TITLE XXXIII.
Proceedings in Criminal Cases.

CHAPTER 355.

PROCEEDINGS BEFORE TRIAL.

355.01 Discharge of accused. Any person held imprisoned on any charge of having committed a crime shall be discharged if he be not indicted or an information filed against him before the end of the second term of the court at which he is held to answer, unless it shall appear to the satisfaction of the court that the witnesses on the part of the state have been enticed or kept away, or are detained and prevented from attending the court by sickness or some inevitable accident.

Note: 355.01, 355.12, 355.17, 355.18, 357.20 and 357.25 provide for the filing of an information in all criminal cases beyond the jurisdiction of a justice court. In 357.01 the word "complaint" refers only to convictions in justice court, appealed to circuit court for trial de novo, in which case the filing of an information would not be necessary. Stecher v. State, 237 W 587, 297 NW 391.

355.02 Arrest of accused. If the grand jury shall find and return to the court an indictment or the proper officer shall file an information against any person who is not already in custody process shall forthwith be issued to arrest the person charged with the offense.

355.03 Copy of indictment. As soon as may be after the finding of an indictment or the filing of an information for a crime punishable by imprisonment for life the party charged shall be served with a copy thereof, by the sheriff or his deputy, at least twenty-four hours before trial.

355.04 Where tried; jury list; process. All persons indicted or against whom an information is filed shall be tried before the circuit court, unless they request to be arraigned in the county court and plead guilty therein as hereinafter provided; and any prisoner indicted or against whom an information is filed for a crime punishable by imprisonment in the state prison for life shall, on demand upon the clerk by himself or his counsel, have a list of the jurors returned delivered to him at least twenty-four hours before trial, and shall also have process to summon such witnesses as are necessary to his defense at the expense of the state.

355.05 Copy of information. Every person indicted or against whom an information is filed for an offense for which he may be imprisoned in the state prison shall, if he be under recognizance, or in custody to answer for such offense, be entitled to a copy of the indictment or information and of all indorsements thereon without paying any fees therefor.

355.06 Discharge of accused on satisfaction. Whenever an indictment is found, or an information is filed, or an action is begun by complaint, against any person for any misdemeanor, for which the party injured may have a remedy by civil action, except where the offense was committed by or upon any sheriff or other officer of justice or riotously or

with intent to commit a felony, if the party injured shall appear in court where such indictment or information or action is pending and acknowledge satisfaction for the injury sustained the court may, on payment of the costs accrued, order all further proceedings to be stayed and discharge the defendant from the indictment or information or action, which shall forever bar all remedy for such injury by civil action.

355.07 Manner of trial. When any person is arraigned upon an indictment or information it shall not be necessary in any case to ask him how he will be tried.

355.08 Plea if accused mute. If on the arraignment of any person who is indicted or against whom any information is filed he shall refuse to plead or answer or shall not confess the indictment or information to be true the court shall order a plea of not guilty to be entered, and thereupon the proceedings shall be the same as if he had pleaded not guilty to the indictment or information, as the case may be.

355.085 Alibi to be pleaded. In courts of record in case the defendant intends to rely upon an alibi as a defense, he shall give to the prosecuting attorney written notice thereof on the day of the arraignment, stating particularly the place where he claims to have been when the offense is alleged to have been committed; in default of such notice, evidence of the alibi shall not be received unless the court, for good cause shown, shall otherwise order. [*Supreme Court Order, effective Jan. 1, 1935*]

355.09 Technical pleas; waiver of jeopardy. Any objection to a prosecution or the sufficiency of an indictment or information that may be raised by motion to quash, demurrer, plea in abatement, or special plea in bar, shall be so raised before a jury is impaneled or testimony taken, and unless so raised, shall be deemed waived; and objection to the validity or constitutionality of the statute upon which the prosecution is based, in whole or in part, shall be so raised or deemed waived. Provided that the court may, in its discretion, on the application of the defendant, entertain any such objection at a later stage of the trial, but in every such case the application shall constitute a waiver, by the defendant, of any jeopardy that has theretofore attached.

Note: The defects in the information were waived by failure to make timely objections. Perrugini v. State, 204 W 69, 234 NW 384.

The denial of a motion to dismiss for failure of the information to show the venue was not an abuse of discretion. State v. Dowling, 205 W 314, 237 NW 98.

Although objection to sufficiency of information is waived unless taken before jury is impaneled or testimony taken, trial court may, on motion of defendant, relieve him from such waiver, but in such case defendant's motion operates as a waiver of jeopardy and subjects him to trial. Spoo v. State, 219 W 285, 262 NW 696.

Motions to quash defective counts of an indictment made before impaneling of the jury are timely and should be granted. Liskowitz v. State, 229 W 636, 282 NW 103.

The fact that the original complaint and warrant did not set forth the particular accusation was not error, where there was a sufficient information and the testimony on the preliminary hearing disclosed the facts on which the charges were properly made. State v. Neukom, 245 W 372, 14 NW (2d) 34.

Objection to the sufficiency of an information, not raised before testimony taken, is waived, although the trial court may, in its descretion, entertain an objection at a later time. State v. Bachmeyer, 247 W 294, 19 NW (2d) 261.

355.10 Person in prison, when tried. Every person held in prison upon an indictment or information shall, if he require it, be tried as soon as the next term of court after the expiration of six months from the time when he was imprisoned, or shall be bailed upon his own recognizance, unless it shall appear to the satisfaction of the court that the witnesses on behalf of the state have been enticed or kept away or are detained and prevented from attending the court by sickness or some inevitable accident.

355.11 Proof of plea. When a plea in abatement or other dilatory plea to an indictment or information shall be offered the court may refuse to receive it until the truth thereof shall be proved by affidavit or other evidence.

355.12 Jurisdiction. The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as they possess and may exercise in cases of like prosecution upon indictment.

355.13 Who to file and when. All informations shall be filed during the term in the court having jurisdiction of the offenses specified therein, except as hereinafter provided, by the district attorney of the proper county as informant, and he shall subscribe his name thereto.

355.14 Offense, how charged. The offense charged in any information shall be stated in plain, concise language, without prolixity or unnecessary repetition. Different offenses and different degrees of the same offenses may be joined in one information in all cases where the same might be joined by different counts in one indictment; and in all cases the defendant shall have the same rights as to all proceedings therein as he would have if prosecuted for the same offense upon indictment.

Note: Same indictment may include several offenses committed by defendant, notwithstanding they differ from each other, vary in degree of punishment, and have been committed at different times, provided offenses are of same general character and mode of trial is the same. Gutenkunst v. State, 218 W 96, 259 NW 610.

355.15 Law relating to indictments applicable. All provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the passing or execution of any sentence, and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall, to the same extent and in the same manner, as near as may be, apply to informations and all prosecutions and proceedings thereon.

355.16 Commitment; bail. Any person who may, according to law, be committed to jail or become recognized or held to bail, with sureties for his appearance in court, to answer to any indictment, may, in like manner, be so committed to jail or become recognized and held to bail for his appearance to answer to any information or indictment as the case may be.

355.17 District attorney's duties. The district attorney of the proper county shall inquire into and make full examination of all facts and circumstances connected with any case of preliminary examination as provided by law, touching the commission of any offense whereon the offender shall have been committed to jail, become recognized or held to bail, and file an information setting forth the crime committed, according to the facts ascertained on such examination and from the written testimony taken thereon, whether it be the offense charged in the complaint on which the examination was had or not; but if the district attorney shall determine in any such case that an information ought not to be filed he shall make, subscribe and file with the clerk of the court a statement in writing containing his reasons in fact and in law for not filing an information; such statement shall be filed at or before the term of the court at which the defendant shall be held for appearance for trial; and the court or presiding judge shall examine such statement, together with the evidence filed, if there be any, and if upon such examination the court or judge shall not be satisfied with such statement the district attorney shall file the proper information and bring the case to trial; but if said statement is satisfactory said court or judge shall indorse "approved" upon it; and if at the time of such approval the defendant be confined in jail under commitment for trial the clerk of the court shall forthwith serve upon the sheriff or jailer having such defendant in custody his certificate under the seal of the court to the effect that the reasons for not filing an information have been approved by the court or judge, as the case may be; whereupon the defendant shall forthwith be discharged.

Note: Where accused was held for trial, district attorney was required to file information setting forth crime committed according to facts ascertained on preliminary examination, whether it were offense charged in complaint before examining magistrate or not. Where defendant was charged with burning and with being accessory before fact in burning of buildings, permitting state to amend information by adding count respecting burning of personalty in buildings, under the circumstances of this case, was not error. Scott v. State, 211 W 548, 248 NW 473.

A district attorney in filing an information is not restricted to the crime stated in the complaint before the examining magistrate, but may file an information setting forth the crime committed according to the facts ascertained on such examination; consequently the evidence on the preliminary examination must be deemed sufficient to warrant holding the defendants for trial if it admits of finding the existence of the essential facts to constitute any criminal offense, although it was not charged in the complaint. The evidence submitted on the preliminary examination must be construed favorably to determine whether there was any substantial basis for the exercise of the judgment of the committing magistrate. State ex rel. Kropf v. Gilbert, 213 W 196, 251 NW 478.

The district attorney in filing an information is not limited by the complaint, nor is he limited by the opinion of the examining magistrate as to the offense committed by the defendant. Hobbins v. State, 214 W 496, 253 NW 570.

The information should set forth the crime committed according to the facts ascertained upon the examination and from the written testimony taken thereon, whether it be the offense charged in the complaint on which examination was held or not. Mark v. State, 228 W 377, 280 NW 299.

The district attorney in filing an information is not restricted to the crime stated in the complaint made before the examining magistrate but he may file an information setting forth the crime committed according to the facts ascertained on the examination whether it be the offense charged in the complaint or not. State ex rel. Dinneen v. Larson, 231 W 207, 284 NW 21, 286 NW 41.

District attorney must produce at preliminary examination enough evidence to satisfy magistrate that crime has been committed and that there is probable cause to believe defendant guilty; he need not produce all evidence in his possession that he may produce at trial. 24 Atty. Gen. 258.

355.18 Preliminary examination. No information shall be filed against any person for any offense until such person shall have had a preliminary examination, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination; provided, that information may be filed without such examination against fugitives from justice within the meaning of the constitution and laws of the United States and against corporations; but no failure or omission of such preliminary examination shall in any case invalidate any information in any court unless the defendant shall take advantage of such failure or omission before pleading to the merits by a plea in abatement.

Note: Where the accused stood mute on arraignment and a plea of not guilty had been entered, his later oral objection to proceeding with the trial for want of a preliminary examination was properly overruled because an oral motion is not a plea in abatement and because the court may, in its discretion, refuse such plea after pleading to the merits. Stetson v. State, 204 W 250, 235 NW 539.

355.19 Procedure if no examination had. Whenever any information shall be filed by any district attorney against a fugitive from justice, without a preliminary examination, and the defendant in such information shall be acquitted or discharged without trial thereof it shall be the duty of the court in which the defendant shall be so acquitted or otherwise discharged to determine in writing whether such information was filed upon probable cause and in good faith, and when found to be so filed shall file such determination with the clerk. And when such court shall not file such determination the defendant in such information may maintain an action against such district attorney for malicious prosecution.

355.20 Second examination. In case any preliminary examination has been had, as provided by law, and the person complained of has been discharged for want of sufficient evidence to raise a probability of his guilt, and the district attorney shall afterwards discover admissible evidence sufficient, in his judgment, to convict the person discharged he may, notwithstanding such discharge, cause another complaint to be made before any officer authorized by law to make such examination, and thereupon a second arrest and examination shall be had.

Note: Accused may be bound over for trial notwithstanding previous discharge, since district attorney may hold second preliminary examination if he "shall afterwards discover admissible evidence sufficient, in his judgment, to convict the person discharged." Judgment of district attorney is not open to review upon objection at trial to legality of second examination; nor is it jurisdictional that he should recite in proceedings that he has discovered additional evidence. Dreps v. State ex rel. Kaiser, 219 W 279, 262 NW 700.

355.21 Form of information. The information may be in the following form:

STATE OF WISCONSIN, ... County. } In .... court.

The State of Wisconsin
against
(Name of accused).

I, ..., district attorney for said county, hereby inform the court that on the .... day of ...., in the year ...., at said county, A. B. (name or alias of accused) did (state the offense), against the peace and dignity of the state of Wisconsin.

Dated, ..., District Attorney.

355.22 Information, when good. The information shall be sufficient if it can be understood therefrom:

(1) That it is presented by the person authorized by law to prosecute the offense;

(2) That the defendant is named therein, or described as a person whose name is unknown to the informant;

(3) That the offense was committed within the jurisdiction of the court or is triable therein;

(4) That the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case.

Note: The defendant was not prejudiced by the fact that information charging libel also charged slander under a single statute covering both, every essential element of libel being found by the jury and the punishment for libel and slander being the same. Branigan v. State, 209 W 249, 244 NW 767.

355.23 Immaterial defects. No indictment or information shall be deemed invalid nor shall the trial, judgment or other proceedings thereon be affected:

(1) By reason of having omitted the addition of the defendant's title, occupation, estate or degree, or by reason of the misstatement of any such matter, or of the town or county of his residence, when the defendant shall not be misled or prejudiced by such misstatements; or,

(2) By the omission of the words "with force and arms" or any word of similar import; or,

(3) By reason of omitting to charge any offense to have been committed, contrary to a statute or contrary to several statutes, notwithstanding such offense may have been created or the punishment thereof may have been declared by any statute; or,

(4) By reason of any other defect or imperfection in matters of form which shall not tend to the prejudice of the defendant.

Note: Perjury indictment is not fatally defective for failure to allege, along with statement of false testimony, what was in fact the truth, where no substantial right of defendant had been affected by the omission. Koehler v. State, 218 W 75, 260 NW 421.

An indictment charging that each defendant as an officer of a bank unlawfully accepted for deposit or for safekeeping or to loan to certain persons moneys or bills, notes or other paper for safekeeping or for collection, well knowing that the bank was insolvent, was properly quashed as not charging the commission of any offense because of the use of the disjunctive "or," although the indictment followed the language of 348.19, on which the indictment was based. State v. Kitzerow, 221 W 436, 267 NW 71.

355.24 Murder and manslaughter. In indictments or informations for murder or manslaughter it shall not be necessary to set forth the manner in which or the means by

which the death of the deceased was caused, but it shall be sufficient in any indictment or information for murder to charge that the accused did wilfully, feloniously and of his malice aforethought kill and murder the deceased; and in any indictment or information for manslaughter it shall be sufficient to charge that the accused did feloniously kill and slay the deceased.

355.25 Perjury and subornation thereof. In indictments or informations for wilful or corrupt perjury it shall be sufficient to set forth the substance of the offense charged and in what court or before whom the oath or affirmation was taken, averring such court, person or body to have competent authority to administer the same, together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the indictment, information, complaint, affidavit, declaration or part of any records or proceedings, other than as aforesaid, and without setting forth the commission or authority of the court, person or body before whom the perjury was committed. In indictments or informations for subornation of perjury or for endeavoring to incite or procure any person to commit the crime of perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the indictment, information, complaint, affidavit, declaration or part of any record or proceedings, and without setting forth the commission or authority of the court, person or body before whom the perjury was committed, agreed, promised or incited to be committed.

355.26 Forgery, etc. In any indictment or information for falsely making, uttering, forging, printing, photographing, disposing of or putting off any instrument it shall be sufficient to set forth the purport thereof.

355.27 Description of instrument, etc. In any indictment or information for engraving, making or mending, or beginning so to do, any instrument, matter or thing, or for providing, using or having the unlawful custody or possession of any instrument or other material, matter or thing it shall be sufficient to describe such instrument, material, matter or thing by any name or designation by which the same may be usually known.

355.28 Same. In all other cases whenever it shall be necessary to make any averment in any indictment or information as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known or by the purport thereof.

355.29 Offenses against election laws. When an offense shall be committed in relation to any election an indictment or information for such offense shall be deemed sufficient if it allege that such election was authorized by law, without stating the names of the inspectors or officers holding such elections or the offices to be filled thereat, or the names of the persons voted for.

355.30 Money, bank bills, etc., how described. In every indictment or information in which it shall be necessary to make any averment as to any money, or bank bill or note, United States treasury notes, postal or fractional currency or other bills, bonds or notes issued by lawful authority intended to pass and circulate as money, or any United States bonds it shall be sufficient to describe such money or bills, notes, currency or bonds simply as money, without specifying any particular coin, note, bill or bond, and such allegation shall be sustained by proof of any amount of coin or of any such note, bill, currency or bond, although the particular species of coin of which such amount was composed or the particular nature of such note, bill, currency or bond shall not be proven.

355.31 Larceny and embezzlement; pleading and evidence; second jeopardy. In any case of larceny where 2 or more thefts of money or property belonging to the same owner have been committed pursuant to a single intent and design or in execution of a common fraudulent scheme, and in any case of embezzlement or larceny by bailee, all thefts or misappropriations of money or property belonging to the same owner may be prosecuted as a single offense and it shall be sufficient to allege generally in the complaint, indictment or information a larceny or embezzlement of money to a certain amount or property to a certain value committed between certain dates, without specifying any particulars thereof, and on the trial evidence may be given of any such larceny or embezzlement committed on or between the dates alleged; and it shall be sufficient to maintain the charge and shall not be deemed a variance if it shall be proved that any money or property, of whatever amount or value, was so stolen or embezzled within the said period. But an acquittal or conviction in any such case shall not bar a subsequent prosecution for any acts of larceny or embezzlement concerning which no evidence was received at the trial of the original charge; and in case of a conviction of the original charge on a plea of guilty or nolo contendere, the district attorney may, at any time before sentence, file a bill of particulars or state in the record what particular acts of larceny or embezzlement are included in the complaint, indictment or information and said conviction shall in that event

not bar a subsequent prosecution for any other acts of larceny or embezzlement. [*1943 c. 52*]

Note: Where an agent at different times converts to his own use, with intent to defraud, specific sums of his principal's money in his possession, the acts constitute separate and distinct crimes of embezzlement, and an acquittal in a prosecution for one of the acts would not support the defense of former jeopardy in a prosecution for the other, regardless of the order in which the prosecutions were tried. Anderson v. State, 221 W 78, 265 NW 210.

355.32 Larceny. An indictment or information for larceny may contain also a count for obtaining the same property by false tokens or pretenses, or a count for embezzlement thereof, and for receiving or concealing the same property knowing it to have been stolen, and the jury may convict of either offense, and may find all or any of the persons indicted or informed against guilty of either of the offenses charged in the indictment or information.

355.33 Charge in language of statute. When the offense charged has been created by any statute or the punishment of such offense has been declared by any statute the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute if it describe the offense in the words of the statute or in words of substantially the same meaning; and words used in the statutes to define a public offense need not be strictly pursued in charging an offense under such statutes, but other words conveying the same meaning may be used.

Note: Where an indictment charges an alleged offense in the language of a statute, and then proceeds to state the facts constituting the particular offense on which the indictment is based, if such facts do not constitute an offense under the statute, the indictment must fall, since the court must assume that the grand jury returned its indictment based on such facts. Shinners v. State ex rel. Behling, 221 W 416, 266 NW 784.

Statement of an offense in statutory language is sufficient only when enough is stated in connection with such language to inform the accused of the particular act of violation claimed. Liskowitz v. State, 229 W 636, 282 NW 103.

In an indictment or information, a statement of the offense in statutory language is sufficient only when enough is stated in connection with that language to inform the accused of the particular offense with which he stands charged. Unger v. State, 231 W 8, 284 NW 18.

An information charging the defendant with feloniously and unlawfully killing a certain person, without a premeditated design to effect the death of such person, said killing being prepetrated by an act imminently dangerous to others and evincing a depraved mind regardless of human life, contrary to 340.03, was sufficient to charge the offense of second degree murder. State v. Johnson, 233 W 668, 290 NW 159.

355.34 Pleading judgment. In pleading a judgment or other determination of or proceeding before any court or officer the facts conferring jurisdiction need not be stated, but it shall be sufficient to state that the judgment or determination was duly rendered or made or the proceeding duly had before such court or officer; but the facts conferring jurisdiction must be established on the trial.

355.35 Pleading private statute. In pleading a private statute or a right derived therefrom it shall be sufficient to refer to the statute by its title and the date of its approval.

355.36 Lost information. In case of the loss or destruction of an information the district attorney may file in court another information, and the prosecution shall proceed and trial be had without delay from that cause. In case of the loss or destruction of an indictment the court, upon suggestion of the fact, may order another to be found or an information to be filed as it deems proper.

355.37 Mistake in charging offense. When it appears at any time before verdict or judgment that a mistake has been made in charging the proper offense the defendant shall not be discharged if there appears to be good cause to detain him in custody, but the court may recognize him to answer to the offense and, if necessary, recognize the witnesses to appear and testify.

355.38 Sex of animals. In an indictment or information for the larceny of any animal or for any other public offense committed in reference to any animal it shall be sufficient to describe the animal by such name as, in the common understanding, embraces it, without designating its sex.

355.39 Ownership, how alleged. In an indictment or information for an offense committed in relation to property it shall be sufficient to state the name of any one or the name of several joint owners, or of any officer of any joint-stock company or association owning the same.

355.40 Intent to defraud. In any case where the intent to defraud is necessary to constitute the offense of forgery or any other offense that may be prosecuted it shall be sufficient to allege in the indictment or information an intent to defraud, without naming therein the particular person or body corporate or joint-stock company or association intended to be defrauded; and on the trial of such indictment it shall be sufficient and shall not be deemed a variance if there appear to be an intent to defraud the United States, or any state, territory, county, city, town or village, or any body corporate, or any public officer in his official capacity, or any copartnership, or member thereof, or any particular person.

355.41 Informations to be recorded. It shall be the duty of the several clerks of the circuit courts of this state, immediately upon the presentment of any indictment by the grand jury or the filing of any information, to record the same at length in the book to be provided for that purpose, to be kept in the office of each such clerk, and such record or certified copies therefrom may be read in evidence and proceedings had thereon in like manner and with the same effect as the originals.