act shall not apply to the following cases:
Administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce, not more than one grain of codeine or of any of its salts.
The exemptions authorized by this section shall be subject to the following conditions:
(a) That the medicinal preparation administered, dispensed, or sold, shall contain in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone.
(b) That such preparation shall be administered, dispensed, and sold in good faith as a medicine, and not for the purpose of evading the provisions of this act.
Nothing in this section shall be construed to limit the quantity of codeine or of any of its salts that may be prescribed, administered, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, dispensed, or sold in compliance with the general provisions of this act.
(c) No person shall administer, dispense or sell, under the exemption of this section, any preparation included within this section, when he knows, or can by reasonable diligence ascertain, that such administering, dispensing or selling will provide the person to whom or for whose use such preparation is administered, dispensed or sold, within any 48 consecutive hours, with more than six grains of codeine or any of its salts. (As amended Apr. 9, 1941, c. 157, §1.)
Both §2551 of Title 26 of Mason's U.S.C.A., and this act exempt the same medicinal preparations from their prohibitions. People v. Gennaro, 26NYS(2d)336, 261App Div533.

10463. Trusts and combinations in restraint of trade prohibited.
Anti-Trust Laws have been adopted in Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. (1940).
Action by owner of a motion picture theatre against the only other theatre in town for conspiracy and attempt to obtain a monopoly upon all the feature films for "first run" showing in order to drive plaintiff out of business presented a matter of sufficient general public interest to make a case of violation of §2 of the Sherman Act (15 Mason's U. S. Code Ann. §2) upon which an action for treble damages would lie under §4 of the Clayton Act (15 Mason's U. S. Code Ann. §15). White Bear Theatre Corp. v. State Theatre Corp., (C.C.A.8) 129 F. (2d) 600. See Dun. Dig. 8437.
In a civil action in federal court under the Sherman Anti-Trust Law [15USC1, et seq.] the fact of damage to the plaintiff must be established by clear and satisfactory evidence, while the amount of damage may be approximated if the fact of damage appears with reasonable certainty and definiteness. Twin Ports Oil Co. v. Pure Oil Co., (DC-Minn), 46FSupp149. See Dun. Dig. 8437.
The labor injunction in Minnesota. 24MinnLawRev757.
Monopolies—restraint of trade—price and production control through trade associations. 25MinnLawRev208.
The Apex and Hutcheson cases, 25 MinnLawRev 915.

10500. Peace officers to be voters—Penalty.
The mayor of the city of Minneapolis could not appoint a police chief who was not at the time of his appointment a legal voter of the state of Minnesota. Op. Atty. Gen., (785d), June 30, 1941.
Right of adjoining villages to maintain a joint policing service is doubtful, because of residential requirement. Op. Atty. Gen. (785-s), June 9, 1942.

10503. Indians located on reservations—Crimes, etc. [Repealed.]
Repealed. Laws 1943, c. 583.
Maintenance of gambling devices and slot machines on land to which United States holds title in trust for an Indian tribe cannot be prosecuted under state law if maintained by a tribal Indian (one under guardianship of United States government), but any other Indian or person is subject to prosecution. Op. Atty. Gen. (733D), Sept. 17, 1941.
Indian rights and the federal courts. 24MinnLawRev 145.

10509. Unlawful use of Red Cross.
Adopted in Arizona, Louisiana, Maine, Maryland, Michigan, Minnesota, South Dakota, Tennessee, Virginia, Vermont, Washington and Wisconsin.

10523. Protection to motormen.
Industrial commission has authority to determine necessity of automatic windshield wipers on one-man streetcar, but any requirement that two men operate streetcar is a matter for city to determine. Op. Atty. Gen. (270c-4), Dec. 29, 1942.

10536-5. Visitors at tourist camps, etc., to register.
A group of 10 cabins on one 50-foot lot conducted as rental property where overnight guests or guests for 2 or 3 days or by week were registered and accommodated was a tourist camp and not a "place of residence" within meaning of building restriction, registers being kept as provided by this act. Cantieny v. B., 209M407, 296NW491. See Dun. Dig. 2393.

10536-17 and 10536-18. [Repealed.]
Repealed. Laws 1941, c. 495.

CHAPTER 104

Criminal Procedure

SEARCH WARRANTS

10537. When issued.
"Magistrates" does not include district judges, but a district judge has inherent power to issue a search warrant for gambling devices, keeping of which is a gross misdemeanor, upon sworn warrant, and then have grand jury indict persons. Op. Atty. Gen. (141f), Dec. 5, 1941.

EXTRADITION

10542. Warrant of extradition, service, etc. [Repealed].
3. Who is a fugitive from justice.
Abandonment of a child is a continuing offense, and limitation does not run during time father is outside state, and he is a fugitive from justice if offense charged is a few days prior to date of leaving state, and same

result is accomplished if father returns to state and again leaves. Op. Atty. Gen., (193B-1), Sept. 28, 1939.

FRESH PURSUIT ACT

10547-1. Uniform law on fresh pursuit.
Adopted by Idaho and South Dakota, 1941.

UNIFORM CRIMINAL EXTRADITION ACT

10547-11. Definitions.
Adopted by Florida, Hawaii and Virginia.
This act has no relation to apprehension and return of parolees under compact entered into pursuant to § 10778-1. Op. Atty. Gen., (193a-4), March 4, 1940.

10547-12. Duties of Governor in extradition matters.
Extradition papers may be issued for a gross misdemeanor. Op. Atty. Gen. (193a-4), Dec. 27, 1940.

10547-13. Demand must be in writing.
A demand for criminal extradition which failed to allege that accused was within state at time crime was committed, or that he had fled to state upon which demand was made, was insufficient basis for an extradition warrant. Kelley v. S., 200So(AlaApp)115.
Recitals in extradition warrant are prima facie evidence of jurisdictional facts. Id.
Court of asylum state cannot consider contention that affidavit upon which warrant is based shows that prosecution is barred by limitations. Waggoner v. Feeney, 44NE(2d)(Ind)499. See Dun. Dig. 3704, 3706, 3708, 3709, 3713.

10547-15. Extradition by agreement.
Provision that one state may surrender fugitive on demand of another state, even though prosecution is pending in rendering state, is valid. Harris, 309Mass180, 34NE(2d)504.

10547-16. May extradite persons causing crime.
Man leaving wife and children and going to another state and sending wife money for a number of months before stopping, could not be prosecuted under §10135, but could be prosecuted under §10136 for non-support, and could probably be extradited under the uniform extradition act adopted by both states. Op. Atty. Gen. (193B-1), Aug. 14, 1940.
Extradition would not lie for abandonment of wife and children in another state which has not adopted this act. Op. Atty. Gen., (193b-1), May 23, 1941.

10547-17. Warrant of arrest.
Governor's warrant which states that accused is charged with a crime in another state by a "transcript of the minutes" is invalid. Watson v. State, 2So(2d)(Ala) 470.

10547-20. Accused to be taken before court.
Court cannot consider limitations. Waggoner v. Feeney,44NE(2d)(Ind)499. See Dun. Dig. 3713.

10547-23. Who may be apprehended.
A person who has violated his parole and is in another state may be extradited, provided original offense was extraditable and his probation has been revoked. Op. Atty. Gen., (193a), Jan. 8, 1941.
A commitment by Juvenile Court is not a conviction of a crime and is no basis for extradition. Op. Atty. Gen., (193B-15), Mar. 3, 1941.
Failure to pay alimony is not an extraditable offense. Op. Atty. Gen. (193b-24), Apr. 2, 1942.
Interstate compact as to parolees does not cover parolee who has fled from paroling state, and he is subject to extradition. Op. Atty. Gen. (193a-4), June 15, 1942.
Delinquent child who escaped from girls school at Sauk Center is not subject to extradition, but director of social welfare as guardian has right to custody of his ward and may obtain it in courts of the other states. Op. Atty. Gen. (193b-15), July 14, 1943.

INDICTMENTS

10547-30. Governor not to inquire into guilt or innocence.
Court cannot consider claim that affidavit shows prosecution is barred by limitations. Waggoner v. Feeney, 44NE(2d)(Ind)499. See Dun. Dig. 3708.

10547-38. Governor may appoint agent.
Sheriff going to another state for a prisoner is to be allowed his actual expenses which would be railroad fare, hotel, taxi bills, etc., and if he goes by car he is only allowed his actual expenses limited by statute. Op. Atty. Gen., (390a-11), Apr. 3, 1941.

ARRESTS

10566. Defined—By whom made—Aiding officer.
It is duty of army commanders to turn violators of state laws over to civil authority in peace time, but they are not required to do so in time of war. Op. Atty. Gen. (310), Jan. 13, 1943.

10567. When made.
In prosecution of police officer for willful neglect of official duty, it was not prejudicial error to refuse request to read statutes pertaining to an officer's power to arrest because those statutes covered situations other than that presented by evidence, and court in summarizing indictment made elements of crime clear to jury, though court should have instructed jury as to officer's power and authority in response to such request. State v. Grunewald, 211M74, 300NW206. See Dun. Dig. 512.
Defendant's requested instructions that he as a police officer had no right to arrest proprietors of a house of ill fame without being in possession of competent evidence of commission of that felony were properly refused. Id.
This section relates to arrest made on a warrant, and is not intended to relate to arrest for crime committed in presence of officer making the arrest. Op. Atty. Gen. (785b), Jan. 25, 1943.

10568. How made—Restraint—Show warrant.
Manner of executing warrants. Op. Atty. Gen. (218f-3), Dec. 2, 1943.

10570. Without warrant, when—Break door, etc.
In prosecution of police officer for willful neglect of official duty, it was not prejudicial error to refuse request to read statutes pertaining to an officer's power to arrest because those statutes covered situations other than that presented by evidence, and court in summarizing indictment made elements of crime clear to jury, though court should have instructed jury as to officer's power and authority in response to such request. State v. Grunewald, 211M74, 300NW206. See Dun. Dig. 512.
Defendant's requested instructions that he as a police officer had no right to arrest proprietors of a house of ill fame without being in possession of competent evidence of commission of that felony were properly refused. Id.
Police should not arrest a man in his own home, without a warrant, for simple assault, attempted simple assault or threat to do bodily injury when these alleged offenses were not committed in the presence of the officer, and it is immaterial that wife states that she will sign a complaint against the man the next morning. Op. Atty. Gen. (785b), Dec. 3, 1942.
An officer with a warrant may arrest a man for drunkenness in his own home, but cannot arrest him without a warrant and merely on verbal complaint of wife. Id.
Inmates of a National Youth Administration Camp while driving government trucks are not employees of the United States and may be arrested for violation of highway laws in same manner as other persons. Op. Atty. Gen., (989a), April 17, 1940.

10575-1. Arrests any place in state—When allowed.
Chief of police receiving a warrant from municipal court for a felony against an accused in jail in another county may go to that county and be reimbursed from county funds. Op. Atty. Gen., (785*l*), March 26, 1940.
Authority of village constable to serve civil or criminal process outside village is doubtful. Op. Atty. Gen. (847a-8), Dec. 12, 1941; Dec. 18, 1941.
A village marshal may pursue one committing an offense within the village and arrest anywhere in the state. Op. Atty. Gen. (847a-8), Jan. 20, 1943.

EXAMINATION OF OFFENDERS—COMMITMENT—BAIL

10576. Process by whom issued.
A preliminary examination is not a trial, but an inquiry to determine whether there is sufficient ground to hold prisoner for trial. State v. Jeffrey, 211M55, 300NW7. See Dun. Dig. 2429.

10577. Proceedings on complaint—Warrant.
5. The complaint.
Proceedings for violation of municipal ordinances are not subject to or governed by the technicalities protecting defendants who are asked to answer for a crime against the state. State v. Siporen, 215M438, 10NW(2d) 353. See Dun. Dig. 6801.
6. The examination.
Even though an arrest be lawful, a detention of the prisoner for an unreasonable length of time without taking him before a committing magistrate will constitute false imprisonment. Kleidon v. Glascock, 215M417, 10NW (2d)394. See Dun. Dig. 517.

10588. Bail—Commitment.
1. Commitment.
Defendant may challenge sufficiency of evidence before committing magistrate in a timely proceeding by a writ of habeas corpus. State v. Gottwalt, 209M4, 295NW67. See Dun. Dig. 2436.
Uncorroborated testimony of an accomplice is sufficient to sustain a finding of probable cause for holding a pris-

oner to district court to answer for a felony. State v. Jeffrey, 211M55, 300NW7. See Dun. Dig. 2436.

Evidence need only fairly and reasonably tend to show commission of offense charged and probable cause for charging prisoner with its commission. Id.

10602. Examination before justice—Removal.

When court commissioner is acting for judge of district court, he is acting for the judge and effect of his acts are same as that of acts of judge, and when he acts for probate judge, his action has same effect as action of judge when performing same identical duties. Op. Atty. Gen. (128B), Jan. 27, 1942.

Action cannot be dismissed on motion of county attorney by filing a written dismissal with the clerk of the district court without making application to the court and without the court making an order stating reasons for the dismissal before an information is filed on the basis of the complaint, following preliminary hearing in justice court. Op. Atty. Gen. 121B-(7), Dec. 29, 1943.

GRAND JURIES

10620. Indictment and presentment defined.

Indictment by a grand jury. 26MinnLawRev153.

10623. Indictment found, when.

An accountant in finance division of highway department was an accomplice as a matter of law in false auditing and payment of claims on state where he assisted in having claims approved with full knowledge that they were irregular. State v. Elsberg, 209M167, 295NW913. See Dun. Dig. 4060.

INDICTMENTS

10639. Contents.

14. Essential elements to be alleged.

Information charging obtaining of signatures to mortgages and notes by false pretenses held to sufficiently charge knowledge on part of defendant of falsity of documents used to obtain signatures and reliance of victims on false representations. State v. Gottwalt, 209M4, 295NW67. See Dun. Dig. 4390.

16. Ultimate facts.

In an information charging obtaining of signatures to mortgages and notes by false pretenses, it is not necessary to set out specific invoices and memoranda whereby signatures were obtained where false documents are described in general terms, defendant having right to demand a bill of particulars, unless documents are in his possession. State v. Gottwalt, 209M4, 295NW67. See Dun. Dig. 4384.

18. Following language of statute or ordinance.

An indictment which alleges an offense generally in the language of the statute, and is certain as to party, offense and particular circumstances of offense charged is sufficient. State v. Yurkiewicz, 208M71, 292NW782. See Dun. Dig. 4379.

10641. To be direct and certain.

4. Bill of particulars.

In an information charging obtaining of signatures to mortgages and notes by false pretenses, it is not necessary to set out specific invoices and memoranda whereby signatures were obtained where false documents are described in general terms, defendant having right to demand a bill of particulars, unless documents are in his possession. State v. Gottwalt, 209M4, 295NW67. See Dun. Dig. 4401.

10643. Different counts.

Two offenses cannot be joined in one information but means for committing same offense can be alleged in alternative. Op. Atty. Gen., (133B-7), April 29, 1940.

10645. Erroneous allegation as to person injured.

A charge of larceny from an unincorporated labor union sufficiently alleged ownership of the property. State v. Postal, 215M427, 10NW(2d)373. See Dun. Dig. 4399.

10646. Words of statute need not be followed.

It is sufficient that charging words are equivalent in meaning to those of statute defining a crime. State v. Jansen, 207M250, 290NW557. See Dun. Dig. 4377.

10648. Formal defects disregarded.

Denial of right to show bias or interest of a witness is prejudicial error. State v. Elijah, 206M619, 289NW 575. See Dun. Dig. 416.

Conduct of the prosecuting attorney on cross-examination of defendant was not so improper as to justify granting a new trial on the state of the record in the case. State v. Lemke, 207M35, 290NW307. See Dun. Dig. 2489.

An amendment of an indictment which alleges that old age assistance was obtained "by means of a false representation" in language of statute, so as to amplify and state in detail nature of false representations and reliance thereon, does not allege a new offense, but merely restates with particularity original one. State v. Jansen, 207M250, 290NW557. See Dun. Dig. 4430.

Date is not essential element of crime of embezzlement, and court did not err in permitting amendment of information by changing date on which charged theft took place, after admission of evidence at trial. State v McGunn, 208M349, 294NW208. See Dun. Dig. 4430.

A new trial will not be granted for refusal to dismiss when state rested if evidence as finally in warrants conviction. State v. Hokenson, 211M70, 300NW193. See Dun. Dig. 2477a.

On trial of charge of selling liquor on Sunday there was no fatal variance because proof showed an offsale, for which defendant had no license. State v. Wilson, 212M380, 3NW(2d)677. See Dun. Dig. 4941.

In prosecution for murder of wife it was highly improper for prosecutor on cross-examination of defendant to ask whether his wife remained silent as to his acts of misconduct in order to save the family reputation and also whether or not he had beat his first wife, but such questions, to which objections were sustained, were not prejudicial where record contained an abundance of testimony of defendant's brutality toward deceased. State v. Rediker, 214M470, 8NW(2d)527. See Dun. Dig. 2489.

Reference by prosecuting attorney to counsel for defendant as "doctor" could not be said to require a new trial in view of state of the record. Id. See Dun. Dig. 2490.

10653. Indictment for perjury.

What happens to perjurers. 24MinnLawRev727

10655. Limitations.

Abandonment of a child is a continuing offense, and limitation does not run during time father is outside state, and he is a fugitive from justice if offense charged is a few days prior to date of leaving state, and same result is accomplished if father returns to state and again leaves. Op. Atty. Gen., (193B-1), Sept. 28, 1939.

Statute begins to run from time of shortage or embezzlement by a city official, and not from time of its discovery by public examiners. Op. Atty. Gen., (353a-3), Mar. 31, 1941.

Indictment for embezzlement by city official must be filed within three years after commission of offense, irrespective of time crime was discovered. Op. Atty. Gen. (605A-13), Aug. 11, 1941.

10662. Larceny by clerks, agents, etc.

Ownership of money embezzled was properly alleged in one designated in a contract as "agent", but who in fact was trustee of business of another. State v. McGunn, 208M349, 294NW208. See Dun. Dig. 3001.

Date is not essential element of crime of embezzlement, and court did not err in permitting amendment of information by changing date on which charged theft took place, after admission of evidence at trial. Id. See Dun. Dig. 3002.

10663. Evidence of ownership.

A charge of larceny from an unincorporated labor union sufficiently alleged ownership of the property. State v. Postal, 215M438, 10NW(2d)373. See Dun. Dig. 4428.

INFORMATION

10665. Information shall state, what—Etc.

State v. Gottwalt, 209M4, 295NW67; note under §10685.

ARRAIGNMENT OF DEFENDANT

10671. Form of bench warrant in felony.

There is no provision for justice of the peace to issue a bench warrant. Op. Atty. Gen., (266b-27), June 12, 1941.

10678. Defendant informed of his right to counsel.

An inmate in a penal institution may be advanced money deposited with warden to employ attorneys to present case to parole or pardon board in the discretion of the director of division of public institutions, bearing in mind long established policy of giving accused an opportunity to present his case through counsel. Op. Atty. Gen. (342B), Oct. 2, 1941.

10681-1. Defense of alibi—Application by county attorney.

Notice of proposed introduction of evidence of alibi is required in Arizona, Indiana, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, South Dakota, Utah, Vermont and Wisconsin. (1942).

SETTING ASIDE INDICTMENT

10685. Grounds—Waiver of objections.

5. Held not grounds for setting aside.

Sufficiency of evidence before committing magistrate on preliminary hearing to justify a finding that a crime had been committed and that there was reasonable cause to charge defendant therewith, may not be raised upon a demurrer or a motion to quash information subsequently filed. State v. Gottwalt, 209M4, 295NW67. See Dun. Dig. 4422.

10688. Proceedings if new indictment is not found—Setting aside no bar.

Double jeopardy. 24MinnLawRev522.

DEMURRERS

10690. Grounds of demurrer.

1. In general.

Sufficiency of evidence before committing magistrate on preliminary hearing to justify a finding that a crime had been committed and that there was reasonable cause to charge defendant therewith, may not be raised upon a demurrer or a motion to quash information subsequently filed. State v. Gottwalt, 209M4, 295NW67. See Dun. Dig. 4416.

On demurrer to a "tab charge" in municipal court that defendant did "operate a tippling house at 23 No. Wash.", court was justified in amending charge to read "keep a disorderly (tippling) house at 23 So. Wash.", not changing nature of offense or misleading defendant as to the address. State v. Siporen, 215M438, 10NW(2d)353. See Dun. Dig. 6804.

8. Indictments held not double.

An information charging that two mortgages and two notes were obtained by same false pretenses in one transaction, does not charge more than one offense though separate notes and mortgages bear different dates. State v. Gottwalt, 209M4, 295NW67. See Dun. Dig. 4413.

PLEAS

10696. Plea of guilty.

Rule that a plea of guilty which has been withdrawn by leave of court is not admissible as an admission upon trial on substituted plea of not guilty does not apply to statements made to municipal judge on preliminary examination, which he waived. State v. McClain, 208M91, 292NW753. See Dun. Dig. 2444.

10698. Acquittal—When a bar.

Double jeopardy. 24MinnLawRev522.

ISSUES AND MODE OF TRIAL

10705. Issue of fact—How tried—Appearance in person.

1. In general.

Where defendant knew that newspaper articles concerning trial were read by jurors and with such knowledge proceeded with trial to a final conclusion without objection, he waived right to object. State v. Soltau, 212 M20, 2NW(2d)155. See Dun. Dig. 7107.

3. Evidence.

Photograph of burning truck taken after it had been stolen in Minnesota and moved into Iowa held admissible. Carpenter v. U. S., (CCA8), 113F(2d)692.

In prosecution for assault and battery, photograph taken by an amateur of the assaulted person shortly after the assault was admissible where testimony left no doubt that it was a true portrayal of condition of complaining witness. State v. Dimler, 206M81, 287NW785. See Dun. Dig. 3260.

Photographs shown by extrinsic proof to be faithful representations of place or object as it existed at time involved in controversy, are admitted when they serve to explain, illustrate, or otherwise be of aid to trier of fact. Id.

Where defendant's witness testified to statement made by state witness contradictory to her testimony, it was proper on rebuttal to call witnesses to whom state witness had made statement contradictory to statement testified to by defendant's witness. State v. Palmer, 206 M185, 288NW160. See Dun. Dig. 10319.

County attorney held not given too wide range in cross-examining defendant in respect to other offenses, brought into the case by his direct examination. Id. See Dun. Dig. 2459.

Illicit relations between a witness and victim of a crime may be shown to show bias, prejudice, interest and disposition of witness to tell truth. State v. Elijah, 206M619, 289NW575. See Dun. Dig. 10350.

State cannot cross-examine its own witness unless: testimony is adverse rather than lack of favorable testimony; prosecution must be surprised; and cross-examination must be restricted so as only to neutralize adverse testimony to which it is directed. State v. Lemke, 207M 35, 290NW307. See Dun. Dig. 10356.

In prosecution for manslaughter by abortion question to medical witness as to whether he was "able to determine from the examination of this body of this girl, and the different things that you saw, as to whether in your opinion that induced abortion was necessary to save the life of this woman?" was not accurately worded, but there was no prejudicial error where, read in its context, it clearly refers to observations made by witness in course of an autopsy which had been previously detailed. Id. See Dun. Dig. 3336.

Where state desires to cross-examine its own witness on ground of surprise, in deciding preliminary question of surprise court is entitled to use its discretion. Id. See Dun. Dig. 10356.

It was improper for county attorney on cross-examination of defendant to ask respecting statements made by defendant which he refused to agree to substantiate by proof, but defendant should have made a proper objection or move to strike out question and answer. Id. See Dun. Dig. 10307.

Rule that unexplained failure to call a witness or produce evidence within control of a party permits an inference that witness if called or evidence if produced would be unfavorable to party applies against a defendant in a criminal case, except only his own failure to testify. State v. Jansen, 207M250, 290NW557. See Dun. Dig. 3444.

Proof of similar acts which tend to characterize the specific act charged are admissible, although they incidentally tend to show the commission of other crimes. Id. See Dun. Dig. 2459.

Undisputed previous good character and reputation do not require an acquittal. Id. See Dun. Dig. 2449.

Even in criminal cases, a statute may properly shift to accused burden of going on with evidence, in his own possession or of facts within his own knowledge, where result is but a reasonable aid to prosecution and does not subject accused to hardship or oppression. McElhone v. G., 207M580, 292NW414. See Dun. Dig. 2449.

On prosecuting attorney's claim of surprise, permission to cross-examine and impeach prosecuting witness rests in discretion of trial judge. State v. McClain, 208M91, 292 NW753. See Dun. Dig. 10356(8).

Where prosecuting attorney was surprised by testimony of prosecuting witness, an extra-judicial statement of prosecuting witness introduced in evidence was for purposes of impeachment and not affirmative evidence of corpus delicti or guilt of defendant. Id.

Evidence of a proposal to plead guilty to a charge of embezzlement on promise or recommendation of a suspended sentence is not admissible on trial on a subsequent plea of "not guilty" to same charge. State v. McGunn, 208M349, 294NW208. See Dun. Dig. 2463.

Courts take notice of fact that whiskey is an intoxicating liquor. State v. Russell, 209M488, 296NW575. See Dun. Dig. 3451.

A statement, either oral or written, which lacked necessary foundation for admissibility at time it was made, if admissible where it is subsequently reaffirmed or reiterated as part of a dying declaration having necessary predicate. State v. Brown, 209M478, 296NW582. See Dun. Dig. 2461.

Fact that declarant was about to die and believed that death was imminent and there was no hope of recovery is essential as a predicate for admission of dying declaration. Id.

Existence of necessary predicate must be clearly shown and not left to conjecture to render a dying declaration admissible. Id.

State of mind of one making a dying declaration is susceptible of proof like any other fact, and no particular kind of proof is required. Id.

Existence of state of mind may be shown by declarations of declarant, which are generally regarded as most satisfactory evidence of fact, or by circumstantial evidence where facts shown support such an inference in the required degree, as affecting admissibility of dying declaration. Id.

Dying declarations were not inadmissible because there was conflicting evidence as to existence of a proper predicate upon which their admissibility depended. Id.

Dying declaration of victim of a homicide, including a case where death results from an illegal abortion, concerning facts and circumstances of infliction of fatal injury are admissible upon trial of person charged with having committed the abortion and homicide. Id.

Defendant's silence in face of accusation of policewoman which he provoked by asking a question and his evasive conduct under circumstances were admissible as admission. Id. See Dun. Dig. 2463.

Silence under accusation permits an inference that accused acquiesced in statement and admitted its truth. Id. See Dun. Dig. 3420.

Reputation of a defendant that may be testified to must be that of a general consensus of opinion on part of those who reside in his neighborhood, and has as a basis for its existence what has been heard and said among members of community. State v. Palmersten, 210M476, 299NW669. See Dun. Dig. 2458.

Testimony which on its face is not material or relevant and not shown to be so should be rejected. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 3241.

Admission in evidence of a letter otherwise immaterial to prove a date was permissible. Id. See Dun. Dig. 3249a.

In prosecution for abortion, all conversations between all persons taking any part in arrangements for abortion were admissible as acts of co-conspirators, even though victim was not technically an accomplice and took part in such conversations. State v. Tennyson, 212 M158, 2NW(2d)833, 139ALR987. See Dun. Dig. 27, 2460.

There is no error in admitting evidence from which no prejudice could result. Id. See Dun. Dig. 3251.

Everything said, written or done by any conspirator in execution or furtherance of the common purpose of a conspiracy to commit a crime is deemed to be act of every one of them and is admissible against each. Id. See Dun. Dig. 2460.

Where evidence of other similar crimes shows a common scheme or related crimes tending to prove present accusation, it is properly received. State v. Yurkiewicz, 212M208, 3NW(2d)775. See Dun. Dig. 2459.

Both corpus delicti and guilty of defendant may be proved by circumstantial evidence. State v. Lytle, 214M 171, 7NW(2d)305. See Dun. Dig. 2453.

In arson prosecution, evidence tending to prove that defendant was in financial straits, that burned property was insured, and that insurance was about to be canceled, was admissible as tending to prove motive. Id. See Dun. Dig. 2467.

Identification of defendant may be sufficient though facial features are not identified. Id. See Dun. Dig. 2468d.

In prosecution for rape, evidence that soon after offense girl assaulted made complaint of outrage is admissible in corroboration of her testimony. State v. Toth, 214M147, 7NW(2d)322. See Dun. Dig. 8231.

Where evidence is in conflict it is for trial court to determine which version to adopt. State v. Ronnenberg, 214M272, 7NW(2d)769. See Dun. Dig. 2477.

Trial court was not bound to accept testimony of defendant as true, where he was not only impeached but there were also surrounding circumstances strongly indicative of guilt. Id. See Dun. Dig. 10344a.

In prosecution for murder of wife it was highly improper for prosecutor on cross-examination of defendant to ask whether his wife remained silent as to his acts of misconduct in order to save the family reputation and also whether or not he had beat his first wife, but such questions, to which objections were sustained, were not prejudicial where record contained an abundance of testimony of defendant's brutality toward deceased. State v. Rediker, 214M470, 8NW(2d)527. See Dun. Dig. 2473.

Evidence obtained by search and seizure is admissible even though the search was unlawful. State v. Siporen, 215M438, 10NW(2d)353. See Dun. Dig. 2468i.

Intoxicating liquor is admissible in evidence though it has been seized unlawfully. Op. Atty. Gen., (218f-3), Oct. 31, 1939.

10706. Continuance—Defendant committed, when.

Denial of a continuance to give time for preparation for trial held not an abuse of discretion where defendants requesting such continuance were represented by same counsel who appeared for other defendants and defense of all was same alibi. Carpenter v. U. S., (CCA8), 113F(2d)692.

10707. Joint indictment, separate trial.

Indictment against one defendant may be consolidated with indictments against other defendants involving the same act or transaction, or acts or transactions connected together, or acts or transactions of the same class of crimes or offenses. Firotto v. U. S., (C.C.A.8), 124 F. (2d) 532. See Dun. Dig. 2474.

Where several charges involving more than one defendant are predicated on connected transactions and consolidated in one indictment, granting such defendants separate trials is a matter resting largely in the discretion of the trial court, which will not be reviewed in the absence of clear indications of serious prejudice to one or more of the defendants. Id.

10709. Juror may testify, when—View.

Failure to provide for benefit of defendant in an action for criminal negligence a stenographic transcript of proceedings at locus in quo, at which defendant was not present, recording court's comments to jury relating to objects identified, was a denial of due process. State v. Clow, 215M380, 10NW(2d)359. See Dun. Dig. 2475.

Court in a criminal case may point out and identify objects at the locus in quo to better enable jury to understand the testimony. Id.

10710. Questions of law and fact, how decided.

1. Province of court and jury generally.

Conflicts in evidence, credibility of witnesses, plausibility of explanations offered by defendant, and weight of evidence are all questions for jury. Neal v. U. S., (CCA8), 114F(2d)1000. Cert. den. 61SCR448.

The credibility of witnesses and the weight to be given to their testimony are matters to be determined by the jury. Firotto v. U. S., (C.C.A.8), 124 F. (2d) 532. See Dun. Dig. 2477.

A new trial will not be granted for refusal to dismiss when state rests if evidence as finally in warrants conviction. State v. Jamieson, 211M262, 300NW809. See Dun. Dig. 2477a.

Responsibility of imposing punishment upon a defendant in a criminal case rests exclusively with the court, and jury go outside their province as triers of the facts if they include the matter of punishment in their deliberations. State v. Finley, 214M217, 8NW(2d) 217. See Dun. Dig. 2477.

In a prosecution for murder of wife investigation by representatives of the state of a juror during the trial following information to prosecuting officials that such juror had indicated in a conversation to some unknown or undisclosed person that he believed defendant was guilty but that he was going to vote for acquittal did not require a new trial on the theory that such juror was intimidated, where such juror voluntarily appeared before trial judge and disclosed that she was of the opinion that the investigation was of a general nature and pertained to all of the jurors and that she was in no way influenced by it. State v. Rediker, 214M470, 8NW(2d)527. See Dun. Dig. 2473, 2490, 5235.

10711. Order of argument.

Proper way to object to argument of counsel and preserve claims of error is to object at the time, or, in lieu thereof, argument should be taken down by official reporter, and then objections should be made before jury retires to afford trial court opportunity to correct error, if any, and then argument, objections, and rulings should be made a part of settled case. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 2496.

County attorney's argument is to be condemned where he stated "I have been county attorney for this county now for—this is my tenth year. During that time I have probably handled some two thousand cases. I have never yet had a case where so much evidence came in, direct evidence, circumstantial evidence, and so many alibis, and I must say in frankness that I have never had such a strong case of the violation of the law." State v. Cook, 212M495, 4NW(2d)323. See Dun. Dig. 2474.

There was no prejudicial error or misconduct on part of state in permitting it, in its oral argument, to give tenor of a conversaion occurring a month or two before the fire in which statement was made, in presence of defendant, of how a good fire could be set in building which he was later accused of burning, nor was there prejudicial error in admitting evidence of such conversation, where it was of little probative force. State v. Lytle, 214M171, 7NW(2d)305. See Dun. Dig. 2478.

State closing argument to jury which was no more than a statement of conclusions which state contended jury was entitled to draw from circumstantial evidence presented was not prejudicial. Id.

In prosecution for murder of wife statement by prosecuting attorney in argument that deceased's physician was called as a witness by the state but that the defence would not permit the physician to speak on ground that information was confidential was not so prejudicial as to require a new trial. State v. Rediker, 214M470, 8NW (2d)527. See Dun. Dig. 2478.

Reference by prosecuting attorney to counsel for defendant as "doctor" could not be said to require a new trial in view of state of the record. Id.

10712. Charge of court.

1. In general.

Trial court erred in submitting to jury question whether witness was an accomplice whose testimony must be corroborated where evidence showed as matter of law that he was an accomplice, and such error was prejudicial because jury might have concluded that witness was not an accomplice and needed no corroboration. State v. Elsberg, 209M167, 295NW913. See Dun. Dig. 2479.

Jury should be instructed that prior conviction of crime may be considered in determining credibility and weight of testimony of a witness. State v. Soltau, 212M 20, 2NW(2d)155.

It is proper to instruct that weight of evidence should not be determined solely by number of witnesses. Id.

In prosecution for causing another's death by driving an automobile in a reckless and grossly negligent manner, court properly refused to instruct that if a second car struck deceased after he was struck by defendant's car and impact of second car was sufficient to cause death, there should be a verdict of not guilty even though deceased was already mortally wounded, where there was no evidence from which jury could infer that any car other than defendant's dealt a fatal blow to deceased, and there was no question but what wound inflicted by defendant was fatal. State v. Cook, 212M495, 4NW(2d)323.

An instruction that state "produced some witnesses who established, according to their testimony, that the defendant was in the vicinity of the fire or of the building at about the time the fire broke out. He was identified by some of the state's witnesses," if erroneous in using the word "established," defendant should have invited court's attention to it at the time, and in any case any vice in use of that word was eliminated by the following phrase "according to their testimony." State v. Lytle, 214M171, 7NW(2d)305. See Dun. Dig. 2479a.

Where defendant took exception to numerous parts of charge but not to specific part complained of, if there is any mere verbal inadvertence, it comes within rule of Steinbauer v. Stone, 85M274, 88NW754. Id.

It is proper in criminal cases to admonish jury that in event of verdict of guilty their responsibilities as triers of the facts do not extend to a consideration of the punishment. State v. Finley, 214M228, 8NW(2d)217. See Dun. Dig. 2479, 9789.

Where court did not present facts of case to jury, it was not required to instruct jury that they were exclusive judges of the facts, but it is generally advisable to give such an instruction. Id. See Dun. Dig. 2479.

When the court reviews evidence defendant is entitled to a charge that jury are exclusive judges of all questions of fact, but a failure so to charge, no request being made therefor and no exceptions taken to the charge as given, will not result in a reversal. Id. See Dun. Dig. 2479(b).

4½. Presumption of innocence.

"Presumption of innocence" is but a phrase used to caution jurors that they are not to infer that defendant

committed criminal act charged against him merely because he has been brought to trial. State v. Rivers, 206 M85, 287NW790. See Dun. Dig. 2451.

In prosecution for causing death by driving an automobile in a reckless and grossly negligent manner, a requested instruction that "Even though defendant was driving negligently, unless you are satisfied beyond a reasonable doubt the accident was not unavoidable, you must bring in a verdict of not guilty" was properly refused as imposing a greater burden on state than the law required. State v. Cook, 212M495, 4NW(2d)323. See Dun. Dig. 2449.

5. Requests for instructions.

In prosecution of police officer for willful neglect of official duty, it was not prejudicial error to refuse request to read statutes pertaining to an officer's power to arrest because those statutes covered situations other than that presented by evidence, and court in summarizing indictment made elements of crime clear to jury, though court should have instructed jury as to officer's power and authority in response to such request. State v. Grunewald, 211M74, 300NW206. See Dun. Dig. 2479a.

Absent a request, it is not reversible error not to give a cautionary instruction: as to weight of testimony of a witness previously convicted of crime; that weight of evidence is not to be determined solely by number of witnesses; and as to necessity of corroboration of accomplices and weight of their testimony. State v. Soltau, 212M 20, 2NW(2d)155. See Dun. Dig. 2479, 2479a.

It is error not to submit a matter in issue even without a request to charge, but corroboration of an accomplice relates only to proofs of matter in issue. Id. See Dun. Dig. 2479.

Unless there is evidence of facts, or of circumstances from which facts may be inferred, to which a requested instruction of law is applicable, it should not be given. State v. Cook, 212M495, 4NW(2d)323. See Dun. Dig. 2479.

It is proper to refuse a requested instruction fully covered in apt language in general charge. Id.

Failure of court to give a specific instruction, in the absence of a request, is not reversible error. State v. Finley, 214M228, 8NW(2d)217. See Dun. Dig. 2479a.

10713. Jury—How and where kept.

Trial courts should be vigilant to prevent any communications between bailiffs and juries except such as are absolutely necessary to provide for needs of jurors and to inform court that a verdict has been reached. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 7115.

Where evidence is conflicting as to whether there was improper communication between bailiff and jury, fact is to be determined by trial court in exercise of sound discretion, on motion for new trial. Id.

10722. Insanity, etc., of defendant.

District court may commit a defendant to any state hospital, and may commit him to hospital for dangerous insane, even without a finding that he has homicidal tendencies. Op. Atty. Gen., (248B-3), March 18, 1940.

Estate and guardian of one committed to asylum for dangerous insane by district court for safekeeping and treatment until recovery and trial for crime are liable for cost of maintenance while a patient in state hospital, the same as a patient committed by probate court. Op. Atty. Gen. (248A-1), Jan. 3, 1942.

10725. Dismissal of cause—Record of reasons for.

Action cannot be dismissed on motion of county attorney by filing a written dismissal with the clerk of the district court without making application to the court and without the court making an order stating reasons for the dismissal before an information is filed on the basis of the complaint, following preliminary hearing in justice court. Op. Atty. Gen. (121B-7), Dec. 29, 1943.

APPEALS AND WRITS OF ERROR

10747. Removal to supreme court.

Right to appeal from conviction is waived by payment of fine. Op. Atty. Gen. (208G), Feb. 27, 1942.

10751. Bill of exceptions.

Final argument of county attorney, not objected or excepted to when delivered does not justify a new trial, though it merits disapproval. State v. Palmer, 206M185, 288NW160. See Dun. Dig. 2496.

Where record discloses no adequate objection to cross-examination by state of its own witness with respect to a prior statement made by him, a new trial will not be ordered. State v. Lemke, 207M35, 290NW307. See Dun. Dig. 2496.

Omission to give certain instructions where no instructions were offered by appellant or exceptions taken to those given at time of trial does not make a new trial necessary. Id. See Dun. Dig. 2496.

It was improper for county attorney on cross-examination of defendant to ask respecting statements made by defendant which he refused to agree to substantiate by proof, but defendant should have made a proper objection or move to strike out question and answer. Id. See Dun. Dig. 2496.

Objections to argument of counsel made for first time on motion for new trial are not timely and will not be reviewed on appeal. State v. Jansen, 207M250, 290NW557. See Dun. Dig. 2496.

Where argument of county attorney was not part of settled case, misconduct cannot be shown on appeal by a transcript of minutes thereof made by a stenographer who took it down, though verity of transcript was shown by her affidavit, argument being a part of trial. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 2496.

A transcript of a stenographer's notes cannot take place of a settled case, even though official court reporter made notes and transcript. Id.

On appeal from conviction and imprisonment for perjury, supreme court cannot consider a statement not part of record, but shown by affidavit of defendant's counsel, that county attorney stated in a loud voice that no question of punishment by imprisonment was involved. Id.

Supreme court upon evidence by affidavit considered assignments relating to alleged misconduct of jury in reading newspapers and alleged improper communications between bailiff and jury, because such matters did not occur in course of trial, and record of trial court could not show them. Id.

The settled case cannot be supplemented by affidavit. Id.

Assignments relating to improper questioning of prospective jurors during impaneling of jury could not be considered because proceedings were part of trial and were not included in settled case. Id.

No error may be assigned on reception of testimony without objection at the time. Id. See Dun. Dig. 2479a.

No ruling or decision in course of a trial can be reviewed on appeal in absence of a settled case or bill of exceptions; but matters not occurring in court may be shown by affidavit. Id. See Dun. Dig. 2496.

When the court reviews evidence defendant is entitled to a charge that jury are exclusive judges of all questions of fact, but a failure so to charge, no request being made therefor and no exceptions taken to the charge as given, will not result in a reversal. State v. Finley, 214M228, 8NW(2d)217. See Dun. Dig. 2479(b), 2479a.

In both civil and criminal cases where no exception was taken to ruling admitting testimony over objection at the trial or where the error is not clearly specified in the motion for a new trial it is not properly a matter for review on appeal. State v. Clow, 215M380, 10NW(2d) 359. See Dun. Dig. 7091, 9724.

10752. Proceedings in Supreme Court.

1. In general.

Where verdict is guilty, reviewing court must take the most favorable view of the Government's testimony of which it is reasonably susceptible. Firotto v. U. S., (CC A8), 124F(2d)532. See Dun. Dig. 2500.

It is duty of appellate court in criminal cases to examine evidence with care to end that it may be able to determine guilt or innocence of accused. State v. Dimler, 206M81, 287NW785. See Dun. Dig. 2500.

Trial court has discretion to suspend sentence, and where there is no abuse of discretion, appellate court will not interfere with a sentence imposed in exercise of such discretion. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 2487.

Counsel should know that where only fact issues are involved nothing is to be gained by an appeal to supreme court. State v. Hope, 212M319, 3NW(2d)499. See Dun. Dig. 411.

Where only fact issues are involved nothing is to be gained by an appeal to the supreme court from a conviction for violating a city ordinance. State v. Davis, 212M608, 3NW(2d)677. See Dun. Dig. 2501.

Where a judgment in a criminal case is reversed upon ground that verdict and judgment are not sustained by evidence and case is remanded without directions as to disposition thereof in the trial court as required by statute, although necessary legal effect of such action is to remand case for a new trial, supreme court cannot amend its judgment accordingly. State v. Peterson, 214M204, 7NW(2d)408. See Dun. Dig. 2501.

After remittitur supreme court is without jurisdiction to amend its judgment. Id.

2. Incomplete record.

No ruling or decision in course of a trial can be reviewed on appeal in absence of a settled case or bill of exceptions; but matters not occurring in court may be shown by affidavit. State v. Soltau, 212M20, 2NW(2d)155.

3. New trial.

Where conviction and sentence under first count of indictment was free from error and sentence was such as might have been imposed under that count, it was unnecessary to discuss the other counts. Carpenter v. U. S., (CCA8), 113F(2d)692.

If there be no doubt of guilt, errors not affecting substantial or constitutional rights should be brushed aside. State v. Dimler, 206M81, 287NW785. See Dun. Dig. 2490.

A new trial in a criminal case should be granted cautiously and only for substantial error. Id.

Because in manslaughter case evidence as strongly supported an inference of innocence as it did one of guilt, a new trial was ordered. State v. Larson, 207M 515, 292NW107. See Dun. Dig. 2489.

A new trial will not be granted for refusal to dismiss when state rests if evidence as finally in warrants conviction. State v. Jamieson, 211M262, 300NW809. See Dun. Dig. 2477a.

New trials should be granted only where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. State v. Yurkiewicz, 212M208, 3NW(2d)775. See Dun. Dig. 2490.

Where evidence of defendant's guilt is very convincing there should be no new trial unless some constitutional right of his has been violated. State v. Cook, 212M495, 4 NW(2d)323. See Dun. Dig. 2490.

4. Misconduct of counsel.

Great weight is to be given judgment of trial court that there was no fault with argument of county attorney. State v. Palmer, 206M185, 288NW160. See Dun. Dig. 2500.

County attorney should not refer to defendant as a hoodlum, nor tell jury what witness he believes or does not believe. Id. See Dun. Dig. 7102(69).

There can be no reversal in a criminal case for alleged misconduct of prosecuting attorney in making his opening statement to jury without a record of statement claimed to be prejudicial. State v. Lemke, 207M35, 290 NW307. See Dun. Dig. 2496.

Proper way to object to argument of counsel and preserve claims of error is to object at the time, or, in lieu thereof, argument should be taken down by official reporter, and then objections should be made before jury retires to afford trial court opportunity to correct error, if any, and then argument, objections, and rulings should be made a part of settled case. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 2496.

Misconduct of county attorney in final argument may not be objected to for the first time on motion for a new trial. State v. Cook, 212M495, 4NW(2d)323. See Dun. Dig. 2478.

There was no prejudicial error or misconduct on part of state in permitting it, in its oral argument, to give tenor of a conversation occurring a month or two before the fire in which statement was made, in presence of defendant, of how a good fire could be set in building which he was later accused of burning, nor was there prejudicial error in admitting evidence of such conversation, where it was of little probative force. State v. Lytle, 214M171, 7NW(2d)305. See Dun. Dig. 2490.

5. Newly discovered evidence.

It was not an abuse of discretion to deny a motion for a new trial on ground of newly discovered evidence dealing with a matter too remote to be material. State v. Bresky, 213M323, 6NW(2d)464. See Dun. Dig. 2490.

6. Reception of evidence.

Admission of testimony which was admissible against two defendants as an admission of their guilt but which was hearsay as to the other defendant, was not ground for reversal of conviction where the other defendant made no request for instruction excluding such testimony from consideration of jury upon question of his guilt. Carpenter v. U. S., (CCA8), 113F(2d)692.

Denial of motion for new trial made by one of defendants who were tried together and convicted, based upon a co-defendant's affidavit confessing perjury at the trial was not error where the confessing co-defendant was not a government witness and where his testimony at the trial, given in his behalf, did not involve the defendant seeking a new trial. Firotto v. U. S., (CCA8), 124F(2d)532. See Dun. Dig. 2489.

No complaint can be made of county attorney's objection to a question which attorney for defendant withdrew. State v. Palmer, 206M185, 288NW160. See Dun. Dig. 2479a.

Permitting expert to examine hospital records, but not their receipt in evidence was not error to defendant's prejudice. Id. See Dun. Dig. 2490.

Answer of accused to question on cross-examination as to whether he had made a certain statement being in the negative was not prejudicial. State v. Lemke, 207M35, 290NW307. See Dun. Dig. 2489.

Defendant cannot complain of answer of witness not called for by question where he made no motion to strike it from the record. Id. See Dun. Dig. 2500.

In prosecution for manslaughter, opinion of coroner that the "woman died from a criminal abortion", while based on an ultimate issue, did not so affect jury as to make a new trial necessary. Id. See Dun. Dig. 2489.

Sustaining objection to testimony of character witness on ground of lack of foundation held harmless. State v. Palmersten, 210M476, 299NW669. See Dun. Dig. 2490.

In prosecution of a minister for perjury committed in a liquor prosecution, no prejudice resulted from admission in evidence on examination of defendant fact that he had gone back to vote after he had moved from a district, where testimony was ordered stricken on subsequent objection. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 2490.

In prosecution for abortion permitting physician called by state to testify that material used to produce an abortion was dangerous to life of woman could not have been prejudicial, since any juror of ordinary intelligence knows that an attempt to produce an abortion is dangerous. State v. Tennyson, 212M158, 2NW(2d) 833, 139ALR987. See Dun. Dig. 3451, 7187.

Where competent proof of defendant's guilt was convincing, any error in admitting self-serving letters written by complaining witness was not prejudicial and did not require a new trial. State v. Yurkiewicz, 212M208, 3 NW(2d)775. See Dun. Dig. 2490.

In prosecution for assault and battery upon a woman in her apartment, it was not prejudicial error to exclude evidence of a plumber that he had instructed defendant to return to the complaining witness's apartment to examine a radiator. State v. Bresky, 213M323, 6NW(2d)464. See Dun. Dig. 2490.

Where evidence relied upon by the state was largely circumstantial, prejudice was more likely to arise in the admission of family history of the accused. State v. Clow, 215M380, 10NW(2d)359. See Dun. Dig. 10348.

In prosecution of secretary-treasurer of a local labor union for larceny of funds, there was no error in the admission of a check belonging to the local, the proceeds of which were turned over to defendant personally, although the proceeds of the check had been the subject of a criminal prosecution in which defendant had been acquitted by direction of the court, the defendant himself having introduced the judgment roll of his acquittal. State v. Postal, 215M427, 10NW(2d)373. See Dun. Dig. 2459.

In prosecution for secretary-treasurer of a labor union for larceny of funds, there was no prejudicial error in admission of evidence that a general meeting of the Local was preceded by a preliminary meeting whereat friends of the officers of the local were the only ones admitted, nor in the admission of certain undenied accusations made by a union member against the defendant and other officers. Id. See Dun. Dig. 7180.

7. Misconduct of or respecting jury.

At common law in criminal trials communications between a bailiff and a jury were absolutely prohibited, except to make known their necessities and to answer question whether they had agreed on a verdict, and any communication except those permitted vitiated verdict without a showing of prejudice, but rule now is that verdict will not be set aside unless prejudice is shown. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 7115.

Where defendant knew that newspaper articles concerning trial were read by jurors and with such knowledge proceeded with trial to a final conclusion without objection, he waived right to object. Id. See Dun. Dig. 7107.

Conduct of jurors in reading newspapers during trial was a mere irregularity, but not grounds for a new trial, where published articles were reports of incidents which occurred at the trial and in the courtroom and presumably known to jurors. Id. See Dun. Dig. 2490.

Statements to a third party by a juror that the juror did not agree to the verdict of guilty could not be used to impeach the verdict. State v. Bresky, 213M 323, 6NW(2d)464, following State v. Talcott, 178M564, 227NW893. See Dun. Dig. 7109.

JUDGMENTS AND EXECUTION THEREOF

10757. Judgment on conviction—Judgment roll.

Court cannot usurp powers of pardon board or board of parole by suspending a sentence after commitment, but always has right to grant a new trial or to correct a judgment or sentence entered by mistake. Op. Atty. Gen., (341k-9), Jan. 17, 1940.

A person is "convicted" within meaning of Selective Service Regulations when there has been a determination of guilt and an imposition of sentence, even though sentence is subsequently suspended or stayed. Op. Atty. Gen. (310), Feb. 18, 1941.

Where defendant was sentenced when board of classification was in existence and placed on probation and after abolishment of such board he was sentenced for a second crime, court could revoke probation and amend first sentence by changing institution of confinement. Op. Atty. Gen. (341k-9), Dec. 11, 1941.

INDETERMINATE SENTENCES AND PAROLES

10765. Term of sentence.

Maximum sentence for attempted swindling is 2½ years and minimum sentence is nothing in view of indeterminate sentence law. Op. Atty. Gen. (341k-5), July 10, 1940.

Board of parole is not bound by minimum sentences and may parole prisoners at any time. Op. Atty. Gen., (341k-5), June 16, 1941.

Where defendant was sentenced when board of classification was in existence and placed on probation and after abolishment of such board he was sentenced for a second crime, court could not revoke probation and amend first sentence by changing institution of confinement. Op. Atty. Gen. (341k-9), Dec. 11, 1941.

10769. Chairman of board—Salary—Compensation of members.

Provisions authorizing board of parole to charge expenses of parole of prisoners from state penal institutions to funds of respective institutions are still in force, but are temporarily suspended. Op. Atty. Gen., (640), Dec. 5, 1939.

10770. Powers of board—Limitations.

Under the old form for conditional pardons or commutations there was not as now a requirement of waiver by the prisoner of the right to notice and hearing before a revocation, and in the circumstances the safe course to follow before the revocation of such former pardons or

commutations, whether a violation of their conditions is evidenced by subsequent conviction of otherwise, is to give the released convict notice of the board's intention and of a time and place when and where he can be heard. Op. Atty. Gen. (328a-9), May 18, 1943.

Period of release granted conditionally by pardon board may operate as a suspension of the sentence rather than as a part of the sentence, and a condition may be imposed which would permit imprisonment for unexpired portion of sentence, even after the expiration of the period covered by the original sentence. Id.

10773. Duty of board—Final discharge.

A commutation of sentence to a term of 4½ months, with reservation of right to revoke commutation for misconduct, does not restore civil rights. Op. Atty. Gen. (68h), Sept. 13, 1940.

Convict is not entitled to restoration of civil rights when he can still be recommitted for a violation of conditional pardon, and this was true where sentence was unconditionally commuted by Board of Pardons to a term of four years, and later Board of Pardons granted another commutation subject to certain conditions of conduct, board not having filed a certificate of absolute discharge. Op. Atty. Gen. (328b-2), Feb. 25, 1943.

When board of pardon grants releases through an unconditional commutation of sentence and so certifies, governor on receipt of certification may in his discretion restore such persons to civil rights, but then a prisoner is released through a commutation granted on condition the pardon board's jurisdiction is not completely terminated and governor has no power to restore civil rights before the final disposition of the sentence. Op. Atty. Gen. (68h), May 18, 1943.

10775. Supervision by board—Agents.

Provisions authorizing board of parole to charge expenses of parole of prisoners from state penal institutions to funds of respective institutions are still in force, but are temporarily suspended. Op. Atty. Gen., (640), Dec. 5, 1939.

10777. Rules governing paroles, etc.

Board may adopt rule that a parole may be rescinded as of date of violation though case is not considered until some time later. Op. Atty. Gen. (328a-9), Apr. 19, 1943.

10778-1. Governor may enter into reciprocal agreement.

Under reciprocal compact no formal requisition, governor's warrant in extradition, hearing to accuse or take him before a judge to obtain waiver of his right to habeas corpus, is necessary. Op. Atty. Gen., (193a-4), March 4, 1940.

Opinion of March 4, 1940, that under reciprocal compact no formal requisition, governor's warrant in extradition, hearing to accuse or take him before judge to obtain waiver of his right to habeas corpus, is necessary, is limited to cases covered by interstate compact, where a parolee is allowed to go into another state by consent of both, and does not cover case of a person, paroled within a state, who thereafter flees to another state. Op. Atty. Gen. (193a-4), Nov. 14, 1940.

Interstate compact as to parolees does not cover parolee who has fled from paroling state, and he is subject to extradition. Op. Atty. Gen. (193a-4), June 15, 1942.

BOARD OF PARDONS

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

Any person, convicted of crime in any Court of this State, who was under the age of 21 years at the time when said criminal act was committed, and which person has served the sentence imposed by the said Court and complied with all the orders of said Court with respect thereto, including probation or parole, and has been discharged of said sentence either by order of Court or by operation of law, may petition the board of pardons for the granting of a pardon extraordinary. If the board of pardons shall determine that such person has been convicted of no criminal acts other than the act upon which such conviction was founded and is of good character and reputation, the board may, in its discretion, grant to such person a pardon extraordinary. Such pardon extraordinary, when granted, shall have the effect of restoring such person to all civil rights, and shall have the effect of setting aside said conviction and nullifying the same and of purging such person thereof and such person shall never thereafter be required to disclose the said conviction at any time or place other than in a judicial proceeding thereafter instituted.

The application for such pardon extraordinary and the proceedings thereunder and notice thereof shall be governed by the statutes and the rules of the board in respect to other proceedings before the board and shall contain such further information as the board may require. (As amended Act Apr. 22, 1941, c. 377, §§1-4.).

Pardon for purpose of restoring citizenship in another state was no bar to imposition of a double sentence on subsequent conviction. State v. Stern, 210M107, 297NW 321. See Dun. Dig. 7296.

A commutation of sentence to a term of 4½ months, with reservation of right to revoke commutation for misconduct, does not restore civil rights. Op. Atty. Gen. (68h), Sept. 13, 1940.

Under the old form for conditional pardons or commutations there was not as now a requirement of waiver by the prisoner of the right to notice and hearing before a revocation, and in the circumstances the safe course to follow before the revocation of such former pardons or commutations, whether a violation of their conditions is evidenced by subsequent conviction or otherwise, is to give the released convict notice of the board's intention and of a time and place when and where he can be heard. Op. Atty. Gen. (328a-9), May 18, 1943.

Period of release granted conditionally by pardon board may operate as a suspension of the sentence rather than as a part of the sentence, and a condition may be imposed which would permit imprisonment for unexpired portion of sentence, even after the expiration of the period covered by the original sentence. Id.

CHAPTER 105

State Prison and State Reformatory

STATE PRISON

10787. Location and management.

Act Mar. 5, 1941, c. 69, §1, authorizes sale to Washington County Historical Society, of warden's residence at old prison in Stillwater, Minnesota.

10795. Visitors—Fees.

Visitors' fees are not subject to federal admission tax. Op. Atty. Gen. (532A-1), Jan. 27, 1942.

10796. Clothing and food—Money on discharge. [Repealed.]

Repealed. Laws 1943, c. 430, §4.

Op. Atty Gen. (91c-1), May 27, 1943, June 8, 1943; note under §1021 (2), 640.32.

Every inmate at Women's Reformatory at Shakopee is entitled to be paid $25.00 upon discharge, and it is immaterial that state has been put to much expense in pursuing and apprehending and caring for inmates. Op. Atty. Gen. (344f), May 2, 1942.

10797. Commitment papers, etc.

The warden of the state prison has the right to refuse to accept any prisoners if the sheriff delivering them does not present proper and complete commitment papers. Op. Atty. Gen., (341), June 27, 1941.

10799. United States convicts.

Rule formerly applicable to imprisonment of federal women prisoners in penitentiary now apply to imprisonment in reformatory. Op. Atty. Gen., (342f), Apr. 8, 1941.

Civil rights should be restored to convict not a resident of the state at time of conviction. Op. Atty. Gen. (68h), Mar. 5, 1943.