

CHAPTER 357.

CRIMINAL TRIALS.

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357.01 Jury trial; waiver. (1) Except as otherwise provided in this section, criminal cases in courts of record shall be tried by a jury of 12 jurors, drawn in the manner prescribed in chapter 270, unless the defendant waives a jury trial in writing or by statement in open court, entered in the minutes, with the approval of the court and the consent of the state.

(2) At any time before verdict the parties may stipulate in writing or by statement in open court, entered in the minutes, with the approval of the court, that the jury shall consist of any number less than 12.

(3) In a case tried without a jury the court shall make a general finding and may in addition find the facts specially.

357.02 Grand juror not to serve on trial jury. No member of the grand jury which found the indictment shall be a juror for the trial of the indictment if challenged for that cause.

357.03 Peremptory challenges. Each side is entitled to only 4 peremptory challenges except as provided otherwise in this section. When the crime charged is punishable by life imprisonment, each side is entitled to 12 peremptory challenges. If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges. If the crime is punishable by life imprisonment the total peremptory challenges allowed the defense shall not exceed 16 if there are only 2 defendants and 18 if there are more than 2 defendants; in other cases 6 challenges if there are only 2 defendants and 9 challenges if there are more than 2.

357.04 Exercise of challenges. The parties shall exercise or waive their peremptory challenges alternately as nearly as practicable, the state beginning. Twenty jurors shall be called, and that number (exclusive of those challenged peremptorily and those excused for cause) shall be maintained in the jury box until all peremptory challenges in excess of 8 have been exercised or waived. From the 20 remaining the parties shall exercise in their order the remaining 8 challenges; and if any party declines to challenge in turn, such challenge shall be made by the clerk by lot.

[357.05 Stats. 1935 repealed by Supreme Court Order; effective Jan. 1, 1937]

357.05 Alternate jurors. If the court is of the opinion that the trial of the action is likely to be protracted, it may, immediately after the jury is impaneled and sworn, call one or 2 alternate jurors. They shall be drawn in the same manner and have the same qualifications as regular jurors and shall be subject to like examination and challenge. Each party shall be allowed one peremptory challenge to each alternate juror. The alternate jurors shall take the oath or affirmation and shall be seated next to the regular jurors and shall attend the trial at all times. If the regular jurors are kept in custody, the alternates shall also be so kept. If before the final submission of the cause a regular juror dies or is discharged, the court shall order an alternate juror to take his place in the jury box. If there are 2 alternate jurors, the court shall select one by lot. Upon entering the jury box, the alternate juror becomes a regular juror.

[357.06 Stats. 1933 repealed by 1935 c. 213 s. 18]

[357.065 Stats. 1947 renumbered section 357.05 by 1949 c. 631]

357.07 Defendant to be present. A defendant accused of a felony shall be personally present during the trial. A defendant accused of a misdemeanor may at his written request and by leave of court be tried in his absence if represented by his attorney duly authorized for that purpose.

357.08 View. The court may order a view by the jury.

357.09 Conviction of included crime. When a defendant is tried for a crime and is acquitted of part of the crime charged and is convicted of the residue thereof, the verdict may be received and thereupon he shall be adjudged guilty of the crime which appears to the court to be substantially charged by such residue of the indictment or information and shall be sentenced accordingly.

[357.10 Stats. 1947 renumbered section 340.445 by 1949 c. 631]

357.11 Plea of insanity as defense. (1) No plea that the defendant indicted or informed against was insane or feeble-minded at the time of the commission of the alleged crime shall be received unless it is interposed at the time of arraignment and entry of a plea of not guilty unless the court for cause shown otherwise orders. When such plea is interposed the special issue thereby made shall be tried with the plea of not guilty; and if the jury finds that the defendant was insane or feeble-minded or that there is reasonable doubt of his sanity or mental responsibility at the time of the commission of the alleged crime, they shall find the defendant not guilty because insane or feeble-minded.

(2) The presumption of the defendant's sanity and mental normality at the time he committed the alleged crime shall prevail on the trial of the special issue unless the evidence creates in the minds of the jury reasonable doubt of his sanity or mental responsibility at said time.

(3) If found not guilty because insane or not guilty because feeble-minded, the defendant shall be committed to the central state hospital or to an institution designated by the state department of public welfare, there to be detained until discharged in accordance with law.

(4) A reexamination of his mental condition may be had as provided in section 51.11, except that his application for rehearing shall be to the committing court. If upon such reexamination the court finds he is insane or feeble-minded, another reexamination shall not be had unless the court is satisfied there is reasonable cause to believe that his mental condition is improved, in which case the court may order another examination. No person so committed shall be discharged unless the court, in addition to finding him sane and mentally responsible, also finds that he is not likely to have a recurrence of insanity or mental irresponsibility as will result in acts which but for insanity or mental irresponsibility would be crimes.

[357.12 Stats. 1947 renumbered section 357.27 by 1949 c. 631]

357.13 Insane at time of trial. (1) If the court is reliably advised before or at his trial or after conviction and before commitment that the defendant is probably insane or feeble-minded, the court shall in a summary manner make inquiry thereof.

(2) If the court finds that the defendant is insane or feeble-minded, his trial or sentence or commitment shall be postponed indefinitely and the court shall thereupon order him confined in the central state hospital or an institution designated by the department of public welfare.

(3) Upon the defendant's recovery the hospital superintendent shall notify the committing court thereof. The court shall thereupon issue an order remanding the defendant to the custody of the sheriff pending further proceedings in the cause.

(4) A person committed under this section shall be entitled to a rehearing as to his sanity, as provided by section 51.11, except that his application for rehearing shall be to the court which committed him. If he is found insane or feeble-minded, another rehearing shall not be had unless the court is satisfied there is reasonable cause to believe that there is improvement in his mental condition, in which case the court may order another rehearing. If it is determined upon reexamination that the insanity or feeble-mindedness of the defendant is chronic, he shall be recommitted to such institution and shall not be discharged except upon the order of the court which committed him.

357.14 Rules of civil trials. The summoning of jurors; the impaneling and qualifications of the jury; the challenge of jurors for cause; the duty of the court in charging the jury and giving instructions and discharging the jury when unable to agree shall be the same in criminal as it is in civil actions, except that section 270.18 shall not apply to criminal actions. Section 327.25 applies to criminal proceedings.

[357.15 Stats. 1947 repealed by 1949 c. 631]

357.16 Variances disregarded; amendment. (1) The trial court may allow amendments in case of variance between the complaint or indictment or information and the proofs in all cases where the variance is not material to the merits of the action. After verdict the pleading shall be deemed amended to conform to the proof if no objection based on such variance was timely raised upon the trial.

(2) Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

[357.17 Stats. 1949 renumbered section 357.16 (2) by 1949 c. 631]

[357.18 Stats. 1947 renumbered section 355.09 (7) by 1949 c. 631]

[357.19 Stats. 1947 renumbered section 355.09 (8) by 1949 c. 631]

357.20 Arraignment in county court; proceedings; sentence. (1) A defendant charged with a crime not punishable by more than 5 years' imprisonment may request in writing to be arraigned in the county court. Such request shall be delivered to the district attorney and by him filed in the circuit court to which defendant is bound for trial. Within 5 days after receipt thereof the district attorney shall file an information and give the defendant a copy. The clerk of the circuit court shall notify the county judge, who shall fix a time for the arraignment as soon as reasonably possible and notify the district attorney, the defendant and his counsel, if any.

(2) At the time fixed the defendant shall be produced or appear in the county court for arraignment. The clerk of the circuit court shall act as clerk of the county court and shall produce the file of the case. Thereupon the defendant shall be arraigned.

(3) If the defendant pleads not guilty, refuses to plead, or makes a motion under section 355.09, he shall be remanded to jail or, if at large on bail, released, pending the action of the circuit court, and his plea or motion shall be entered of record.

(4) If the defendant pleads nolo contendere the court may either accept such plea and proceed under subsection (5) or reject it and return the case to the circuit court as provided in subsection (3), and the tendering of the plea and its rejection shall be entered of record.

(5) If the defendant pleads guilty the court shall proceed in the same manner as though it were the circuit court and all the proceedings shall be entered in a docket kept for that purpose in the county court as well as in the docket of the circuit court. The sentence or order of probation shall be certified and executed the same as if pronounced or made in the circuit court.

(6) All applicable provisions of law not inconsistent herewith shall apply to proceedings under this section.

(7) This section shall not apply to any county having a court other than the circuit court with trial jurisdiction of such crimes.

[357.21 to 357.24 Stats. 1947 renumbered section 357.20 by 1949 c. 631]

357.25 Plea of guilty at any time. Upon the request of a defendant stating that he desires to plead guilty or nolo contendere the trial court may at any time at a regular or special term require the district attorney to file an information against him and may receive his plea and enter judgment thereon. The defendant may be arraigned by reading to him the identical charge stated in the complaint as though it were an information, but the information as so read shall be reduced to writing and filed as soon as possible thereafter.

357.26 Counsel for indigent defendants charged with felony; advice by court.

(1) Courts of record may appoint counsel for defendants charged with felonies and who are without means to employ counsel. Such appointment shall be in time to enable counsel to attend at the taking of any deposition. The county shall pay the attorney so appointed such sum as the court shall order as compensation and expenses, not exceeding \$25 for each half day in court, \$15 for each half day of preparation not exceeding 5 days, \$15 for each half day attending at the taking of depositions, and his actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 7 cents a mile. The certificate of the clerk of court shall be sufficient warrant to the county treasurer to make such payment.

(2) Upon arraignment and before plea, the court shall advise any person charged with a felony of his right to counsel and that if he is indigent the court will appoint counsel at his request. A record of such advice and of the defendant's reply, if any, shall be made in the docket or in a transcript of the proceedings.

(3) If appointment of counsel has not been so made as to include services upon appeal or writ of error, or if no counsel was appointed in the trial court, the supreme court or the chief justice, upon timely notice to the district attorney and upon being satisfied that

review is sought in good faith and upon reasonable grounds (or if the appeal or writ of error is prosecuted by the state) may appoint counsel to prosecute or defend such appeal or writ of error. If no counsel was appointed in the trial court, the defendant shall be required to show his inability to employ counsel. Upon the certificate of the clerk of the supreme court the county treasurer shall pay the attorney such sum for compensation and expenses as the supreme court allows.

(4) Under like circumstances counsel may be appointed and compensated for representing prisoners upon writs of habeas corpus.

Cross Reference: See 270.125 (4) as to district attorney's duty to inform prisoner of his right to counsel and to compulsory process to procure attendance of witnesses.

[357.27 Stats. 1925 repealed by 1927 c. 242]

357.27 Expert witnesses. (1) **EXPERTS TO BE APPOINTED BY JUDGE.** Whenever, in any criminal case, expert opinion evidence becomes necessary or desirable the judge of the trial court may after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. Before entering upon such investigation such expert shall take and subscribe the following oath, before the judge making the appointment or some officer designated by him: "I do solemnly swear that I will make a faithful and impartial examination of the matters to be investigated by me and that I will make a true report thereon according to the best of my knowledge, belief and understanding. So help me God." The compensation of such expert witnesses shall be fixed by the court and paid by the county upon the order of the court as a part of the costs of the action. The receipt by any expert witness summoned under this section of any other compensation than so fixed by the court and paid by the county, or the offer or promise by any person to pay such other compensation shall be unlawful and punishable as contempt of court. The fact that such expert witnesses have been appointed by the court shall be made known to the jury, but they shall be subject to cross-examination by both parties, who may also summon other expert witnesses at the trial, but the court may impose reasonable limitations upon the number of witnesses who may give opinion evidence on the same subject.

(2) **EXPERTS TO EXAMINE ACCUSED.** No testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused, if such opportunity shall have been seasonably demanded.

(3) **ACCUSED MAY BE COMMITTED TO HOSPITAL.** Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation, but the court may proceed under section 357.13. In case of commitment to a hospital the court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for the purpose of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of the said chief physician who may be cross-examined regarding the report by counsel for both parties.

(4) **EXPERTS, WRITTEN REPORTS OF.** Each expert witness appointed by the court may be required by the court to prepare a written brief report under oath upon the mental condition of the person in question and such report shall be filed with the clerk at such time as may be fixed by the court. Such report may with the permission of the court be read by the witness at the trial.