CHAPTER 632

NEW TRIALS, APPEALS, AND WRITS OF ERROR

632.01 REMOVAL TO SUPREME COURT; APPEAL; WRIT OF ERROR.

An order of the trial court denying permission to add to a settled case testimony offered in trial of another action is nonappealable. State v McBride, 215 M 123, 9 NW(2d) 416.

Escape of accused pending appeal as ousting appellate court's jurisdiction. 6 MLR 521.

Effect of acceptance of pardon on right to appeal. 26 MLR 273.

Procedure on judgment and appeal in federal criminal cases. 27 MLR 169.

632.02 TRIAL OR SUPREME COURT JUDGE MAY STAY PROCEEDINGS; NOTICE.

The trial courts of this state have, independent of statute, the power and authority to grant and order a stay of proceedings for a definite period after conviction in a criminal case for the purpose of enabling the defendant to perfect an appeal, or to take such other proceedings as he may be advised necessary in the protection of his rights. Note distinction between stay and an indefinitely suspended sentence. State ex rel v Langum, 112 M 121, 127 NW 465.

The right to a stay of execution, even in a capital case, is not an absolute one, and the court should refuse it, if it is clearly on an inspection of the record that there is no merit in the appeal. State v Waterman, 112 M 157, 127 NW 473.

See, L. 1947, c. 595, M.S.A., s. 260.125, cited as youth conservation act. 28 MLR 300, 331.

632.04 RETURN.

A statement by the court, on objection being made to something said by defendant's counsel in his opening statement to the jury, where the record does not show what counsel said in his opening statement, is too indefinite and incomplete a record to show error in the appellate court. State v Lynch, 192 M 534, 257 NW 278.

There can be no reversal in a criminal case for alleged misconduct of the prosecuting attorney, without a record of the conduct claimed to be prejudicial and objection thereto, with an exception if needed. State v Hankins, 193 M 375, 258 NW 578.

No ruling or decision in the course of the trial can be reviewed on appeal in the absence of a settled case or bill of exceptions; but matters not occurring in court may be shown by affidavit; but where, as here, the defendant knew that newspaper articles concerning the trial were read by jurors and with such knowledge proceeded with the trial to a final conclusion without objection, he waived the right to object. State v Soltau, 212 M 21, 2 NW(2d) 155.

That some testimony was stricken out which may have been competent cannot prejudice defendant. That the jury heard some incompetent testimony which was later stricken cannot, in the light of the entire record, be said to have prejudiced him. It does not appear that the court's attention was called, at the close of the evidence, to the fact that any of the testimony now claimed to be prejudicial was left in the record. State v Rediker, 214 M 470, 8 NW(2d) 527.

Where the record on appeal is inadequate to present the questions raised, and the questions raised ought not to be left open so that party can raise them again

on another appeal, under Rule VIII(2) the appellate court will affirm rather than dismiss the appeal. State v Wilson, 221 M 224, 21 NW(2d) 521.

An assignment of error, based on a ruling of the trial court on a motion submitted on affidavits, presents no question for review, where the affidavits are not contained in the record. United States v Siden, 293 F. 422.

Assignments of error based on rulings made during the trial present no question for review, in the absence of a bill of exceptions showing such rulings and exceptions thereto. United States v McDonald, 293 F. 433.

Conviction of using mails to defraud will not be reversed, because exhibit consisting of ledger could not be produced. Cochran v United States, 41 F(2d) 193.

632.05 BILL OF EXCEPTIONS.

In a prosecution for murder the conduct of the prosecuting attorney, in stating to the jury his personal belief or unbelief of the testimony of witnesses, and designating the defendant as a "hoodlum," though it merits disapproval, does not justify a new trial as it was not objected to and no exception was taken. State v Palmer, 206 M 185, 288 NW 160; State v Lemke, 207 M 35, 290 NW 307.

Where, as in the instant case, the record discloses no adequate objection to cross-examination by the state of its own witness with respect to a prior statement made by him, a new trial will not be ordered. State v Lemke, 207 M 35, 290 NW 307.

Objections to argument of counsel made for the first time on motion for new trial are not timely and will not be reviewed on appeal. State v Jansen, 207 M 250, 290 NW 557.

No ruling or decision in the course of a trial can be reviewed on appeal in the absence of a settled case or bill of exceptions; but matters not occurring in court may be shown by affidavit. Error cannot be assigned on the receiving of testimony where no objection was made at the time the evidence was introduced. State v Soltau, 212 M 20, 2 NW(2d) 155.

Even though there was misconduct on the part of the county attorney, there was no objection made thereto at the trial, and it is too late to raise the objection for the first time on the motion for a new trial. State v Cook, 212 M 495, 4 NW(2d) 328.

Without a bill of exceptions or settled case containing the testimony, the appellate court will not consider evidence discussed in the briefs. Absent a showing to the contrary, it will be presumed that the evidence warranted the assumptions of fact in the court's charge. State v Finley, 214 M 228, 8 NW(2d) 217.

Evidence not clearly specified in motion for a new trial is not properly before the appellate court or subject to review on appeal. State v Clow, 215 M 380, 10 NW(2d) 359.

An accused, whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court and of prosecuting counsel as well to see that he gets one. There must be no conduct, either by argument or by the asking of irrelevant questions, the effect of which is to inflame the prejudices or excite the passions of the jury against the accused. Where prejudice to defendant's rights is as manifest as appears in the case at bar, it was the duty of the trial court sua sponte to intervene to protect defendant's rights. Failure to do so is prejudicial error. State v Haney, 222 M 124, 23 NW(2d) 369.

Error in the admission of testimony secured by illegal search of defendant's home is not reviewable on appeal in absence of a bill of exceptions. A stipulation of facts signed by the attorneys for government and the accused, but not signed and approved by the trial judge, cannot supply absence of a bill of exceptions. DeCosimo v United States, 37 F(2d) 344.

Where prejudicial error is obvious in a criminal case, appellate courts should of their own motion recognize it and give protection against unlawful deprivation of personal liberty. Danaher v United States, 39 F(2d) 325.

Effect of acceptance of pardon for innocence on right of appeal. 26 MLR 273.

632.06 PROCEEDINGS IN SUPREME COURT.

1. New trial
2. Admissibility of evidence
3. Newly discovered evidence
4. Misconduct of counsel
5. Misconduct of jury or others
6. Generally

1. New trial

Guilt of accused of conspiracy is not dependent upon accomplishment of the object of the conspiracy. Conspiracy to commit crime is a separate offense from the crime that is the object of the conspiracy. Evidence in the instant case was sufficient to possess and sell quantity of distilled spirits without immediate containers thereof having proper stamps attached evidencing payment of all internal revenue taxes imposed on such distilled spirits. Mark v United States, 86 F(2d) 245.

Conflicts in the evidence, credibility of witnesses, the plausibility of explanations offered by defendant, and the weight of the evidence were questions for the jury, and the sole question in the circuit court of appeals was whether there was substantial evidence to support the verdict. Neal v United States, 114 F(2d) 1000.

2. Admissibility of evidence

There is no error in admitting evidence from which no prejudice could result. State v Tennyson, 212 M 158, 2 NW(2d) 833.

Where evidence of other similar crimes shows a common scheme or related crimes tending to prove the present accusation, it is properly received. State v Yurkiewicz, 212 M 208, 3 NW(2d) 775.

In prosecutions for rape, evidence that soon after the offense the girl assaulted made complaint of the outrage is admissible in corroboration of her testimony. State v Toth, 214 M 147, 7 NW(2d) 322.

Experienced firemen who observed the fire were properly permitted to testify that, from the manner and speed with which the fire burned and spread, it was a "boosted" fire, that is, that some inflammable substance other than that of which the building was constructed or which it contained contributed to its burning and spreading. State v Lytle, 214 M 171, 7 NW(2d) 305.

The evidence establishes the fact that the wife was present at the time of the shooting, and statements and actions of the wife made and occurring at a neighbor's home next door immediately after the shooting were admissible as evidence as res gestae. State v Sucik, 217 M 560, 14 NW(2d) 857.

The credibility of the expert witnesses and the weight of their testimony was for the jury, to be determined by the same rules used in determining the weight of other testimony. State v Gorman, 219 M 162, 17 NW(2d) 46.

3. Newly discovered evidence

Supreme court will not hold as a matter of law that the trial court abused its discretion in denying a motion for a new trial on the ground of newly discovered evidence where such evidence is merely cumulative or corroborative of testimony already submitted in the action. State v Smith, 221 M 359, 22 NW(2d) 318.

4. Misconduct of counsel

Improper questions asked by the prosecuting attorney, which of themselves might warrant a new trial, are, in the instant case, not sufficiently prejudicial in view of the abundance of testimony adverse to the defendant relating to the same point. State v Rediker, 214 M 471, 8 NW(2d) 527.

The state is not permitted by means of the insinuation or innuendo of incompetent and improper questions to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not admissible and thereby prevent the defendant from having a fair trial. State v Haney, 219 M 519, 18 NW(2d) 315.

Improper conduct of prosecutor in cross-examining a witness is waived where no motion is made to strike the testimony improperly injected into the case and no request is made for instruction to offset it. State v Gorman, 219 M 163, 17 NW(2d) 43.

The impropriety of counsel becoming a witness for his client in a case which he is trying is waived where no objection is made to his continuing the examination of witnesses after he had testified or to his arguing the case to the jury. Estate of Cunningham, 219 M 80, 17 NW(2d) 85.

A canon of ethics of the American Bar Association reads as follows: "When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client." Except when essential to the ends of justice, a violation of the foregoing rule constitutes prejudicial error. Kansgaarde v Endres, 126 Neb. 129.

5. Misconduct of jury or others

Though defendant elects not to take the witness stand, statement by the trial court, after summary of the evidence, that certain assertions of witnesses for the state were "not denied," did not violate the provisions of section 611.11. State v Yurkiewicz, 212 M 208, 3 NW(2d) 775.

6. Generally

There is no occasion for impeachment of a witness by the party who calls him unless to the caller's surprise he testifies adversely on some material point; and then the impeachment must be confined to the subject matter of the surprising adverse statement. State v Saporen, 205 M 358, 285 NW 898.

Without a bill of exceptions or settled case containing the testimony, the appellate court will not consider evidence discussed in the briefs. Absent a record showing the contrary, it will be presumed that the evidence warranted the assumptions of fact in the judge's charge. State v Finley, 214 M 228, 8 NW(2d) 217.

The decision on the former appeal, State v Prickett, 217 M 629, 15 NW(2d) 95, construing L. 1943, c. 621, as not applicable to frogs caught and bought in another state and possessed within this state while in interstate transportation from the state where caught and bought in another state, is the law of the case, and the rule so announced controls the decisions in all subsequent proceedings. State v Prickett, 221 M 179, 21 NW(2d) 474.

Where a question of law is decided on appeal, without limitation as to the particular kind of legal question involved, it becomes the law of the case, which the trial court is bound to follow on a new trial, and the appellate court will not re-examine on a subsequent appeal. State v Schabert, 222 M 261, 24 NW(2d) 846.

It is generally sufficient to charge statutory offense in the language of the statute, particularly if the statute expressly defines the offense. In the instant case, the evidence is sufficient to support a conviction for carrying on the business of retail liquor and wholesale liquor dealer without paying special tax, and concealing distilled spirits removed to place other than bonded warehouse without payment of special tax. Taran v United States, 88 F(2d) 54.

Right of appellate court to enter verdict of conviction for offense of lower degree. 11 MLR 660.

Legal conclusions. 16 MLR 379.

Assignments of error; requirement of specification. 27 MLR 89.

632.07 ADMISSION TO BAIL OR APPEARANCE BEFORE SUPREME COURT.

Rule by supreme court for admission to bail by one whose application to have bail fixed has been denied by the trial court: (1) Notice of the application must be given to the attorney general and to the attorney for the prosecution in the court below; (2) the application must be accompanied by the settled case or bill of exceptions, but, if the applicant, in the exercise of due diligence, has been unable to procure a transcript from the court reporter, the application may be based upon a verified petition specifying the grounds upon which the defendant relies for a reversal; (3) there must be a fair showing of apparent error or irregularity in the proceedings in the court below, to the substantial prejudice of the applicant. State v Russell, 159 M 290, 199 NW 750.

632.09 DISMISSAL OF APPEAL; NOT TO PRECLUDE ANOTHER.

Where the defendant pleaded guilty and paid the fine imposed with apparent intention to abide by and comply with the sentence of the court, a later appeal to the appellate court was properly dismissed. State v People's Ice Co. 127 M 252, 149 NW 286.

632.10 CERTIFYING PROCEEDINGS; STAY.

Certification of questions as "important and doubtful." State v Iosue, 220 M 283, 19 NW(2d) 738.

Since the trial court has concluded, for adequate reasons, that defendant's testimony before the grand jury was "free from any sense of compulsion" and that the waiver of immunity was then operative, the fourth certified question is answered in the negative. State v Iosue, 220 M 283, 19 NW(2d) 736.

Upon certification of the question from the district court, the appellate court holds that section 17.15 is valid as against the challenge of lack of due process on the ground that the section omits the element of intent to destroy competition from the definition of the crime of unfair discrimination. State v Lanesboro Hatchery, 221 M 246, 21 NW(2d) 792.

Choice of law as to usurious character of contract. 24 MLR 410.