CHAPTER 619

CRIMES AGAINST THE PERSON

619.01 SUICIDE, CHALLENGE, TORTURE, AND CRUELTY.

HISTORY. Penal Code ss. 141, 205, 359; 1893 c. 96 s. 1; G.S. 1894 ss. 6426, 6490, 6542, 6653; R.L. 1905 s. 4869; G.S. 1913 s. 8597; G.S. 1923 s. 10061; M.S. 1927 s. 10061.

SUICIDE

619.02 AIDING SUICIDE.

HISTORY. Penal Code s. 144; G.S. 1894 s. 6429; R.L. 1905 s. 4871; G.S. 1913 s. 8598; G.S. 1923 s. 10062; M.S. 1927 s. 10062.

619.03 ABETTING ATTEMPT AT SUICIDE.

HISTORY. Penal Code s. 145; G.S. 1894 s. 6430; R.L. 1905 s. 4872; G.S. 1913 s. 8599; G.S. 1923 s. 10063; M.S. 1927 s. 10063.

619.04 INCAPACITY OF PERSON AIDED, NO DEFENSE.

HISTORY. Penal Code s. 146; G.S. 1894 s. 6431; R.L. 1905 s. 4873; G.S. 1913 s. 8600; G.S. 1923 s. 10064, M.S. 1927 s. 10064.

HOMICIDE

619.05 HOMICIDE CLASSIFIED.

HISTORY. Penal Code ss. 148, 149; G.S. 1894 ss. 6433, 6434; R.L. 1905 s. 4874; G.S. 1913 s. 8601; G.S. 1923 s. 10065; M.S. 1927 s. 10065.

Defenses raised on appeal are too technical and trivial to warrant consideration. State v Rusk, 123 M 276, 143 NW 782.

To establish the charge of murder in the third degree, the state need not show that the defendant was inherently of depraved mind. The nature of the act causing the death of another, and the circumstances attending it, may be prima facie evidence that the doer of the act was a man of depraved mind. State v Weltz, 155 M 143, 193 NW 43.

The evidence sustains the finding of the jury that the defendant was one of a party of three, who had participated in a bank robbery and were in flight, some one of whom shot and killed an officer who intercepted them as they were fleeing. State v McTague, 158 M 516, 197 NW 962.

Evidence that defendant was possessor of a weapon of the kind with which the homicide was committed is not rendered incompetent by reason of the fact that it tends incidentally to prove the commission of other and unrelated offenses. State v McClendon, 172 M 106, 214 NW 782.

A conviction for homicide cannot stand on evidence of motive with nothing more. There must be enough additional evidence so that the whole shows guilt beyond reasonable doubt. State v Waddell, 187 M 191, 245 NW 140.

In murder prosecution the county attorney's argument to the jury that just as surely as defendant "killed her husband in cold blood, that same thing will happen to her son, or someone else if she is released" was prejudicial. State v Schabert, 218 M 1, 15 NW(2d) 585.

Indictment for murder when death occurs more than a year and a day after the assault. 19 MLR 241.

619.06 PROOF OF DEATH, AND OF KILLING BY DEFENDANT.

HISTORY. Penal Code s. 150; G.S. 1894 s. 6435; R.L. 1905 s. 4875; G.S. 1913 s. 8602; G.S. 1923 s. 10066; M.S. 1927 s. 10066.

A prisoner's confessions are insufficient for his conviction without other proof that the crime has been committed. If there be no evidence that a crime has been committed, it is improper to admit the confession of the accused. Upon a voluntary confession of a crime by a prisoner, the jury is not bound to take as true the statement most favorable to the prisoner, nor anything he may have said in his own favor, merely because the state has used it against him. State v Laliyer, 4 M 368 (277).

Evidence that the offense charged has been committed by some person is all that is required in order that the confession of the defendant may be sufficient to warrant his conviction. It is not necessary that such evidence should be introduced before the confession is received. State v Grear, 29 M 221, 13 NW 140.

The death of the person charged in the indictment to have been killed was sufficiently established by direct proof, within the meaning of the statutes, and the evidence justified the jury in finding defendant guilty. State v Schreiber, 111 M 138, 126 NW 536.

The stab inflicted by defendant penetrated the left lung of the deceased. Forty-eight hours after the assault, the deceased developed pneumonia from which he died a week later. The evidence did not leave the cause of death a matter of speculation or conjecture. It is clear the germ causing the death entered through the puncture. State v James, 123 M 487, 144 NW 216.

Defendant is the mother of the girl who gave birth to a child, and was indicted for the murder of the newborn child. There is no direct evidence that anyone saw the child, dead or alive. There was no body and experts were unable to testify as to whether the child was born alive. The evidence is insufficient to warrant a verdict of murder in the first degree or any lesser degree thereof. State v Voges, 197 M 85, 266 NW 265.

It is not error for the trial court to deny defendant's motion made at the opening of the case to require the state to elect as to the theory of the manner in which death of the deceased was brought about by the defendant. The charges were sufficiently specific. Specific proof of the exact manner of death is not required when there was sufficient proof that the death of the deceased was caused by some specific act by the defendant. State v Poelaert, 200 M 30, 273 NW 641.

It is identity of the offense, and not of the act, which is referred to in the 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 the consequences affect, separately, each person injured, there is a corresponding number of distinct offenses. State v Fredlund, 200 M 44, 273 NW 353.

Indictment for murder when death occurs more than a year and a day after the assault. 19 MLR 241.

619.07 MURDER IN FIRST DEGREE.

HISTORY. Penal Code ss. 152, 156; G.S. 1894 ss. 6437, 6441; R.L. 1905 s. 4876; 1911 c. 387; G.S. 1913 s. 8603; G.S. 1923 s. 10067; M.S. 1927 s. 10067.

1. Definition; evidence
2. Intention and premeditation distinguished
3. Presumption as to intention, malice and premeditation
4. Premeditation
5. By conspirators
6. What constitutes
7. Indictment

1. Definition; evidence

The court, in defining murder to the jury, should give the statutory, rather than the common law, definition. Bonfanti v State, 2 M 123 (99).

To establish the charge of murder in the third degree, the state need not show that defendant was inherently of depraved mind. The evidence may be prima facie evidence that the doer was a man of depraved mind. State v Weltz, 155 M 143, 193 NW 42.

The evidence sustains the verdict finding the defendants guilty of murder in the first degree. Their claim that they swore falsely on the trial and of new evidence available was not sufficient to warrant a new trial. State v Gleeman, 170 M 197, 212 NW 203.

Snoek did the killing, defendant being present. The evidence justified the jury in finding that defendant with knowledge of Snoek's intent to kill Smith encouraged and abetted him in accomplishing his object. State v Youngquist, 176 M 562, 223 NW 917.

The injured person fatally wounded made a statement 30 minutes after he was shot, and repeated the statements with further particularity at the hospital three hours after the fatal wound. The first statement was a part of the res gestae, and it was not error to receive in evidence the statement made at the hospital. State v Jue Ming, 180 M 221, 230 NW 639.

A conviction for homicide cannot stand on evidence of motive with nothing more. There must be enough additional evidence so that the whole shows guilt beyond a reasonable doubt. In the instant case the motive (insurance) plus circumstantial evidence sustains a verdict of guilty. State v Waddell, 187 M 191, 245 NW 140.

The court in this case did not err in refusing to submit to the jury the question of whether the defendant could be convicted of manslaughter in the first degree. Defendant was properly convicted of murder in the second degree. State v Norton, 194 M 410, 260 NW 502.

The testimony of the accomplice was sufficiently corroborated. State v Jackson, 198 M 111, 268 NW 924.

The evidence supported the admission in evidence of a scoopshovel with which the state contended the murder was committed, and that hair similar to that of the deceased was not discovered on the shovel until some months later went to the weight, but not to the admissibility, of the evidence. State v Rowe, 203 M 172, 280 NW 646.

The word "unjustifiable" and its antonym "justifiable" are far from being unknown in our law. Section 619.07 makes killing of a human being murder in the first degree unless it is "excusable or justifiable," and by section 619.52 the term "justifiable" is used in connection with libel. State v Eich, 204 M 136, 282 NW 810.

Verdict of murder in the first degree is sustained by the evidence. State v Sucik, 217 M 556, 14 NW(2d) 857.

Where the attorney for the defendant takes the stand and serves as a witness in the case he is then subject to liberal cross-examination by the state, not only regarding the issue he testifies but the case is open for complete examination. State v Gorman, 219 M 162, 17 NW(2d) 42.

Jury triers; consent that challenge be tried by the court. 9 MLR 357.

2. Intention and premeditation distinguished

"Intentionally" and "with premeditated design" are not synonymous expressions; the latter involving a greater degree of deliberation and forethought than the former. State v Brown, 12 M 538 (448); State v Hoyt, 13 M 132 (125).

If the intention to kill is formed the "heat of passion, upon sudden provocation, or in sudden combat," or, though formed in the heat of passion, is executed after sufficient cooling time, or after the heat of passion has subsided, the case comes within the meaning of a killing with a premeditated design to affect the death of the person killed. State v Hoyt, 13 M 132 (125); State v Nelson, 148 M 285, 181 NW 850.

Evidence of ill-feeling and threats admissible. State v Nelson, 148 M 285, 181 NW 850.

3. Presumption as to intention, malice and premeditation

Every homeside is presumed unlawful and when the mere act of killing is proved, and nothing more, the presumption is that it was intentional, malicious, and murder. State v Shippey, 10 M 223 (178); State v Brown, 12 M 538 (448); State v Lautenschlager, 22 M 514; State v Prolow, 98 M 461, 108 NW 873.

This presumption is for the accused to rebut. State v Shippey, 10 M 223 (178).

An instruction that "the law presumes a premeditated design from the naked fact of killing" is inaccurate but not prejudicial. State v Lautenschlager, 22 M 514.

A deliberate and intentional homicide is presumptively murder. State v Hanley, 34 M 430, 26 NW 397.

Murder in the first degree may be proved by the mere fact of killing and the attendant circumstances; and, where there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was malicious as well as intentional and was prompted and determined on by the ordinary operations of the mind. State v Brown, 41 M 319, 43 NW 69.

Murder in the first degree may be proved by the mere fact of an intentional killing. State v Lentz, 45 M 177, 47 NW 720.

When it clearly appears that defendant deliberately and intentionally shot deceased, the presumption is that it was an act of murder. Premeditation means thought beforehand for any length of time, no matter how short. There need be no appreciable time between the conception of the intention and the act of killing. State v Prolow, 98 M 459, 108 NW 873.

When the undisputed evidence shows that the homicide was committed with a dangerous weapon with design to effect death, or under circumstances from which such design must conclusively be inferred, and after time sufficient for passion to subside, it is murder, and not manslaughter. State v Towers, 106 M 105, 118 NW 361.

4. Premeditation

The character of the weapon used in sudden combat may be considered for the purpose of determining whether the party killing entered upon the combat with a premeditated design to kill; and such design may be inferred from a previous arming with a deadly weapon. State v Hoyt, 13 M 132 (125).

Where it appears that the accused intentionally committed the murder as a matter of revenge, the premeditated design sufficiently appears. State v Gut, 13 M 341 (315).

Design held properly inferred from the expression of the accused that "dead men tell no tales." State v Staley, 14 M 105 (75).

The law does not attempt to define the length of time within which the determination to murder or commit the unlawful act resulting in death must be formed. State v Brown, 41 M 319, 43 NW 69.

Various degrees of murder were read to the jury by the court. The court properly stated that murder in the first degree requires a design to effect the death of the person killed or another. State v Norton, 194 M 410, 260 NW 502.

5. By conspirators

A person may be guilty of murder actually perpetrated by another, if he combines with such other party to commit a felony, engages in its commission, and death ensues in the execution of the felonious act. If two or more persons, having confederated to attack and rob another, actually engage in the felony, and in the prosecution of the common object the person assailed is killed, all are alike guilty of the homicide. State v Barrett, 40 M 77, 41 NW 463.

6. What constitutes

If a person kills A when intending to kill B, it is murder. Bonfanti v State, 2 M 123 (99).

The designed killing of another without provocation and not in sudden combat is none-the-less murder because done in a state of passion. State v Shippey, 10 M 223 (178).

The intentional killing of an officer acting in the proper discharge of his duty, is ordinarily murder in the first degree. State v Spaulding, 34 M 361, 25 NW 793.

7. Indictment

Prior to the enactment of the Penal Code, effective Jan. 1, 1886, the common law controlled except as modified by statute. An indictment which follows the form provided by statute (see General Statutes 1878, Chapter 108), is sufficient. Bilansky v State, 3 M 427 (313); State v Dumphey, 4 M 438 (340); State v Ryan, 13 M 370 (343); State v Lessing, 16 M 75 (64); State v Lautenschlager, 22 M 514; State v Johnson, 37 M 493, 35 NW 373.

An indictment which charges the killing of a person on a day specified imports that he died on that day. State v Ryan, 13 M 370 (343).

An indictment charging defendant in this state, followed by death in another, held sufficient. State v Gessert, 21 M 369; State v Smith, 78 M 362, 81 NW 17.

The means employed to effect death need not be stated precisely. State v Lautenschlager, 22 M 514.

The indictment may charge the killing to have been done "with premeditated design to effect the death" instead of "with malice aforethought." State v Holong, 38 M 368, 37 NW 587.

619.08 MURDER IN SECOND DEGREE.

HISTORY. Penal Code ss. 153, 157; G.S. 1894 ss. 6438, 6442; R.L. 1905 s. 4877; G.S. 1913 s. 8604; G.S. 1923 s. 10068; M.S. 1927 s. 10068; 1941 c. 314 s. 1.

The indictment construed as one for manslaughter in the first degree and not murder in the second degree. The words "wilfully killed" are not the equivalent of "with a design to effect death." State v Smith, 78 M 362, 81 NW 17; State v Prolow, 98 M 459, 108 NW 873.

Every homicide is presumed unlawful and when the mere act of killing is proven it is presumed intentional and malicious. State v Prolow, 98 M 459, 108 NW 873.

Defendant was indicted for murder in the first degree. The evidence sustains the finding of the jury that defendant was guilty of murder in the second degree. State v Quinn, 186 M 243, 243 NW 70; State v Poelaert, 200 M 30, 273 NW 641.

Three degrees of murder defined. Murder in the second degree requires a design to effect the death of the person killed or another, but without deliberation or premeditation. State v Norton, 194 M 412, 260 NW 502.

Amendment to Laws 1941, Chapter 314, Section 1. 26 MLR 222.

619.09 DUEL FOUGHT OUT OF STATE.

HISTORY. Penal Code s. 154; G.S. 1894 s. 6439; R. L. 1905 s. 4878; G.S. 1913 s. 8605; G.S. 1923 s. 10069; M.S. 1927 s. 10069.

619.10 MURDER IN THIRD DEGREE.

HISTORY. Penal Code ss. 155, 158; G.S. 1894 ss. 6440, 6443; R.L. 1905 s. 4879; G.S. 1913 s. 8606; G.S. 1923 s. 10070; M.S. 1927 s. 10070; 1941 c. 314 s. 2.

1. What constitutes
2. Indictment

1. What constitutes

To warrant a conviction under this section the state need not prove affirmatively that the killing was without any design to effect death, nor that no circumstance of justification or extenuation existed. State v Stokeley, 16 M 282 (249).

This section was designed to cover cases where the reckless, mischievous or wanton acts of the accused were committed without special regard to their effect on any particular person or persons, but were committed with a reckless disregard of whether they injured one person or another. It is not necessary that more than one person was or might have been put in jeopardy by the reckless acts of the accused, but it is necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged. State v Lowe, 66 M 296, 68 NW 1094; State ex rel v Reed, 138 M 465, 163 NW 984; State v McTague, 158 M 516, 197 NW 962.

The court properly submitted murder in the third degree upon the theory that the jury might find that there was an unintentional killing while engaged in the commission of a felony. State v McTague, 158 M 519, 197 NW 962.

Defendant, one of four, concerned in the robbery of a bank, in the accomplishment of which an officer of the bank was killed, was guilty of murder. State v Shansky, 164 M 10, 204 NW 467.

Recklessly driving an automobile while drunk resulting in killing a person is third degree murder, and the fact defendant was so drunk that he did not know what he was doing is no defense. State v Shepard, 171 M 414, 214 NW 280.

The degrees of murder defined. Murder in the third degree is the killing of a human being, when perpetrated by an act eminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual, or without a design to effect death, by a person engaged in committing or attempting to commit a felony either upon or affecting the person killed or otherwise. State v Norton, 194 M 412, 260 NW 502; State v Eich, 204 M 138, 282 NW 810.

Where the verdict was of murder in the second degree but the evidence sustains conviction only in the third degree, this court has power to direct the entry of judgment accordingly. State v Jackson, 198 M 113, 268 NW 924.

It is the identity of the offense, and not of the act, which is referred to in the constitutional guarantee against putting a person twice in jeopardy. State v Fredlund, 200 M 45, 273 NW 353.

Relationship required between the felony and the killing. 21 MLR 333.

Manslaughter by motorists. 22 MLR 771.

Amendment, Laws 1941, Chapter 314.

2. Indictment

The acts, facts, and circumstances alleged in the court may be true, and yet defendant be guilty of no offense. The indictment is insufficient. State v McIntyre, 19 M 93 (65).

The term "wilfully" imports designedly and intentionally; and the indictment in the instant case is sufficient. State v Lehman, 131 M 427, 155 NW 399.

Defendant was indicted and convicted for the crime of murder in the third degree. The evidence justified the jury in finding from defendant's act alone, that he was a man of depraved mind within the meaning of this section. State v Weltz, 155 M 143, 193 NW 42.

Indictment by grand jury. 26 MLR 170.

619.13 MANSLAUGHTER.

HISTORY. Penal Code s. 159; G.S. 1894 s. 6444; R.L. 1905 s. 4880; G.S. 1913 s. 8607; G.S. 1923 s. 10073; M.S. 1927 s. 10073

The jury under the evidence and under the judge's charge might have found the defendant guilty of murder in the second degree or manslaughter in the first degree. The alternative was submitted. There was no error in a finding of murder in the second degree. State v Quinn, 186 M 251, 243 NW 70.

Manslaughter defined. State v Norton, 194 M 412, 260 NW 502.

Manslaughter by motorists. 22 MLR 755, 771.

619.15 MANSLAUGHTER IN FIRST DEGREE.

HISTORY. Penal Code s. 160; G.S. 1894 s. 6445; 1905 c. 125 s. 1; R.L. 1905 s. 4881; G.S. 1913 ss. 8608, 8609; G.S. 1923 ss. 10074, 10075; M.S. 1927 ss. 10074, 10075.

1. **Provocation**
2. **Cooling time**
3. **Indictment**
4. **Instructions**
5. **Practice**

1. Provocaton

A mere trespass upon land is not such a provocation as the law will recognize as sufficient to reduce a killing below murder. State v Shippey, 10 M 223 (178); State v Smith, 56 M 78, 57 NW 325; State v O'Neil, 58 M 478, 59 NW 1101.

The designed killing of another without provocation and not in sudden combat is no less murder because done in a state of passion. State v Shippey, 10 M 223 (178).

The killing of a friend of the accused, but out of his presence, is not a provocation. Provocation, to reduce homicide from murder to manslaughter, must be something the natural tendency of which would be to disturb and obscure the reason of men of average mind and disposition so as to cause them to act rashly without due deliberation or reflection, and from passion rather than judgment. To determine the sufficiency of the provocation the instrument or weapon with which the homicide was committed must be considered, for if it was effected with a deadly weapon the provocation must be great, indeed, to lower the grade of crime from murder. In case of sudden combat, the character of the weapon is not to be considered unless to determine whether the party entered into the combat with premeditated design to kill. The existence of provocation is for the jury under proper instructions from the court. State v Gut, 13 M 341 (315).

An attempt to make an arrest, by an officer authorized to make it, is of itself no provocation. State v Spaulding, 34 M 361, 25 NW 793.

Mere words do not constitute provocation. The facts constituting provocation must be proved by the accused if they do not appear from the evidence introduced by the state. They cannot be assumed by the jury without evidence. State v Hanley, 34 M 430, 26 NW 397; State v Smith, 56 M 78, 57 NW 325.

Laws 1905, Chapter 125, the definition of manslaughter in the first degree, amended Penal Code, Section 160 (General Statutes 1894. Section 6445, Revised Laws 1905, Section 4881), by adding the present clause (3), and by omitting the words "or gross misdemeanor" from clause (1). It may be safely assumed that the word "misdemeanor" as used in Laws 1905, Chapter 125, is used in a generic sense to include all misdemeanors. State v Nelson, 148 M 292, 181 NW 850.

If the facts proved under an indictment for murder in the first degree warrant a conviction of manslaughter in the second degree, the defendant upon request is entitled to the submission of such degree of manslaughter. State v Abdo, 149 M 195, 183 NW 143.

The evidence justified the submission of first degree manslaughter. Heat of passion may be caused by fright as well as by anger. State v Miller, 151 M 386, 186 NW 803.

Manslaughter by motorists. 22 MLR 771.

Death resulting from commission of a misdemeanor. 23 MLR 95.

2. Cooling time

If the intention to kill is formed before the heat of passion, upon sudden provocation, or in sudden combat, or though formed in the heat of passion is executed after sufficient cooling time, or after the heat of passion has subsided, the killing is with a premeditated design to effect death. State v Hoyt, 13 M 132 (125).

3. Indictment

The words "wilfully killed" are not the equivalent of "with a design to effect death." The indictment construed as one for manslaughter in the first degree, and not for murder in the second degree. State v Smith, 78 M 362, 81 NW 17.

Defendant threw deceased over a banister, thus killing him; and was indicted and convicted of manslaughter in the first degree. This was error. Defendant was entitled to an instruction submitting second degree manslaughter. State v Abdo, 149 M 195, 183 NW 143.

The indictment is not defective in charging a design on the part of the defendant to "effect the death of Albert W. Fenton, or of another." State v Miller, 151 M 386, 186 NW 803.

While the indictment charged manslaughter in the first degree, the trial court properly submitted to the jury the question of manslaughter in the second degree. State v Stevens, 184 M 286, 238 NW 673.

Indictment by grand jury. 26 MLR 170.

4. Instructions

The court should not instruct the jury with reference to the law of manslaughter, unless there is evidence tending to establish the elements which constitute that crime. State v Towers, 106 M 105, 118 NW 361.

There was no evidence to justify a verdict of manslaughter, and the trial court was correct in informing the jury that it was their duty to convict of murder in the first or second degree or acquit. State v Potoniec, 117 M 80, 134 NW 305.

The evidence was such that it was not proper to instruct that defendant was under all circumstances responsible for what his brother thought and did when firing the fatal shots. State v Miller, 151 M 386, 186 NW 803.

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, 184 M 292, 238 NW 673.

Where there was evidence tending to prove that defendant committed homicide while he was being chased with a pitchfork by the man who was killed, it was error in the trial court to instruct the jury that the law does not permit the taking of a human life to repel a mere trespass, "as in this case." This was in effect passing on the facts and ignoring the evidence of self-defense. State v Klym, 204 M 57, 282 NW 655.

5. Practice

Upon arriving at his home 40 minutes after the assault, he said to his mother: "One held me while the other hit me." The statement was admissible as part of the res gestae. State v Humphrey, 173 M 410, 217 NW 373.

A defendant in a criminal case in advancing good character to show the improbability of his guilt is not limited to general repute but may show as a fact that he possesses a certain disposition or certain personal characteristics. State v Humphrey, 173 M 410, 217 NW 373.

The court, under the facts disclosed, did not err in refusing to submit to the jury the question of whether the defendant could be convicted of manslaughter in the first degree. State v Norton, 194 M 412, 260 NW 502.

619.16 KILLING OF UNBORN CHILD OR MOTHER.

HISTORY. Penal Code ss. 161, 162; G.S. 1894 ss. 6446, 6447; R.L. 1905 s. 4882; G.S. 1913 s. 8610; G.S. 1923 s. 10076; M.S. 1927 s. 10076; 1935 c. 108.

The acts, facts and circumstances alleged in the first count may be true, and yet defendant be guilty of no public offense. The second count is bad because it is not therein alleged that the administration of the drug was not advised by two physicians to be necessary to save life. State v McIntyre, 19 M 93 (65).

An ante mortem statement of deceased was properly received in evidence as a dying declaration, it appearing that declarant was in extremis and realized her condition. State v Mueller, 122 M 91, 141 NW 1113; State v Hunter, 131 M 252, 154

NW 1083; State v Hatch, 138 M 317, 164 NW 1017; State v Doty, 167 M 164, 208 NW 760.

An instruction that to bring a case within the exception the danger of death must be immediate, is not erroneous where the defense is predicated on the existence of immediate danger to life. State v Hatch, 138 M 317, 164 NW 1017.

The evidence in this case is sufficient to sustain a finding that defendant, a midwife, used instruments upon a patient to procure a miscarriage and that the instruments used caused the injection of germs which produced a septic condition, resulting in death. State v Hansen, 153 M 339, 190 NW 481.

Proof of other abortions by the defendant prior to or about the time the one charged was competent as showing willingness and readiness, or a guilty or criminal intent. State v Doty, 167 M 164, 208 NW 760.

It was not error to receive in evidence statements of a woman aborted, to her husband, as to her treatment by defendant, during its progress. State v Doty, 167 M 164, 208 NW 760.

Statement of the deceased girl before the operation, indicating consultation with a physician other than defendant, but not stating a performance of the act, was properly excluded for lack of relevancy. State v French, 168 M 341, 210 NW 45.

Dying declarations may be impeached in the same manner as other testimony. State v French, 168 M 341, 210 NW 45.

Admission of testimony as to conversation had with deceased after performance of the operation is not prejudicial error since defendant was in no way mentioned in the conversation testified to. State v Zabrocki, 194 M 346, 260 NW 507.

619.17 MANSLAUGHTER IN FIRST DEGREE; PENALTY.

HISTORY. Penal Code s. 163; G.S. 1894 s. 6448; R.L. 1905 s. 4883; G.S. 1913 s. 8611; G.S. 1923 s. 10077; M.S. 1927 s. 10077.

619.18 MANSLAUGHTER IN SECOND DEGREE.

HISTORY. Penal Code s. 164; G.S. 1894 s. 6449; R.L. 1905 s. 4884; G.S. 1913 s. 8612; G.S. 1923 s. 10078; M.S. 1927 s. 10078.

The indictment upon which defendant was tried and convicted of manslaughter in the second degree stated facts sufficient to constitute that crime, as it is defined in Penal Code, Section 164, Clause 2. That the crime is committed "in the heat of passion" is a mitigating, not a differentiating circumstance, so that a failure to allege the fact, or a failure to prove it, could not have prejudiced defendant. State v Matakovich, 59 M 514, 61 NW 677.

The indictment does not state a public offense, because it does not sufficiently charge that death was caused by any of the acts or omissions of the accused. State v Lowe, 66 M 296, 68 NW 1094.

A parent who by culpable negligence fails to provide care, nurture, and sustenance and medical assistance to a child wholly incapable of supplying its own wants, and so causes its death, is guilty of manslaughter in the second degree. The indictment is sufficient. State v Staples, 126 M 396, 148 NW 283.

An indictment against a physician for manslaughter in the second degree, committed in connection with the operation of an X-ray machine, is sustained as against demurrer on the ground that the facts charged were not stated with sufficient certainty to, and did not, constitute a public offense. State v Lester, 127 M 282, 149 NW 297.

It is the infliction of death by culpable negligence that constitutes manslaughter in the second degree under General Statutes 1913, Section 8612 (s. 619.18), Clause 3. Disobedience of General Statutes 1913, Section 2635, may constitute culpable negligence. State v Goldstone, 144 M 405, 175 NW 892.

Defendant was charged with the crime of murder in the first degree and found guilty of manslaughter in the first degree. The facts proved under the indictment warrant a conviction of manslaughter in the second degree, and as the defendant requested instruction to that effect, there must be reversal. State v Abdo, 149 M 195, 183 NW 143.

It was not error to refuse to submit manslaughter in the second degree. The submission of that degree might be proper as to defendant's brother, also under arrest, but, if the brother was only guilty of manslaughter in the second degree, defendant was entitled to an acquittal. State v Miller, 151 M 386, 186 NW 803.

Defendant and his friend Anderson, when both were intoxicated, fought and as a result of blows by defendant, Anderson died. The evidence sustains a verdict finding defendant guilty of manslaughter in the second degree. State v Hagen, 160 M 408, 200 NW 480; State v Stevens, 184 M 286, 238 NW 673.

It is not incumbent on the state to show that the one killed in an automobile accident was not negligent or that death was not the result of an unavoidable accident. The evidence supports a conviction of manslaughter in the second degree, in that defendant while drunk drove his automoblie in a culpably negligent manner against a pedestrian, causing death. State v Kline, 168 M 263, 209 NW 881.

Defendant was properly convicted of manslaughter in the second degree for culpable negligence in running down, and causing the death of a pedestrian. State v Kline, 168 M 263, 209 NW 881; State v La Rose, 175 M 537, 221 NW 899; State v Melin, 179 M 1; 228 NW 171; State v Jackson, 181 M 68, 231 NW 721; State v Geary, 184 M 387, 239 NW 158; State v Warren, 201 M 369, 276 NW 655.

Defendant was indicted and tried for murder in the first degree and convicted of manslaughter in the second degree. It was charged she had caused the death of a newborn child of her unmarried daughter. Because the evidence does not show that defendant's conduct caused the death, the conviction cannot stand. State v Voges, 197 M 85, 266 NW 265.

An indictment charging defendant while fumigating a house, left it to go to a tavern, and left doors unlocked, and an eight year old boy entered and was killed by gas used in fumigation, properly charged the defendant with second degree manslaughter, and as being guilty of "culpable negligence" in that his acts were reckless. State v Cantrell, 220 M —, 18 NW(2d) 681.

Manslaughter by motorists. 22 MLR 771.

619.19 VOLUNTARY MISCARRIAGE; DEATH OF CHILD.

HISTORY. Penal Code s. 165; G.S. 1894 s. 6450; R.L. 1905 s. 4885; G.S. 1913 s. 8613; G.S. 1923 s. 10079; M.S. 1927 s. 10079.

619.20 NEGLIGENT USE OF MACHINERY.

HISTORY. Penal Code s. 166; G.S. 1894 s. 6451; R.L. 1905 s. 4886; G.S. 1913 s. 8614; G.S. 1923 s. 10080; M.S. 1927 s. 10080.

An indictment for criminal carelessness in the operation of a railway engine and train by its engineer, whereby a collision occurred and named persons were killed, was not sufficient, and a demurrer should have been sustained. State v MacDonald, 105 M 251, 117 NW 482.

Indictment for criminal negligence in leaving a house unlocked so that a child entered and was killed by poisonous gas used in fumigation, was sufficient and a demurrer was denied. State v Cantrell, 220 M —, 18 NW(2d) 681.

A county commissioner may sell culverts to a town board. OAG Oct. 23, 1944 (90b-8).

A company may sell culverts to a county even though their salesman, who has no individual pecuniary interest in the sale, is a member of the county board. OAG Oct. 23, 1944 (90b-8).

A deputy coroner may not sell merchandise or service to the county. OAG March 27, 1945.

619.21 DEATH CAUSED BY MISCHIEVOUS ANIMALS.

HISTORY. Penal Code s. 167; G.S. 1894 s. 6452; R.L. 1905 s. 4887; G.S. 1913 s. 8615; G.S. 1923 s. 10081; M.S. 1927 s. 10081.

619.22 OVERLOADING PASSENGER VESSEL.

HISTORY. Penal Code ss. 168, 311; G.S. 1894 ss. 6453, 6605; R.L. 1905 s. 4888; G.S. 1913 s. 8616; G.S. 1923 s. 10082; M.S. 1927 s. 10082.

619.23 RECKLESS OPERATION OF STEAMBOATS AND ENGINES.

HISTORY. Penal Code ss. 169, 170; G.S. 1894 ss. 6454, 6455; R.L. 1905 s. 4889; G.S. 1913 s. 8617; G.S. 1923 s. 10083; M.S. 1927 s. 10083.

619.24 PHYSICIAN WHEN INTOXICATED.

HISTORY. Penal Code ss. 171, 309; G.S. 1894 ss. 6456, 6603; R.L. 1905 s. 4890; G.S. 1913 s. 8618; G.S. 1923 s. 10084; M.S. 1927 s. 10084.

619.25 KEEPING GUNPOWDER UNLAWFULLY; DEATH RESULTING.

HISTORY. Penal Code s. 172; G.S. 1894 s. 6457; R.L. 1905 s. 4891; G.S. 1913 s. 8619; G.S. 1923 s. 10085; M.S. 1927 s. 10085.

619.26 MANSLAUGHTER IN SECOND DEGREE; PENALTY.

HISTORY. Penal Code s. 173; G.S. 1894 s. 6458; R.L. 1905 s. 4892; G.S. 1913 s. 8620; G.S. 1923 s. 10086; M.S. 1927 s. 10086.

619.27 EXCUSABLE HOMICIDE.

HISTORY. Penal Code s. 174; G.S. 1894 s. 6459; R.L. 1905 s. 4893; G.S. 1913 s. 8621; G.S. 1923 s. 10087; M.S. 1927 s. 10087.

It was not error, in view of the evidence, for the trial court to charge the jury that the homicide was neither excusable nor justifiable, and thereby exclude from the consideration of the jury the question of self-defense. State v Corrivan, 93 M 38, 100 NW 638.

619.28 JUSTIFIABLE HOMICIDE BY PUBLIC OFFICER.

HISTORY. Penal Code s. 175; G.S. 1894 s. 6460; R.L. 1905 s. 4894; G.S. 1913 s. 8622; G.S. 1923 s. 10088; M.S. 1927 s. 10088.

It is legal to kill an alien enemy in the heat and exercise of war, but to kill such enemy after he has laid down his arms, and is confined in prison, is murder, and the rule is the same where such enemy belongs to one of the Indian tribes. A state officer cannot make legal the killing of an Indian by offering a reward for such killing. State v Gut, 13 M 341 (315).

Degree of force which an officer may lawfully use in making an arrest for a misdemeanor. 12 MLR 539.

619.29 HOMICIDE BY OTHER PERSON; JUSTIFIABLE WHEN.

HISTORY. Penal Code s. 176; G.S. 1894 s. 6461; R.L. 1905 s. 4895; G.S. 1913 s. 8623; G.S. 1923 s. 10089; M.S. 1927 s. 10089.

1. Self-defense
2. Defense of family

1. Self-defense

Whether the circumstances warranted the use of force in self-defense, and the degree of force necessary, are ordinarily questions for the jury. Gallagher v State, 3 M 270 (185); State v O'Neill, 58 M 478, 59 NW 1101; State v Gallehugh, 89 M 212, 94 NW 723.

As bearing on the reasonableness of a belief in imminent danger the quarrelsome and violent character of the assailant may be proved by evidence of his reputation in that regard, but not by specific acts of violence. State v Dumphey, 4 M 438 (340); State v Ronk, 91 M 419, 98 NW 334.

The law concedes the right to kill in self-defense, but only in extremity, and when no other practicable means to avoid the threatened harm are apparent to the person resorting to the right. If it be practicable, and is so apparent to him, to repeal the attempt by other means than by killing his assailant, he is bound to do

so. State v Shippey, 10 M 223 (178); State v Sorenson, 32 M 118, 19 NW 738; State v Cantieny, 34 M 1, 24 NW 458; State v O'Neil, 58 M 478, 59 NW 1101.

To justify a person in acting in self-defense, it is not enough that he believes himself in imminent danger of great bodily harm. He must have reasonable grounds for his belief. State v Shippey, 10 M 223 (178); State v Spaulding, 34 M 361, 25 NW 793; State v Smith, 56 M 78, 57 NW 325; State v O'Neil, 58 M 478, 59 NW 1101; Germolus v Sausser, 83 M 141, 85 NW 946.

In resisting an attempted arrest by a peace officer, even though the arrest be unlawful, the killing of the officer is not justifiable, when there is neither danger of great bodily harm, or other felony being committed by the officer, nor a reasonable apprehension of such danger in the mind of the person whose arrest is attempted. State v Cantieny, 34 M 1, 24 NW 458; State v Spaulding, 34 M 361, 25 NW 793.

Where the evidence is legally insufficient to show a justification it is the duty of the court to so instruct the jury. State v Rheams, 34 M 18, 24 NW 302; State v O'Neil, 58 M 478, 59 NW 401; State v Corrivan, 93 M 38, 100 NW 638.

The justification of self-defense cannot be invoked by a party who intentionally provokes an assault with the purpose of using a deadly weapon. State v Scott, 41 M 365, 43 NW 62.

Charge that defendant was not bound to flee, but had no right to kill in self-defense, unless apparently necessary to repel assailant and prevent great personal injury to himself or forcible entry into his home, held not error. State v Touri, 101 M 370, 112 NW 422.

The burden is on the state to prove killing not justifiable. State v McPherson, 114 M 498, 131 NW 645.

The burden of proving self-defense is not upon the defendant. State v Quinn, 186 M 243, 243 NW 70.

It was error for the trial court to instruct the jury that the law does not permit the taking of a human life to repel a mere trespass, "as in this case". This was in effect passing upon the facts and ignoring the evidence of self-defense. State v Klym, 204 M 52, 282 NW 655.

A man assailed on his own grounds, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat, but may stand his ground and defend himself with such means as are within his control; and so long as there is no intent on his part to kill his antagonist, and no purpose of doing anything beyond what is necessary to save his life, is not guilty of murder or manslaughter if death results to his antagonist from a blow given him under such circumstances. Beard v United States, 158 US 550.

Deceased used offensive language to the defendant who struck the deceased, then backed up against a counter and deceased immediately attacked defendant with a knife, whereupon defendant shot and killed deceased. Defendant after his blow against decedent retired from the fray, and his right of self-defense was restored to him. Rowe v United States, 164 US 546.

Extent of the right of self-defense in one who is the aggressor. 20 MLR 433.

2. Defense of family

A parent has no right to protect his child in the commission of a crime. State v Herdina, 25 M 161.

Right to defend another. 8 MLR 340.

MAIMING

619.30 MAIMING, HOW PUNISHED.

HISTORY. Penal Code s. 177; G.S. 1894 s. 6462; R.L. 1905 s. 4896; G.S. 1913 s. 8624; G.S. 1923 s. 10090; M.S. 1927 s 10090

In prosecution for maiming, under Penal Code, Section 177 (section 619.30), the injury must be wilfully inflicted, "with the intent to injure, disfigure, or dis-

able"; but the intent is to be presumed from the act of maiming, unless the contrary appears. State v Hair, 37 M 351, 34 NW 893.

619.31 MAIMING ONE'S SELF TO ESCAPE DUTY OR OBTAIN ALMS.

HISTORY. Penal Code ss. 178, 179; G.S. 1894 ss. 6463, 6464; R.L. 1905 s. 4897; G.S. 1913 s. 8625; G.S. 1923 s. 10091; M.S. 1927 s. 10091.

619.32 INSTRUMENT OR MANNER OF MAIMING.

HISTORY. Penal Code s. 180; G.S. 1894 s. 6465; R.L. 1905 s. 4898; G.S. 1913 s. 8626; G.S. 1923 s. 10092; M.S. 1927 s. 10092.

619.33 RECOVERY FROM INJURY, WHEN A DEFENSE.

HISTORY. Penal Code s. 181; G.S. 1894 s. 6466; R.L. 1905 s. 4899; G.S. 1913 s. 8627; G.S. 1923 s. 10093; M.S. 1927 s. 10093.

KIDNAPPING

619.34 KIDNAPPING, HOW PUNISHED.

HISTORY. Penal Code s. 182; G.S. 1894 s. 6467; 1901 c. 14; R.L. 1905 s. 4900; 1909 c. 325 s. 1; G.S. 1913 s. 8628; G.S. 1923 s. 10094; M.S. 1927 s. 10094.

619.35 SELLING SERVICES OF PERSON KIDNAPPED.

HISTORY. Penal Code s. 185; G.S. 1894 s. 6470; R.L. 1905 s. 4901; G.S. 1913 s. 8629; G.S. 1923 s. 10095; M.S. 1927 s. 10095.

619.36 INDICTMENT; WHERE TRIABLE; EFFECT OF CONSENT OF PERSON INJURED.

HISTORY. Penal Code ss. 183, 184; G.S. 1894 ss. 6468, 6469; R.L. 1905 s. 4902; G.S. 1913 s. 8630; G.S. 1923 s. 10096; M.S. 1927 s. 10096.

ASSAULT

619.37 ASSAULT IN FIRST DEGREE, HOW PUNISHED.

HISTORY. Penal Code ss. 186, 189; G.S. 1894 ss. 6471, 6474; R.L. 1905 s. 4903; G.S. 1913 s. 8631; G.S. 1923 s. 10097; M.S. 1927 s. 10097.

Under an indictment with intent to murder, the intention to murder the party assaulted is an essential ingredient of the offense. Bonfanti v State, 2 M 124 (99).

Under an indictment for an assault with intent to kill M, the evidence left it in doubt whether the assault was upon M or T. It was error for the court to charge that if the jury believes that the defendant committed an assault on either M or T, they might convict. State v Boylson, 3 M 438 (325).

Upon an indictment for an assault with intent to murder, the jury found the accused guilty of the assault, but not guilty of the intent charged. The judge properly sentenced him to pay a fine. Boyd v State, 4 M 321 (237).

The rule that in criminal trials "the person charged shall, at his request, but not otherwise, be deemed a competent witness" does not include a co-defendant, not on trial, so as to except him from the operation of the general rule of competency. State v Dee, 14 M 35 (27).

In order to give the court jurisdiction to impose an excess sentence, the former conviction must be charged in the indictment; but a sentence imposed without such charge is void only as to the excess, and the term warranted by law having been served, the prisoner may be released on habeas corpus. State ex rel v Reed, 132 M 295, 156 NW 127.

Evidence is sufficient to sustain the verdict that defendant procured an assault to be committed. It is not necessary, in an indictment, to expressly negative an exception in a statute defining an offense, where the language of the indictment, by necessary inference, negatives the exception. State v Hurst, 153 M 534, 193 NW 680.

Evidence sustains the verdict finding the defendant guilty of assault in the first degree. There was no error in showing that the defendant and the one assaulted belonged to different tongs. State v Suey, 164 M 497, 205 NW 449.

A defendant who, with companions, wrongfully invades plaintiff's premises, and in doing so assaults the latter and makes no attempt to withdraw from the fray until it is ended by plaintiff's resistance, and the interference of others, cannot, on the ground of self-defense justify the injury to plaintiff. Guyer v Smullen, 160 M 114, 199 NW 465.

It was error to instruct that plaintiff was entitled to punitive damages. Kirschbaum v Lowry, 165 M 233, 206 NW 171.

An assault is an inchoate battery. Actual physical contact is not, but violence, threatened or offered, is an essential element. Mere words or threats are not enough to constitute an assault. The complaint states a cause of action. Johnson v Sampson, 167 M 203, 208 NW 814.

The identification of the accused in a criminal case need not be positive and certain. It is enough that an eyewitness testifies that it is his belief, opinion or judgment, that the accused is the person whom he saw commit the crime. State v Farmer, 179 M 516, 229 NW 789; State v Hofmann, 181 M 28, 231 NW 411.

All persons concerned in the commission of a crime may be indicted and punished as principals. This rule applied to all connected with the destruction of Shapiro's dry cleaning establishment. State v Barnett, 193 M 336, 258 NW 508.

Damages awarded are not excessive and are compensatory only. Goin v Premo, 196 M 74, 264 NW 219.

The trial court properly refused to submit to the jury the lesser offenses of indecent assault and assault in the third degree. If he was guilty at all, he was guilty of the crime with which he was charged. State v Nelson, 199 M 88, 271 NW 114.

Assault with a deadly weapon. 9 MLR 71.

Second and third degree murder. 26 MLR 223.

619.38 ASSAULT IN SECOND DEGREE, HOW PUNISHED.

HISTORY. Penal Code ss. 187, 190; G.S. 1894 ss. 6472, 6475; 1897 c. 345; R.L. 1905 s. 4904; G.S. 1913 s. 8632; G.S. 1923 s. 10098; M.S. 1927 s. 10098.

1. What constitutes in general
2. What constitutes assault with dangerous weapon
3. Indictment
4. Accessory

1. What constitutes in general

The forcible ejection of a passenger from a train in motion is an assault. State v Kinney, 34 M 311, 25 NW 705.

There is no room for drawing a distinction between an attempt to commit the crime of rape and an assault with intent to commit that offense. There must be a reversal. State v Macbeth, 133 M 425, 158 NW 793.

Defendant charged with resisting a police officer was convicted of assault in the second degree. This was error. State v Gesell, 137 M 42, 162 NW 683.

It may safely be assumed that the word "misdemeanor" is used in a generic sense to include all misdemeanors. State v Nelson, 148 M 292, 181 NW 850.

An accusd may be convicted of indecent assault under an indictment charging an assault with intent to ravish and carnally know the prosecutrix. State v Glaum, 153 M 219, 190 NW 71.

The fact that the two witnesses produced by the state differ on important matters does not preclude the jury finding defendant guilty. State v O'Connor, 158 M 45, 191 NW 50.

Defendants were properly found guilty in the second degree in assaulting one, whom the court found to be a defacto officer, in the resistance of an arrest. State v Bryant, 174 M 565, 219 NW 877.

Under a statute making an assault "with intent to commit a felony" an assault in the second degree, it is sufficient if the intended "felony" is involved in the offender's conduct in his relation toward some person or persons other than the one actually assaulted. State v Jankowitz, 175 M 409, 221 NW 533.

The word "wilfully" means with an evil intent or a bad purpose. It does not require a specific intent to inflict grievous bodily harm. State v Bowers, 178 M 589, 228 NW 164.

2. What constitutes assault armed with a dangerous weapon

A dangerous weapon is one likely to produce death or great bodily harm. A large stone may be a dangerous weapon. The place of arming is immaterial. The arming must have occurred prior to the encounter, but if a general disturbance exists it is not necessary that it should have taken place prior to the disturbance. State v Dineen, 10 M 407 (325).

Premeditation except as implied in the intent to do great bodily harm, is not an essential element. Since an actual intent to do great bodily harm is essential, drunkenness which deprives a person of the capacity to have such an intent, is a defense if it was not voluntarily induced with a view to the commission of the offense. State v Garvey, 11 M 154 (95); State v Herdina, 25 M 161; State v Grear, 28 M 426, 10 NW 472.

Intent to do great bodily harm is essential. State v Welch, 21 M 22.

One has no right to commit an assault with intent to do great bodily harm to another for a wrong which he has not reasonable ground to believe to be dangerous to himself. State v Tripp, 34 M 25, 24 NW 290.

Defendant indicted with others for the crime of mayhem, was properly convicted of assault in the second degree. State v Damuth, 135 M 76, 160 NW 196.

Landlord for the purpose of scaring his tenants out of the house shot holes in the windows. He could be prosecuted for another offense, but not for assault as he had no purpose to injure anyone. OAG Aug. 29, 1934 (494b-4).

3. Indictment

Indictment describing the weapon is held sufficient. Where the indictment charges a beating and wounding with the weapon, it does not charge two offenses. State v Dineen, 10 M 407 (325); State v Henn, 39 M 476, 40 NW 572.

An indictment is sufficient if it directly charges the accused with acts coming within the statutory description of the offense, substantially in the words of the statute, without any expansion of the matter. State v Garvey, 11 M 154 (95); State v Shenton, 22 M 311.

The term "wilfully" imports designedly and intentionally; and an indictment for an assault which follows the language of the statute and charges that defendant wilfully assaulted another and wilfully inflicted grievous bodily harm upon him, sufficiently charges an intent to inflict such harm. State v Lehman, 131 M 427, 155 NW 399; State v Bowers, 178 M 589, 228 NW 164.

Where one of a group of hi-jackers shot the prosecuting witness, any one of them may be prosecuted for abetting John Doe, and any one of them may be indicted as principals. OAG Feb. 15, 1933.

Under the facts stated, two offenses cannot be joined, but the indictment may allege means in the alternative for committing the same offense. 1940 OAG 40, April 29, 1940 (133b-7).

To convict of an assault with a dangerous weapon, with intent to do great bodily harm, one who comes to the assistance of the person holding the weapon,

it is not necessary that he should have aided in the previous arming of such person. State v Herdina, 25 M 161.

If one conspires with another to commmit a crime, he is guilty of everything done by his confederates, which follows the execution of the common design as one of its natural sequences, even though it was not intended as part of the original plan. State v Hurst, 153 M 525, 193 NW 680.

619.39 ASSAULT IN THIRD DEGREE, HOW PUNISHED.

HISTORY. Penal Code ss. 188, 191; G.S. 1894 ss. 6473, 6476; R.L. 1905 s. 4905; G.S. 1913 s. 8633; G.S. 1923 s. 10099; M.S. 1927 s. 10099.

An averment that the defendant "did wilfully and unlawfully assault complainant with a revolver" imports an intentional attempt by violence to do him a bodily injury, and is sufficient to sustain a conviction for a simple assault. State v Bell, 26 M 388, 5 NW 970; State v Lehman, 131 M 427, 155 NW 399.

619.40 FORCE OR VIOLENCE, WHEN LAWFUL.

HISTORY. Penal Code s. 192; G.S. 1894 s. 6477; R.L. 1905 s. 4906; G.S. 1913 s. 8634; G.S. 1923 s. 10100; M.S. 1927 s. 10100.

A party who is assaulted, may, without retreating to any extent, use sufficient force to prevent the assault; but he must use no more force than may be necessary to prevent the violence. The jury is the sole judge of the necessity of force in self-defense, and of the amount of force which may be used. Gallagher v State, 3 M 270 (185); State v Tripp, 34 M 25, 24 NW 290.

A parent has no right to protect his child in the commisssion of a crime; nor to come to the assistance of a person holding a weapon. State v Herdina, 25 M 161.

In an action for false arrest and imprisonment, it is not a justification that the defendant as a police officer made the arrest upon reliable information that the plaintiff was insane, that the officer in good faith believed this to be true, and that an ordinarily prudent person under the same conditions would have entertained and acted upon such belief, the arrest being made without warrant and there being no proof of insanity nor any urgent necessity for restraint even had plaintiff been in fact insane. Witte v Haben, 131 M 71, 154 NW 662.

It was a question for the jury whether, if plaintiff's bartender assaulted defendant as the latter claimed, it was an act of a servant in the course of his employment, so that plaintiff would be liable. Guyer v Smullen, 160 M 114, 199 NW 465.

Where driver of a car is violating the speed ordinance, the policeman's right to shoot or his offense if any for shooting differs as to whether he shoots at the car or at the driver. OAG Jan. 28, 1944 (605b-4).

Five-year-old child incapable of contributory negligence. 8 MLR 73.

Inapplicability of workmens compensation act to minors illegally employed. 8 MLR 74.

Right of independent infant to recover from its parent for personal injuries. 8 MLR 72.

ROBBERY

619.41 DEFINITION.

HISTORY. Penal Code ss. 193, 196; G.S. 1894 ss. 6478, 6481; R.L. 1905 s. 4907; G.S. 1913 s. 8635; G.S. 1923 s. 10101; M.S. 1927 s. 10101.

The penal code concisely and logically defines the crime of robbery, declares the means by which it may be committed, and divides it into degrees, according to the atrocity of the means used in its perpetration. State v O'Neil, 71 M 399, 73 NW 1091.

Robbery implies the use of force or putting in fear, but if the thief jostles his victim for the purpose of diverting his attention, and, while his attention is so diverted, picks his pockets, the crime is robbery. Duluth St. Ry. v Fidelity & Dep. Co. 136 M 299, 161 NW 595.

Robbery may be committed though no bodily harm is inflicted. State v Bruno, 141 M 56, 169 NW 249.

Where the defendant fled to another state and the officers without a search warrant took certain articles from his abandoned house, such articles are not admissible as evidence. State v O'Laughlin, 156 M 186, 194 NW 396.

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

Positive identification of the defendant by two victims and corroborating testimony of two other witnesses for the state was sufficient to warrant a finding of guilty, even against the testimony of witnesses furnishing an alibi. State v Chick, 192 M 539, 257 NW 280.

619.42 IN FIRST DEGREE, HOW PUNISHED.

HISTORY. Penal Code ss. 197, 200; G.S. 1894 ss. 6482, 6485; 1905 c. 114 s. 1; R.L. 1905 s. 4908; G.S. 1913 ss. 8636, 8637; G.S. 1923 ss. 10102, 10103; M.S. 1927 ss. 10102, 10103.

"Against his will, by means of force and violence, being aided by an accomplice actually present," is sufficient. State v O'Neil, 71 M 399, 73 NW 1091.

The omission of the word "unlawful" in defining the crime of robbery is unimportant if the acts charged, if committed at all, could not be other than unlawful. State v Bruno, 141 M 56, 169 NW 249.

The conviction of defendant for robbery in the first degree, in taking by force a shotgun, the property of a corporation, from its servant during an attempt to rob the corporation, is sustained by the evidence. Remote evidence concerning weapons admissible. State v Barone, 173 M 232, 217 NW 104.

Evidence that defendant, at prior times and places, had in his possession a revolver similar to the one used by him in the robbery complained of, was properly admitted, and even where one of the prior occasions was 11 months past the evidence in the discretion of the trial judge might be admitted. State v Nichols, 179 M 301, 229 NW 99.

Power of the court to fix the maximum term although convicted for a second or subsequent offense. State ex rel v Sullivan, 179 M 532, 229 NW 787.

The identity of the defendant as having participated in the robbery is a question of fact for the jury. State v Kloss, 181 M 203, 232 NW 111, 787.

There is nothing in the testimony of defendant and his alibi witnesses compelling the jury to find that the defendant was not at the place of the robbery. State v Stockton, 186 M 33, 242 NW 344.

619.43 IN SECOND DEGREE, HOW PUNISHED.

HISTORY. Penal Code ss. 198, 201; G.S. 1894 ss. 6483, 6486; R.L. 1905 s. 4909; G.S. 1913 s. 8638; G.S. 1923 s. 10104; M.S. 1927 s. 10104.

Indictment held sufficient although it was not alleged how the force and violence was used or directed. State v O'Neil, 71 M 400, 73 NW 1091.

619.44 IN THIRD DEGREE, HOW PUNISHED.

HISTORY. Penal Code ss. 199, 202; G.S. 1894 ss. 6484, 6487; R.L. 1905 s. 4910; G.S. 1913 s. 8639; G.S. 1923 s. 10105; M.S. 1927 s. 10105.

619.45 LIFE IMPRISONMENT FOR BANK ROBBERS.

HISTORY. Ex. 1919 c. 10 s. 1; G.S. 1923 s. 10106; M.S. 1927 s. 10106.

A statute making bank robbery or an attempt there at punishable by life imprisonment does not violate any constitutonal guaranty. The punishment is not

prohibited as cruel or unusual. State v Colcord, 170 M 504, 212 NW 894; State v Eaton, 171 M 158, 213 NW 735.

When arrested in another state defendants had in their possession all accessories of bank robbery. Evidence of such possession was admissible. State v Colcord, 170 M 504, 212 NW 894.

From the time the defense opened there was an insinuation that defendant was a bootlegger; had participated in other bank robberies; had sold stolen liberty bonds; and this claim was so persistent and so emphasized that it might have prejudiced the jury. There must be a new trial. State v Kloss, 177 M 363, 225 NW 278.

Former jeopardy or prior conviction is a fact issue for trial by jury. The issue cannot be raised by motion or tried on affidavits. State v Eaton, 180 M 439, 231 NW 6.

Trial judge may fix the maximum at less than life. OAG Nov. 25, 1933.

DUELS

619.46 DUEL AND CHALLENGE, HOW PUNISHED.

HISTORY. Penal Code s. 203; G.S. 1894 s. 6488; R.L. 1905 s. 4911; G.S. 1913 s. 8640; G.S. 1923 s. 10107; M.S. 1927 s. 10107.

619.47 CHALLENGER OR ABETTOR.

HISTORY. Penal Code s. 204; G.S. 1894 s. 6489; R.L. 1905 s. 4912; G.S. 1913 s. 8641; G.S. 1923 s. 10108; M.S. 1927 s. 10108.

619.48 ATTEMPT TO INDUCE CHALLENGE; POSTING.

HISTORY. Penal Code ss. 206, 207; G.S. 1894 ss. 6491, 6492; R.L. 1905 s. 4913; G.S. 1913 s. 8642; G.S. 1923 s. 10109; M.S. 1927 s. 10109.

619.49 DUEL OUTSIDE STATE, WHERE INDICTABLE.

HISTORY. Penal Code ss. 208, 209; G.S. 1894 ss. 6493, 6494; R.L. 1905 s. 4914; G.S. 1913 s. 8643; G.S. 1923 s. 10110; M.S. 1927 s. 10110.

619.50 WITNESSES.

HISTORY. Penal Code s. 210; G.S. 1894 s. 6495; R.L. 1905 s. 4915; G.S. 1913 s. 8644; G.S. 1923 s. 10111; M.S. 1927 s. 10111.

LIBEL AND SLANDER

619.51 LIBEL; GROSS MISDEMEANOR; PUNISHMENT; PROSECUTIONS BY COUNTY ATTORNEYS OR ATTORNEY GENERAL.

HISTORY. Penal Code ss. 211, 212; G.S. 1894 ss. 6496, 6497; R.L. 1905 s. 4916; G.S. 1913 s. 8645; G.S. 1923 s. 10112; 1925 c. 364 s. 1; M.S. 1927 s. 10112.

1. Generally

2. Indictment

1. Generally

A libel on two or more persons, although not associated in business, contained in a single writing, and published by a single act, constitutes but one offense. State v Hoskins, 60 M 168, 62 NW 270.

A letter for publication containing language that exposes one to obloquy, hatred, or contempt, is libelous under this section even though the person against whom it is directed is not charged with a criminal act. State v Shippman, 83 M 441, 86 NW 431.

The publication was libelous per se. The statutory notice of retraction is sufficient if it declares the entire publication to be false and defamatory, without specifying particular parts. Craig v Warren, 99 M 246, 109 NW 231.

To render a printed article libelous, it is not necessary that it accuse a person of wrongdoing with the particularity and exactness to be expected in a well-framed indictment. The test is: What does the language naturally import? How will the language be understood by the ordinary reader? State v Norton, 109 M 99, 123 NW 59.

Words charging misconduct in office, want of official integrity or fidelity to public trust, words inconsistent with the due fulfilment of official duty, words which tend to deprive an official of his office, and words which are likely to produce public contempt and reprobation of right-minded men, are libelous per se. The words published in the instant case were not as a matter of law free from defamatory signification. Towney v Simonson, 109 M 341, 124 NW 229.

It is libelous per se to write of a clergyman, an applicant for a pulpit, "I would not have anything to do with him or touch him with a ten-foot pole," if under all the circumstances the words used would expose the person written of to hatred or contempt, or injury in his business or occupation. Cole v Millspaugh, 111 M 159, 126 NW 626.

The words spoken were slanderous, and the evidence sustains the verdict. Yencho v Kruly, 158 M 410, 197 NW 752.

A paragraph in a letter reading as follows: "It is obvious that the real purpose of Leach and yourselves is to create all the trouble that you can and if your efforts should produce anything, the real beneficiaries would be Leach and yourselves and not the stockholders whom you purport to represent," was libelous per se. Brill v Minnesota Mines, 200 M 454, 274 NW 631.

Laws 1925, Chapter 285, providing for abatement of certain newspapers held unconstitutional. Near v Minnesota, 283 US 709.

Libel by act; charivari. 5 MLR 233.

Defamation by radio. 19 MLR 642.

Defamation of a dead person; right of surviving relative to sue. 25 MLR 243.

2. Indictment

The proper purpose of an innuendo in a complaint for libel is to set forth necessary facts to point the application of the same or to explain the meaning of doubtful or ambiguous words; but, where the meaning of the libelous words is clear, unnecessary language in the innuendo, or which is in conflict with the plain terms of the libel itself, may be rejected as surplusage. State v Shippman, 83 M 441, 86 NW 431.

A publication stating that a candidate for office has the backing of certain corporations in the state that are not in sympathy with the masses, is not per se libelous. State v Landy, 130 M 138, 153 NW 258.

Where an indictment for libel sufficiently charges that the libelous language tended to and did expose the persons named therein 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. State v Cramer, 193 M 344, 258 NW 525.

619.52 HOW JUSTIFIED OR EXCUSED; MALICE, WHEN PRESUMED.

HISTORY. Penal Code s. 213; G.S. 1894 s. 6498; R.L. 1905 s. 4917; G.S. 1913 s. 8646; G.S. 1923 s. 10113; M.S. 1927 s. 10113.

The law makes the publication of a libel punishable as a crime, not because of injury to the reputation of the person libeled who may sue for the damage, but because the publication of such articles tends to affect injuriously the peace and good order of society. State v Hoskins, 60 M 169, 62 NW 270.

Defendant was expressly charged with wilful and deliberate wrong. Viewed as a misconstruction, his statement may have been incorrect; but it does not necessarily appear on the face of the pleadings to have been wilfully and deliberately

untrue. The defense of qualified privilege or of fair comment as a matter of law was not made out. Express malice was charged and for the purposes of the motion admitted. Express malice destroys the right of fair comment and criticism or qualified privilege. Towney v Simonson, 109 M 341, 124 NW 229.

The charges published were libelous per se. They were not privileged under section 619.52. The attempt to justify or excuse the publication was a failure. State v Minor, 163 M 109, 203 NW 596.

Where the act of the legislature has as its purpose to prohibit an undesirable form of conduct rather than a specific act, the definition by its very nature must be broad. If it can be determined with reasonable definiteness what is disapproved, the statute is not unconstitutional because of indefiniteness. State v Eich, 204 M 136, 282 NW 810.

When is a suit against a state officer a suit against the state. 13 MLR 137.

619.53 PUBLICATION.

HISTORY. Penal Code s. 214; G.S. 1894 s. 6499; R.L. 1905 s. 4918; G.S. 1913 s. 8647; G.S. 1923 s. 10114; M.S. 1927 s. 10114.

Defendant wrote a libelous letter of and concerning plaintiff, and mailed it, properly addressed to plaintiff's wife. Plaintiff received the letter from the rural carrier, opened and read that part addressed to him and turned the entire letter over to his wife and plaintiff and his wife read it at the same time. This was held to be a publication. Kramer v Perkins, 102 M 455, 113 NW 1062.

Sending a libelous letter through the mail to the person libeled, with no reason to suppose that it will be opened and read by anyone else before he has received and read it, is not a publication which will support a civil action for libel. Olson v Molland, 181 M 364, 232 NW 625.

619.54 LIABILITY OF EDITORS AND OTHERS.

HISTORY. Penal Code s. 215; G.S. 1894 s. 6500; R.L. 1905 s. 4919; G.S. 1913 s. 8648; G.S. 1923 s. 10115; M.S. 1927 s. 10115.

It is not a defense to merely show that the editor was not aware of the publication. The managing editor was criminally liable. The circulation manager was not liable. State v Worker's Co. 150 M 406, 185 NW 931.

Newspaper libel. 13 MLR 21.

619.55 REPORTS OF PROCEEDINGS PRIVILEGED.

HISTORY. Penal Code ss. 216, 217; G.S. 1894 ss. 6501, 6502; R.L. 1905 s. 4920; G.S. 1913 s. 8649; G.S. 1923 s. 10116; M.S. 1927 s. 10116.

A publication of judicial proceedings, if fair and impartial, is privileged; but a complaint or other pleading in a civil action, which has never been presented to the court for its action, is not a judicial proceeding within the rule, and its publication, if it contains libelous matter, can only be justified by showing that it is true. Nixon v Dispatch, 101 M 309, 112 NW 258.

Report of judicial proceedings as qualifiedly privileged. 16 MLR 868.

619.56 WHERE INDICTED; PUNISHMENT RESTRICTED.

HISTORY. Penal Code ss. 218, 219; G.S. 1894 ss. 6503, 6504; R.L. 1905 s. 4921; G.S. 1913 s. 8650; G.S. 1923 s. 10117; M.S. 1927 s. 10117.

619.57 PRIVILEGED COMMUNICATIONS.

HISTORY. Penal Code s. 220; G.S. 1894 s. 6505; R.L. 1905 s. 4922; G.S. 1913 s. 8651; G.S. 1923 s. 10118; M.S. 1927 s. 10118.

Suspicions and rumors of improper and unlawful conduct by a citizen in a public station will not, as a matter of law, justify a newspaper in giving the same circulation. In the instant case there was nothing to require the jury to find that

the alleged libel was excusable, or published upon reasonable grounds of belief in its truth, or for good motives. State v Ford, 82 M 452, 85 NW 217.

The court did not err in submitting to the jury, as a question of fact, the privileged character of certain communications of the libel complained of made by the defendants to their niece and to plaintiff's mother. Brown v Radebaugh, 84 M 347, 87 NW 937.

Misstatement of fact concerning public officers as qualifiedly privileged. 11 MLR 474.

619.58 THREATENING TO PUBLISH LIBEL.

HISTORY. Penal Code s. 221; G.S. 1894 s. 6506; R.L. 1905 s. 4923; G.S. 1913 s. 8652; G.S. 1923 s. 10119; M.S. 1927 s. 10119.

619.59 SLANDER OF WOMEN.

HISTORY. 1891 c. 86 s. 1; G.S. 1894 ss. 6507, 6508; R.L. 1905 s. 4924; G.S. 1913 s. 8653; G.S. 1923 s. 10120; M.S. 1927 s. 10120.

The statute providing that the following actions be brought within two years: "Libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury" includes an action for malicious prosecution. Bryant v Amer. Surety Co. 69 M 30, 71 NW 826.

The acquittal of the accused did not furnish evidence of want of probable cause; nor did the fact that the prosecutor did not himself hear the alleged slander spoken establish a want of good faith. In this action, for a malicious prosecution of plaintiff for slander, a verdict for plaintiff is reversed. Shafer v Hertzig, 92 M 171, 99 NW 800.

The demurrer to the complaint was properly overruled. Under this section, a false charge of unchastity made against a school girl 15 years of age, in her immediate presence and in the presence of another, is a misdemeanor if there is no justification for the accusation, and, if it was the direct cause of mental or bodily injury, there may be a recovery of damages in an action other than one for slander. Johnson v Sampson, 167 M 203, 208 NW 814.

619.60 TESTIMONY NECESSARY TO CONVICT.

HISTORY. 1891 c. 86 s. 1; G.S. 1894 s. 6509; R.L. 1905 s. 4925; G.S. 1913 s. 8654; G.S. 1923 s. 10121; M.S. 1927 s. 10121.

619.61 FALSE STATEMENTS.

HISTORY. 1923 c. 7 s. 1; G.S. 1923 s. 10122; M.S. 1927 s. 10122.

619.62 SLANDER.

HISTORY. 1915 c. 284 s. 1; G.S. 1923 s. 10123; M.S. 1927 s. 10123.

619.63 CERTAIN STATEMENTS UNLAWFUL.

HISTORY. 1929 c. 212 ss. 1, 2; M. Supp. ss. 10123-4, 10123-5.