CHAPTER 357.

TRIALS IN CRIMINAL CASES.

357.01 Issues of fact. Issues of fact joined upon any complaint, indictment or information may be tried by the court without a jury or by a jury of less than twelve men whenever the accused in writing, or by statement in open court, entered in the minutes, consents thereto. When there is no such consent such issue shall be tried by a jury drawn and returned in the manner prescribed by law for the trial of issues of fact in civil causes.

Note: A defendant in a criminal case is not required to submit his case to a jury, but when he does so he takes his chances upon the suitability of its members for jury service. An affidavit of a juror relative to occurrences in the jury room when deliberating upon the case may not be considered to impeach the verdict, and likewise an affidavit of a husband of a juror containing statements made to him by such juror relative to occurrences in the jury room when deliberating upon the case may not be considered to impeach the verdict. Newbern v. State, 222 W 291, 260 NW 236, 268 NW 871.

The fact that the trial is had to the court alone does not justify reception of wholly incompetent evidence, but all trials should be conducted fairly and the trial court must scrupulously attempt to observe all well established rules of evidence. Birmingham v. State, 228 W 448, 279 NW 15.

Where the defendant convicted in justice court of a misdemeanor appeals to the circuit court he is there entitled to a jury trial. State v. Slowe, 230 W 406, 284 NW 4.

The word "complaint" in this section 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.

357.02 Grand juror not to serve. No member of the grand jury which has found an indictment shall be put upon the jury for the trial of such indictment if challenged for that cause by the defendant.

357.03 Peremptory challenges. In all criminal cases the state and the defense shall each be entitled to four peremptory challenges and no more, except as hereinafter otherwise provided. When the offense charged is punishable by imprisonment for life the state and the defense shall each be entitled to twelve peremptory challenges. When there are two or more defendants the court shall divide the challenges as equally as practicable between them, and if their defenses are adverse and the court is satisfied that the protection of their right so requires, the court in its discretion may allow the defendants additional challenges. When such additional challenges are allowed, the total number of all peremptory challenges allowed to the defense shall not exceed the following number:

(1) When the offense charged is punishable by imprisonment for life, sixteen challenges, if there are two defendants only, and eighteen challenges if there are three or more defendants.

(2) When the offense charged is not punishable by imprisonment for life, six challenges if there are two defendants only, and nine challenges if there are three or more defendants.

Note: The denial of defendants' request for additional peremptory challenges was not error, in the absence of anything in the record indicating that the jury as chosen was not fair and impartial. Pollack v. State, 215 W 200, 253 NW 560, 254 NW 471.

357.04 Challenging procedure. When empaneling a jury 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 box until all peremptory challenges, if any, in excess of eight have been exercised or waived. From the twenty remaining the parties shall exercise in their order the remaining eight challenges; and when there are but eight remaining challenges and any party shall decline to challenge in his turn, such challenge shall be made by the clerk by lot.

357.05 [*Repealed by Supreme Court Order, effective Jan. 1, 1937*]

357.06 [*Repealed by 1935 c. 213 s. 18*]

357.065 Alternate jurors in homicide cases. Whenever in the opinion of the court the trial of a defendant in a homicide case is likely to be a protracted one, the court may,

immediately after the jury is impaneled and sworn, direct the calling of one or two additional jurors, to be known as "alternate jurors." Such jurors shall be drawn from the same source, and in the same manner and have the same qualifications as regular jurors, and be subject to examination and challenge as such jurors, except that each party shall be allowed one peremptory challenge to each alternate juror. The alternate juror shall take the proper oath or affirmation and shall be seated near the regular jurors with equal facilities for seeing and hearing the proceedings in the cause, and shall attend at all times upon the trial of the cause in company with the regular jurors. They shall obey all orders and admonitions of the court, and if the regular jurors are ordered to be kept in the custody of an officer during the trial of the cause, the alternate jurors shall also be kept with the other jurors and except as hereinafter provided, shall be discharged upon the final submission of the cause to the jury. If, before the final submission of the cause, a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his place in the jury box. If there are two alternate jurors the court shall select one by lot, who shall then take his place in the jury box. After an alternate juror is in the jury box he shall be subject to the same rules as a regular juror. [*1937 c. 47*]

357.07 Accused to be present. No person indicted or against whom an information is filed for a felony shall be tried unless personally present during the trial; persons indicted or against whom an information is filed for smaller offenses may, at their own request, by leave of the court, be put on trial in their absence by an attorney duly authorized for that purpose.

357.08 View. The court may order a view by any jury impaneled to try a criminal case.

357.09 Conviction of part of offense. Whenever any person indicted or informed against for felony shall on trial be acquitted by verdict of part of the offenses charged in the indictment or information and convicted of the residue thereof, such verdict may be received and recorded by the court, and thereupon the person charged shall be adjudged guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such indictment or information, and shall be sentenced and punished accordingly.

357.10 Conviction of assault when intent not found. In all cases of indictment or information in the circuit court for assault with intent to commit any felony it may be lawful for the jury, in case they do not find the felonious intent charged, to convict of the assault; and the court shall have power to sentence the person so convicted to be punished by imprisonment in the jail of the county for a term not exceeding one year or by fine not exceeding five hundred dollars.

357.11 Insanity at the time of committing the offense. (1) No plea that the person indicted or informed against was insane or feeble-minded at the time of the commission of the alleged offense, and for that reason not responsible for his acts, shall be received unless such plea is interposed at the time of arraignment and entry of plea of not guilty, unless the court for good cause shown shall otherwise order. When such plea is interposed the special issue thereby made shall be tried and determined by the jury with the plea of not guilty; and if such jury shall find upon such special issue that such accused person was so insane, or feeble-minded, or that there is reasonable doubt of his sanity or mental responsibility at the time of the commission of such alleged offense, they shall return a verdict of not guilty because insane, or feeble-minded.

(2) The presumption of such accused person's sanity and mental normality, at the time of the commission of such alleged offense, shall prevail and be sufficient proof thereof on the trial of such special issue, unless the evidence produced on such trial shall create in the minds of the jury a reasonable doubt of the sanity or mental responsibility of such accused person at the time of the commission of such alleged offense.

(3) If the defendant is found by the jury "not guilty because insane" or "not guilty because feeble-minded," he shall forthwith be committed by the court to the central state hospital, or to an institution designated by the state department of public welfare, there to be detained and treated until he shall be discharged according to law.

(4) A re-examination of his sanity or mental condition may be had as provided in section 51.11, except such person shall make his application for rehearing to the court from which he was committed. If upon such rehearing a jury shall determine he is insane or feeble-minded, then another hearing shall not be had thereafter unless the court which had jurisdiction in the first case shall be satisfied there is reasonable cause to believe that there is an improvement in the person's mental condition, in which case such court may order another jury trial. No such person so committed shall be discharged from detention unless the magistrate or the jury upon whom devolves the duty to pass upon his sanity and mental condition shall, in addition to finding him sane and mentally responsible, also find

that he is not likely to have such a recurrence of insanity or mental irresponsibility as would result in acts which, but for insanity or mental irresponsibility, would constitute crimes. [*1933 c. 262; 1943 c. 275*]

Note: The purpose of the statute relating to pleas of insanity "or feeble-mindedness" and proceedings thereon in criminal cases was to make surer the hospitalization of those who because of a lack of mental responsibility are dangerous to have at large, and the statute did not abolish knowledge of right and wrong as a test of criminal responsibility. State v. Johnson, 233 W 668, 290 NW 159.

357.12 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 experts 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.

Note: Costs for expert witnesses appointed by court under (1) cannot be charged against estate of one examined who has not been found guilty of offense charged. 24 Atty. Gen. 409.

Commitment of accused person under (3) may be made to Mendota or Winnebago state hospital. Confinement limitation prescribed by 51.04 for alleged insane does not apply to commitments under 357.12 (3). 25 Atty. Gen. 714.

Out-of-state chemist otherwise qualified to testify as expert is competent as such in Wisconsin. 28 Atty. Gen. 332.

357.13 Insanity at the time of trial or conviction. (1) If the court shall be informed, in any manner, that any person indicted or informed against for any offense probably is, at the time of his trial, or after his conviction and before commitment, insane, or feeble-minded and thereby incapacitated to act for himself, the court shall, in a summary manner, make inquisition thereof by a jury or otherwise as it deems most proper.

(2) If it shall be determined by such inquisition that such accused person is insane or feeble-minded his trial, sentence, or commitment for such offense shall be postponed indefinitely, and the court shall thereupon order that he be confined in the central state hospital or in an institution to be designated by the department of public welfare.

(3) Upon the recovery of such person from his insanity or feeble-mindedness the said superintendent shall notify the court in which such indictment or information is pending of such recovery, and said court shall thereupon issue to the sheriff of the county a warrant requiring him to take such accused person into his custody and confine him in the county

jail of said county pending trial, sentence, or commitment for such offense; but such person may be released on recognizance or bail as provided in chapter 361.

(4) Any person committed under the provisions of this section shall at any time after said commitment be entitled to a rehearing as to such sanity as provided by, and according to procedure outlined in, section 51.11, except such person shall make his application for rehearing to the court from which he was committed. If upon such rehearing a jury shall determine he is insane or feeble-minded, then another hearing shall not be had thereafter unless the court which had jurisdiction in the first case shall be satisfied there is reasonable cause to believe that there is an improvement in the person's mental condition, in which case such court may order another jury trial. If it shall be determined, pursuant to any such re-examination, that the insanity or feeble-mindedness of such accused person is incurable he shall be treated and disposed of as persons incurably insane or feeble-minded are required by law to be treated; but no such person shall be removed or discharged from said hospital or home except upon the order of the court having jurisdiction over such person for trial, sentence or commitment. [*1931 c. 322; 1933 c. 262; 1941 c. 48*]

Note: One who is charged with crime and who was committed for insanity at the time of the trial and who on re-examination is found to be sane cannot be discharged except upon the order of the proper court. State ex rel. Ribansky v. Shaughnessy, 205 W 136, 236 NW 567.

Board of control cannot transfer person committed to central state hospital prior to his being there received, nor transfer to another state hospital person committed to central state hospital under this section. Court may commit, under this section, only to central state hospital, board of control not having designated any other institution for such commitment, and court may not transfer patient elsewhere, except to county asylum if he be adjudicated incurable, under 51.23 (2). Court may order return of committed person for further proceedings in criminal matter. 21 Atty. Gen. 902.

Nolle prosequi should not have been entered after commitment to central state hospital under this section, but after its entry the court has no further jurisdiction. But a new prosecution is not barred where defendant was not in jeopardy. In transferring patient to county institution (4) should be strictly complied with. 24 Atty. Gen. 105, 368.

See note to 51.234, citing 27 Atty. Gen. 229.

357.14 Rules of civil trials. The impaneling and qualifications of the jury, the challenge of jurors for cause, the duty of the court in charging the jury and of giving them further instruction and discharging them when unable to agree shall be the same in criminal cases as provided by law in civil cases, except that section 270.18 shall not apply to criminal cases. Section 327.25 shall apply to criminal proceedings. [*Supreme Court Order, effective July 1, 1941*]

Note: A defendant jointly tried with two others for the murder of a filling station attendant, which occurred during a holdup on an evening on which the parties, one of whom was armed to the knowledge of this defendant, had started out for the purpose of staging holdups and had staged two other holdups, is held not entitled to a separate trial, although such defendant remained in an automobile during the holdup at which the murder occurred. State v. Henger, 220 W 410, 264 NW 922.

An instruction that the law presumes that every reasonable person intends all the natural, usual, and probable consequences of his acts, is held prejudicial error, where not qualified by any statement that such inference exists in the absence of evidence to the contrary. Melli v. State, 220 W 419, 265 NW 79.

357.15 If acquitted not liable for costs. No prisoner or person committed, held in custody or under recognizance, who shall be acquitted by verdict or discharged because no indictment has been found against him or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he was in custody.

357.16 Variance disregarded, when. Any court in which the trial of any criminal action is had may allow amendment in case of variance between the complaint, indictment or information and the proof in the following cases: In the name or description of any person, place or premises, or of any thing, writing or record, or the ownership of any property described in the complaint, indictment or information and in all cases where the variance between the complaint, indictment or information and the proof is not material to the merits of the case. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: In a prosecution under 343.44 the charge that the defendant "destroyed" the property was adequate to apprise him that injury thereto was charged, and, there being no showing on the trial that the defendant was misled, the fact that the proof established only that the property was injured can be considered a variance not material to the merits of the case, and the complaint can be considered amended to conform to the proof. State v. Carroll, 239 W 625, 2 NW (2d) 211.

357.17 Amendment of other parts. Upon allowing such amendment the court may direct such amendment of other parts of the indictment or information as may thereby be rendered necessary, and may in its discretion proceed in or postpone the trial.

357.18 Amendment of misnomer. Whenever the plea of misnomer is pleaded to an indictment or information the court may forthwith cause the indictment or information to be amended in that respect, and call upon the parties to plead thereto as though no such plea had been pleaded.

357.19 What may be amended. No indictment, information, process, return or other proceedings in a criminal case in the courts or course of justice shall be abated, quashed or reversed for any error or mistake where the person and the case may be rightly understood by the court, and the court may, on motion, order an amendment curing such defect.

357.20 Plea of guilty, sentence by county court. Whenever any person committed for trial for an offense for which the highest penalty provided by law shall not exceed five years' imprisonment shall request of the district attorney and county judge of the county in which the offense was committed to be arraigned upon such charge before the county court, before the sitting of the court having jurisdiction to try the same, it shall be the duty of the district attorney, upon the receipt of such request, to file an information against the prisoner upon such charge, within five days thereafter, in the office of the clerk of the court having trial jurisdiction, and deliver a copy thereof to the prisoner. Such request shall be in writing subscribed by the prisoner in the presence of the sheriff, undersheriff or jailer, who shall sign the same as attesting witness, and shall forthwith be delivered to the clerk of the proper court. Immediately upon receiving and filing the same the clerk shall make two certified copies thereof, one of which the sheriff shall forthwith serve upon the district attorney and the other upon the county judge.

357.21 Duty of judge. The county judge, upon receiving such request, shall, at once, issue an order fixing a time for such arraignment and stating the place where the same will be held; which time shall not be less than six days after the receipt by him of such request. The sheriff shall serve a copy of such order upon the district attorney, the prisoner's counsel, if he have any, and, if the prisoner is a minor, on the nearest relative of the prisoner, if any there be known to the sheriff residing in the county, at least three days before the time fixed for such arraignment; provided, that nothing contained in this section or in section 357.20 shall prohibit the county judge from ordering an immediate arraignment of any such prisoner upon the filing of a written request therefor by the prisoner or his counsel, and the district attorney, and, if such prisoner be a minor, by his nearest relative, if there be any residing in the county.

357.22 How court to proceed. At the time fixed for such arraignment the sheriff or jailer shall produce the prisoner before the county judge at the usual court room of the county court. It shall be the duty of the sheriff, district attorney and clerk of the court having trial jurisdiction to attend upon such arraignment. The clerk shall act as clerk of the county court in the proceeding and shall exhibit the information and the evidence taken before the examining magistrate, if such examination has been had, to the county judge, who shall examine the same. If preliminary examination has been waived by the prisoner the county judge shall inquire into the nature of the case; and may examine witnesses, if necessary, to enable him to judge of the proper amount of punishment to be inflicted. The county judge shall cause the proof to be filed with the clerk of the proper service of such request and his order as herein required. The prisoner shall then, in open court, be arraigned. The county judge or district attorney shall fully explain to him the exact nature of the offense charged in the information and the penalty provided therefor by law.

357.23 How if plea not guilty or no plea. If upon such explanation the prisoner refuses to plead or plead not guilty such refusal or plea shall be entered on the minutes and the prisoner remanded to jail to await his trial. If he plead guilty to the information the county judge shall receive the plea, shall pass sentence and render judgment thereon in the same manner and with like effect as if such plea had been made in the court having trial jurisdiction, and shall inflict such punishment, either by fine or imprisonment, or both, as the nature of the case may require; but such punishment shall in no case be less nor greater than the penalty fixed by law for the offense charged. Such request, information, plea, sentence, judgment and the minutes of all the proceedings shall be entered and recorded in a book to be kept for that purpose in the county court in the same manner and substantially the same form as if the arraignment had been had in the court having trial jurisdiction, and the clerk shall also keep a similar record thereof in the same form in his office in a book to be kept for that purpose.

357.24 Sentence to be certified. Such sentence shall be certified by the clerk from his record thereof, delivered and executed in the same manner as if passed by the court having trial jurisdiction.

357.25 Plea of guilty at special term. When any person shall be committed for trial and is in actual confinement or in jail by virtue of any indictment or information pending against him the court having trial jurisdiction may, at any law or special term thereof, upon the application of the prisoner in writing, stating that he desires to plead guilty to the charge made against him by the complaint, indictment or information, direct an information to be filed, if indictment or information has not been filed, and upon the

filing thereof and of such application may receive and record a plea of guilty and award sentence thereon.

357.26 Right to counsel; counsel for indigent defendants. (1) The courts of record may appoint counsel to defend any person charged with any offense before such courts, if the accused is destitute of means to employ counsel, and such appointment shall be in time to enable counsel to attend at the taking of any deposition for which leave is granted. The county in which such criminal action or proceeding shall be pending shall pay such counselor for his services and expenses such sum as the court making the appointment shall, by an order to be entered in its minutes, certify to be a reasonable compensation, but not to exceed $25 per day for each day actually occupied in such trial or proceeding, and not to exceed $15 per day for not more than 5 days actually and necessarily occupied in preparing for trial in any one case, and, in addition thereto, the court may allow him $10 per day and traveling expenses for attendance at the taking of depositions. Such compensation to counsel for indigent persons shall be paid by the county treasurer upon presentation to him of the certificate of the clerk of the said court therefor.

(2) Upon the arraignment, and before plea, of any person charged with a felony he shall be advised by the court of his right to counsel, and a record shall be made of such advice upon the minutes of the court 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, the supreme court or the chief justice, upon being satisfied of the inability of the defendant to pay counsel and that review is sought in good faith and that there are reasonable grounds for seeking review, may appoint counsel to prosecute an appeal or writ of error, and such counsel shall be paid such sum for services and expenses as the supreme court shall determine, to be certified to the county treasurer by the clerk of the supreme court. In any criminal action or proceeding where counsel has been appointed to represent an indigent person and the state seeks review in the supreme court, the supreme court or the chief justice thereof may appoint counsel to represent the indigent defendant on the appeal and such counsel shall be paid such sum for his services and expenses as the supreme court shall determine, to be certified to the county treasurer by the clerk of the supreme court. [*1941 c. 228; 1945 c. 448*]

Note: The provisions of 357.26, Stats. 1935, limiting the compensation of counsel appointed to defend an indigent defendant for services rendered at a "trial" and for services rendered in preparation for trial, do not apply to the prosecution of an appeal or writ of error in the supreme court. John v. Municipal Court of Milwaukee County, 220 W 334, 264 NW 829.

Under 357.26 the practice in the supreme court is that in the absence of the chief justice the powers conferred on him may be exercised by the justice who has been longest a continuous member of the court, who is present and available, and application for appointment of counsel for an indigent defendant should be made accordingly. Under 357.26 appointments are limited to cases where appointments had been made in the trial court for services there but not for services in the supreme court. A showing must be made that there are reasonable grounds for seeking a review, in order to warrant the appointment of counsel to prosecute an appeal or writ of error for an indigent defendant and it should be made to appear by the record, transcript therefrom, or in some other satisfactory way, that the defendant has been prejudiced by error committed on the trial. See note to this case under 251.10. State v. Tyler, 238 W 589, 300 NW 754.

Before counsel can be appointed by the supreme court under this section to prosecute an appeal or writ of error it must appear that there are reasonable grounds for seeking a review. (Stats. 1941) Cundy v. State, 244 W 506, 12 NW (2d) 681.

Attorney appointed by circuit court to represent indigent defendant charged with offense is entitled to be paid fee for appearance in county court upon defendant's arraignment, plea of guilty and sentence pursuant to 357.20 to 357.23. County court has no authority to allow such fee, but application must be made to appointing court, under 357.26. County court has authority and duty under 357.26, and sec. 7, art. I, Const., to appoint counsel to defend indigent defendant charged with offense and brought before such court for arraignment pursuant to 357.20 to 357.23 and to allow fees of such counsel if such appointment of counsel is desired by defendant. 29 Atty. Gen. 449.

357.27 [*Repealed by 1927 c. 242*]