sion is not open to review, and the second preliminary examination, at which further admissible evidence was introduced, is deemed properly held. State ex rel. Tessler v. Kubiak, 257 W 159, 42 NW (2d) 496.

955.20 is directory only and relates solely to the duty of district attorneys, and it does not provide the accused with a defense or operate as a bar to subsequent proceedings involving the same offense. It does not cover cases where, after the first preliminary hearing, evidence still exists, whether because of improper exclusion on the first hearing or of failure to adduce it or of being unknown to the district attorney; nor does the statute prohibit the making of a second complaint for the same charge. Tell v. Wolke, 21 W (2d) 613, 124 NW (2d) 655. See also State ex rel. Beck v. Duffy, 38 W (2d) 159, 156 NW (2d) 368.

970.05 History: 1969 c. 255; Stats. 1969 s. 970.05.

Comment of Judicial Council, 1969: This section retains the existing requirement that a record be made of the testimony at all preliminary examinations. However, the Judicial Council has found that transcripts often are not used by the parties or the court especially where a defendant enters a plea of guilty. In such cases the preliminary examination transcript is often not even on file until after the defendant has been sentenced. This section preserves the right of any party or the court to order the testimony to be transcribed if it is felt there is a need for such testimony. It is believed that in most cases this will not be done since an overwhelming number of cases are disposed of by guilty pleas. This provision should relieve the burden on court reporters, speed the preparation of needed transcripts and result in reducing the expenses attendant to criminal trial, all without prejudice to the administration of criminal justice. [Bill 603-A]

361.27, Stats. 1931, does not require the evidence in a John Doe proceeding under 361.02 to be returned, since such evidence is not required by that section to be reduced to writing. State ex rel. Schroeder v. Page, 206 W 611, 240 NW 173.

CHAPTER 971.

Proceedings Before and at Trial.

971.01 History: 1969 c. 255; Stats. 1969 s. 971.01.

Comment of Judicial Council, 1969: Sub. (1) restates s. 955.17 (1).

Under present s. 955.01 if an information is not filed within 6 months after a preliminary examination, a defendant is entitled to be released without bail. The Council feels a shorter period is adequate.

Sub. (2) adopts 30 days as the standard but permits an extension of time upon application of the district attorney. The penalty for failure to file within the time limitation is a dismissal without prejudice, which will permit a second charge being brought. [Bill 603-A]

Editor's Note: Sec. 955.01 was derived from sec. 355.01, and the latter section was construed in State v. Brill, 1 W (2d) 288, 83 NW (2d) 721, but this was prior to enactment of the amendatory legislation of 1955 and 1961.

Where a preliminary examination has been waived, the district attorney may file an information for any offense included or attempted to be stated in the complaint. Thies v. State, 178 W 98, 189 NW 539.

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

A district attorney in filing an information is not restricted to the crime stated in the complaint made before the examining magistrate, but may file an information setting forth the crime committed according to the facts ascertained on such examination. Johnson v. State, 254 W 320, 36 NW (2d) 86.

See note to 970.03, citing State v. Fish, 20 W (2d) 431, 122 NW (2d) 381.

In felony cases the information is the accusatory pleading under our criminal procedure and its filing is not jurisdictionally dependent upon a valid complaint. State v. Midell, 40 W (2d) 516, 162 NW (2d) 54.

A district attorney possesses quasi-judicial power to decline to prosecute a person regularly accused; but his decision and action in every such case is subject to the approval of the court having jurisdiction of the case. 1902 Atty. Gen. 90.

When a defendant has waived preliminary examination, no information should be filed against him charging a higher crime than that charged in the complaint. The correct procedure is to dismiss and charge a higher crime in the new complaint, if warranted. 12 Atty. Gen. 284.

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

971.02 History: 1969 c. 255; Stats. 1969 s. 971.02.

Comment of Judicial Council, 1969: Present s. 955.18. [Bill 603-A]

Where the complaint charged that perjury

was committed in one court on a given day and the information, subsequently filed, alleged perjury in another court on a different day, a waiver of preliminary examination on the former was not a waiver thereof on the latter charge. Brown v. State, 91 W 245, 64 NW 749.

Where the defendant, without objection to the preliminary examination or proceedings, entered a plea of not guilty, the court properly denied a motion, or request made after the trial had proceeded, to inquire whether or not the complaint was signed in what is known as "due process of law," and issued by a court of competent jurisdiction. Magnuson v. State, 187 W 122, 203 NW 749.

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 the court may, in its discretion, refuse such plea after pleading to the merits. Stetson v. State, 204 W 250, 235 NW 539.

Under 955.18, Stats. 1955, an information should not be filed until a defendant has a preliminary examination, unless he waives it or is a fugitive from justice. Johns v. State, 14 W (2d) 119, 109 NW (2d) 490.

Where a defendant charged with a felony appears without counsel and waives counsel, it is the duty of the trial court to advise defendant of his right to a preliminary hearing before proceeding further. State v. Strickland, 27 W (2d) 623, 135 NW (2d) 295.

Denial of a motion made pursuant to 955.18 (2) (a) for remand (following defendant's waiver of preliminary examination) did not constitute an abuse of discretion, where the trial court then had before it an uncontradicted statement of the district attorney that the defendant had had considerable experience before that court and others; the statement of defendant's counsel that he needed the preliminary examination to adequately prepare for trial; and a handwritten affidavit theretofore submitted by defendant disclosing the latter's familiarity with criminal law and procedure, from all of which it could be concluded that defendant's waiver was made intelligently. State v. Camara, 28 W (2d) 365, 137 NW (2d) 1.

The filing of an information is not dependent jurisdictionally upon a valid complaint or preliminary examination. A defendant validly arrested without a warrant can waive the preliminary examination and be bound over. Pillsbury v. State, 31 W (2d) 87, 142 NW (2d) 187.

An attorney has authority, in the absence of the accused, to waive preliminary examination. Failure of the accused to appear at the preliminary examination is an implied waiver of such examination. Witnesses may be examined at a preliminary examination at which the accused does not appear. The examining magistrate has no authority to hold any part of the preliminary examination in another county. 2 Atty. Gen. 345.

A person who committed an offense in this state and thereafter left the state, no matter for what reasons, and is found in another state, is a fugitive from justice, and need not be given a preliminary examination. 14 Atty. Gen. 266.

Non-use of the preliminary examination; a study of current practices. Miller and Dawson, 1964 WLR 252.

971.03 History: 1969 c. 255; Stats. 1969 s. 971.03.

Editor's Note: This section superseded sec. 955.21, Stats. 1967. Matters of form were considered in Nichols v. State, 35 W 308, State v. Tall, 56 W 577, 14 NW 596, and Jackson v. State, 91 W 253, 64 NW 838.

On rights of accused (nature of accusation) see notes to sec. 7, art. I; on formal defects see notes to 971.26; on amending the charge see notes to 971.29; and on motions before trial see notes to 971.31.

1. General.
2. Words of the statute.

1. General.

It is not enough, in an indictment, to charge the accused generally with the commission of an offense, but all the facts and circumstances constituting the offense must be specifically set forth. State v. Gaffrey, 3 Pin. 369.

"Now it is an elementary rule of criminal law, that not only must all the facts and circumstances which constitute the offense be stated in an indictment, but they must be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an indictable offense or not, in order that he may demur or plead to the indictment accordingly, prepare his defense, and be able to plead the conviction or acquittal in bar of another prosecution for the same offense." Fink v. Milwaukee, 17 W 26, 28-29.

Where a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punished alike, the whole offense may be charged conjunctively in a single count as one offense. Clifford v. State, 29 W 327.

If the name of the person against whom a complaint is to be made is unknown that fact should be stated in the complaint, and the best description of the person given which the nature of the case will admit of. It is not sufficient to give a name, adding thereto "alias." Scheer v. Keown, 29 W 586.

The general principle seems to be that where the offense as stated is not in itself unlawful, but becomes such by other facts, such facts must be stated; but where enough is stated to constitute the crime nothing further is necessary. Bonneville v. State, 53 W 680, 11 NW 427.

Where an exemption is in a separate section of the statutes from the one in which the crime is defined, it is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 W 89, 50 NW (2d) 38.

2. Words of the Statute.

An information charging the breaking and entering of a "freight and express car of the American Express Company" sufficiently charged the offense to have been committed in a "railroad freight car", within the mean-

ing of sec. 4410, R. S. 1878. Nicholls v. State, 68 W 416, 32 NW 543.

An information under ch. 63, Laws 1893, charging defendant with having in his possession tools adapted and designed for cutting through, forcing or breaking open buildings, rooms, etc., in order to steal therefrom money and other property, and alleging generally, in the words of the statute, his intent to use or employ the tools for the purposes aforesaid, is sufficient without charging specifically that he intended feloniously to steal, take, and carry away from the owner thereof money or other property found in such building, room, etc. Scott v. State, 91 W 552, 65 NW 61.

Complaint in a criminal prosecution must present facts necessary to bring accused fully within statutory provisions. Schaeffer v. State, 113 W 595, 89 NW 481.

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.

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, Stats. 1935, on which the indictment was based. State v. Kitzerow, 221 W 436, 267 NW 71.

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 perpetrated 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.

An information charging a violation of 147.02, Stats. 1949, in the language of the statute, was sufficient to state an offense. State v. Harrison, 260 W 89, 50 NW (2d) 38.

There is no requirement that an information in order to charge a crime must be in the language of the statute. Huebner v. State, 33 W (2d) 505, 147 NW (2d) 646.

971.04 History: 1969 c. 255; Stats. 1969 s. 971.04.

Comment of Judicial Council, 1969: New. This is designed to clarify rules for attendance of defendant at various stages in criminal proceedings. The section recognizes that at certain hearings, such as arguments on matters of law and calendaring, a defendant need not be present.

Sub. (2) retains the right of a defendant to waive his appearance when charged with a misdemeanor. This is currently found in s. 957.07.

Sub. (3) is designed to prevent a defendant from stopping a trial which has commenced by absenting himself. (See Fla. CrPR 1.180 (b).) [Bill 603-A]

A judgment on a conviction of a felony will not be reversed because of the absence of the prisoner when the verdict was received, such absence being voluntary, and his counsel being then present. Hill v. State, 17 W 675.

Where 3 or 4 defendants were voluntarily absent from the courtroom when the trial court gave additional instructions at the request of the jury, such 3 defendants by their voluntary absence from the courtroom waived their right to be personally present at the giving of such additional instructions, and they cannot complain that it was error to give the same in their absence. State v. Biller, 262 W 472, 55 NW (2d) 414.

Counsel must assume the risk of his own arrangements with the court reporter or other personnel to be called when the jury comes in for additional instructions or with a verdict, if counsel absents himself from the courtroom during the regular session of the court or during other times at which counsel is expressly advised that the court may sit. If counsel is absent, the judge may presume that such absence is voluntary and a waiver unless the judge knows to the contrary or personally has taken the responsibility to see that counsel is notified, or unless there are court rules governing the situation; but responsibility cannot be placed on the trial court by counsel to be called or searched out when he knows that the court is in session. State v. Russell, 5 W (2d) 196, 92 NW (2d) 210.

It could not be assumed that the record's silence as to whether defendants were present when the jury was taken to view the scene of the crime reflected irregularity and that accordingly they were deprived of their right to be "personally present" during the trial, since there is no requirement that the record affirmatively show an accused's attendance at a view of the scene of the crime. Cullen v. State, 26 W (2d) 652, 133 NW (2d) 284.

971.05 History: 1969 c. 255; Stats. 1969 s. 971.05.

Comment of Judicial Council, 1969: Sub. (3) requires that in felonies a defendant be given a copy of the indictment or information. Currently this requirement exists only in first degree murder cases. The section is consistent with the philosophy of this Code, which requires all parties to have copies of all pleadings. [Bill 603-A]

Where the information was read to the defendant while he was present in court and it appeared that he was fully informed as to the charge against him, the fact that the record failed to disclose that the defendant had

entered a plea to the information was immaterial. State v. Abdella, 261 W 393, 52 NW 924.

The term "arraignment" refers not to the initial appearance before a magistrate, but only to the appearance for the purpose of reading and filing, and pleading to, the information in a court having jurisdiction to accept such a plea and to impose sentence. The functions of the magistrate at the initial appearance of an accused following the latter's arrest are limited to formally charging him with the offense for which he has been arrested, informing him of his right to counsel and of his right to have a preliminary examination, and setting bail. Eskra v. State, 29 W (2d) 212, 138 NW (2d) 173.

971.06 History: 1969 c. 255; Stats. 1969 s. 971.06.

Comment of Judicial Council, 1969: This section is derived from s. 1016 of the California Penal Code. The section contains 2 changes from existing Wisconsin practice. Par. (c) changes the present nolo contendere to "no contest", a term which has more meaning to the average defendant. Par. (d) is a major change for 2 reasons. The plea "not guilty by reason of mental disease or defect" is necessary because of the terminology in s. 971.15 (ALI Test). It is the successor to the former plea of "not guilty by reason of insanity". This plea, however, must be coupled with a "not guilty" plea or it admits that the defendant committed all of the elements of the crime charged and the only issue for the fact finder is the mental responsibility of the defendant. It is believed that a provision such as this will eliminate needless trials on the issue of whether the defendant did, in fact, commit the offense. In nearly all cases where an issue of mental responsibility is raised, there is no dispute that the defendant committed the act and by utilizing a plea system such as found in this section, greater efficiency and more intellectual honesty can be achieved in framing the issues. [Bill 603-A]

Editor's Note: In Galvin v. State, 40 W (2d) 679, 162 NW (2d) 622, the supreme court enunciated the rule, for prospective application only, that where an accused waives counsel and pleads guilty the trial court should be certain that the plea of guilty is not only voluntarily but also understandingly made and should determine for itself that there exists a factual basis therefor.

When defendant has been arraigned and has pleaded and the jury has been fully informed as to the nature of the accusation against him, it is not necessary that the information be read to the jury. Osgood v. State, 64 W 472, 25 NW 529.

Arraignment and plea may be waived in noncapital cases where it appears that the defendant was wholly informed as to the charge against him and was not otherwise prejudiced in the trial by the omission of the arraignment. (Douglass v. State, 3 W 820, and Davis v. State, 38 W 487, overruled.) Hack v. State, 141 W 346, 124 NW 492.

Where the information was read to the defendant while he was present in court and it appeared that he was fully informed as to the charge against him, the fact that the record failed to disclose that the defendant had entered a plea to the information was immaterial. State v. Abdella, 261 W 393, 52 NW (2d) 924.

In sentencing a convict upon his plea of guilty, where the information charges an offense that includes others, the court should adjudge the defendant guilty of a specific offense, though this may not be technically necessary. In re Carlson, 176 W 538, 186 NW 722.

A plea of nolo contendere is an implied confession, and a judgment of conviction follows such plea as a matter of course; yet the plea itself contains no admissions which can be used against the defendant in another action. The plea, however, is one which defendant may not interpose as a matter of right, but it is received at the discretion of the court. State v. Suick, 195 W 175, 217 NW 743.

A change of plea from not guilty to guilty made by the accused's attorney after consultation with and in the presence of the accused was not invalid on the ground that it was not made by the accused personally, and under the evidence taken in examination of the case by the court no error resulted from the acceptance of the plea of guilty. Duenkel v. State, 207 W 644, 242 NW 179.

See note to 971.26, citing State ex rel. Wentzlaff v. Burke, 250 W 525, 27 NW (2d) 475.

See note to 972.13, citing Ellsworth v. State, 258 W 636, 46 NW (2d) 746.

955.08, Stats. 1959, applies to criminal contempts where summary proceedings are not proper. State ex rel. Reynolds v. County Court, 11 W (2d) 560, 105 NW (2d) 876.

A plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea. Hawkins v. State, 26 W (2d) 443, 132 NW (2d) 545; Pillsbury v. State, 31 W (2d) 87, 142 NW (2d) 187. See also: Belcher v. State, 42 W (2d) 299, 166 NW (2d) 211; and State v. Biastock, 42 W (2d) 525, 167 NW (2d) 231.

Where a defendant, with counsel, pleads guilty, courts have the right to assume that counsel has fulfilled his duty of proper representation by fully explaining to the accused the nature of the offense charged, the range of penalties, and possible defenses thereto, and satisfying himself that the accused understands such explanation, before permitting the accused to authorize the entry of a plea of guilty. Mueller v. State, 32 W (2d) 70, 145 NW (2d) 84.

A conviction for a criminal offense could not be validly subjected to challenge for the first time on review on the ground that the trial court was without subject-matter jurisdiction because the complaint was sworn to before a clerk of that court, for such defect went to jurisdiction over the person and was waived when the defendant entered his plea and went to trial without objection thereto. Galloway v. State, 32 W (2d) 414, 145 NW (2d) 761.

A person arrested on a felony charge who purported to plead guilty to a warrant or complaint in Rock county municipal court

was not "convicted" where the court ordered payment of costs and restitution and deferred sentence for one year, without ordering that an information be filed and that defendant plead thereto and no further disposition was made of the case. 29 Atty. Gen. 299.

971.07 History: 1969 c. 255; Stats. 1969 s. 971.07.

971.08 History: 1969 c. 255; Stats. 1969 s. 971.08.

Comment of Judicial Council, 1969: This section is modeled after F.R.Cr.P. 11. Provisions such as those contained in sub. (1) should make for the preparation of records which will better withstand attack in post-conviction proceedings which claim that a "guilty" plea was not knowingly entered.

Sub. (2) reduces from one year to 120 days the time for withdrawing a "guilty" plea. (See Pulaski v. State, 23 Wis. 2d 138, 126 NW 2d 625.) [Bill 603-A]

On timely application a court will vacate a plea of guilty shown to have been obtained or given through ignorance, fear, or inadvertence, and in the exercise of its discretion will permit an accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just. Pulaski v. State, 23 W (2d) 138, 126 NW (2d) 625. See also State v. Payne, 24 W (2d) 603, 129 NW (2d) 250.

Although an application for leave to withdraw a plea is ordinarily addressed to the discretion of the court, such withdrawal would be a matter of right if the applicant established in fact a denial of a relevant constitutional right. Van Voorhis v. State, 26 W (2d) 217, 131 NW (2d) 833.

It is within the inherent power of a court to permit withdrawal of a plea; and the exercise of that power to grant or deny a motion to withdraw the plea will not be disturbed upon appeal unless it is shown that there has been an abuse of discretion. State v. Koerner, 32 W (2d) 60, 145 NW (2d) 157.

Ordinarily, the question of the withdrawal of a plea of guilty is addressed to the discretion of the trial court, the general rule being that the defendant must establish adequate grounds for the withdrawal and that the defendant has the burden of proof on this issue. Mueller v. State, 32 W (2d) 70, 145 NW (2d) 84.

Failure to have counsel is not sufficient ground to withdraw a plea of guilty if the waiver of counsel is made freely, voluntarily, and understandingly. State v. Pierce, 33 W (2d) 104, 146 NW (2d) 395.

A court should vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear, or inadvertence, or if for any reason the granting of the privilege of withdrawing the plea and standing trial seems fair and just. State v. Reppin, 35 W (2d) 377, 151 NW (2d) 9. See also: Reiff v. State, 41 W (2d) 369, 164 NW (2d) 249; and Brisk v. State, 44 W (2d) 584, 172 NW (2d) 199.

The following rules govern the determination of an application to withdraw a guilty plea based upon alleged failure to provide or ineffective representation of counsel: (1) If the record shows that there has been a failure to provide counsel it becomes the duty of the state to show that the defendant was not prejudiced thereby and no constitutional right was infringed as a result; (2) when the record shows on its face that the defendant was represented, upon a motion to withdraw a plea of guilty, the defendant must assume a similar burden if he is to prevail; (3) the question of the withdrawal of a plea of guilty is addressed to the discretion of the court and the defendant has the burden of showing adequate grounds for the withdrawal; and (4) the burden to be met is the one imposed by the clear-and-convincing-evidence test. Curry v. State, 36 W (2d) 225, 152 NW (2d) 906.

Denial of defendants' motions to withdraw their guilty pleas, based upon findings that the same had been entered freely, voluntarily, and understandingly, could not be successfully challenged as an abuse of discretion, where the record revealed that the trial court, following the entry of the pleas, closely interrogated each defendant and objectively determined that their pleas were in fact voluntary. Cresci v. State, 36 W (2d) 287, 152 NW (2d) 893.

When competent counsel is appointed prior to arraignment, a presumption arises that the defendant has been informed of the nature of the offense with which he is charged, the range of punishment, the possible defenses, and that he has understandingly considered these factors with the help of counsel, and such a presumption can be overcome only by a clear showing to the contrary. Vieau v. State, 39 W (2d) 162, 158 NW (2d) 367.

Where a defendant, charged with burglary and felonious theft, personally pleaded guilty to the charges after conferring with his mother and then with retained counsel, but thereafter in 2 successive motions sought withdrawal of the plea on the ground that he was afforded only 5 to 10 minutes to confer with his attorney, thus giving him no opportunity to disclose material facts which might establish a defense, the trial court did not err in denying the motions, the record supporting its finding that the pleas were voluntarily and understandingly made and his counsel was competent, capable, experienced, and conscientious. State v. Willing, 39 W (2d) 408, 159 NW (2d) 15.

An accused is entitled to withdraw a guilty plea if entered without knowledge that the sentence actually imposed could be imposed. State v. Harrell, 40 W (2d) 187, 161 NW (2d) 223.

Where defendant sought to set aside his guilty plea to burglary, invoking the manifest-injustice rule, claiming a plea bargain had gone awry in that a more severe sentence than that expected had been imposed, the trial court properly denied relief, the record disclosing that defendant was fully advised of the maximum sentence, that the recommendation for a lighter sentence which the district attorney agreed to make to the court was conditioned on receipt of a "relatively acceptable" presentence report, whereas the report received reflected a number of prior convictions and sentences for burglary and

grand larceny. LeFebre v. State, 40 W (2d) 666, 162 NW (2d) 544.

A defendant, convicted of a felony nonsupport charge based on his guilty plea, which he sought to withdraw, claiming his waiver of counsel and plea were neither intelligent nor voluntary because he was "upset" and in a "dazed" state at the time, which prevented a proper understanding and appreciation of the nature of the charges against him and the consequences of his plea, and that he accordingly suffered a "manifest injustice", did not sustain his burden of proof. Reiff v. State, 41 W (2d) 369, 164 NW (2d) 249.

Defendant's claim that he was not advised of the probation alternative set forth in 52.05 (4), Stats. 1967, was meritless, the record of sentencing revealing that prior thereto his parole on a nine-year sentence for burglary had been revoked and at the time of his arrest on the current charge he was an escapee from a commitment. Reiff v. State, 41 W (2d) 369, 164 NW (2d) 249.

A motion to withdraw a guilty plea, made by a defendant convicted of reckless use of a weapon (a misdemeanor) was timely, though made 4 days after sentencing, but his entitlement to such relief was dependent on whether sufficient grounds were alleged and proven. State v. Draper, 41 W (2d) 747, 165 NW (2d) 165.

A defendant seeking withdrawal of his guilty plea based on claimed violation of a plea agreement must prove as a first element that a plea agreement was actually made. State v. Draper, 41 W (2d) 747, 165 NW (2d) 165.

A defendant represented by counsel and aware of potential challenge to possible prior violations of his constitutional rights by his plea of guilty waives objections thereto, even though such violations are a direct cause of his entry of a guilty plea. State v. Biastock, 42 W (2d) 525, 167 NW (2d) 231.

A plea of guilty may be withdrawn upon a showing that its withdrawal is necessary to correct a manifest injustice, but this showing must be established by clear and convincing evidence. Griffin v. State, 43 W (2d) 385, 168 NW (2d) 571.

Where a plea of guilty is voluntarily and understandingly entered by one who is assisted by counsel, objections to alleged violations of constitutional rights which occurred prior to the plea are waived, even though such violations were a direct cause of entering the guilty plea; but if a defendant is not so fully aware of a potential challenge to possible violations of his constitutional rights and his plea of guilty was the direct result of and caused by possible constitutional violations, he may raise such objections on motion for the withdrawal of the guilty plea. Ernst v. State, 43 W (2d) 661, 170 NW (2d) 713.

A defendant convicted of assisting in a jail escape, based on his guilty plea, which he sought to withdraw, grounded on the claim that his prior waiver of counsel was not knowingly and intelligently made, notwithstanding compliance with 957.26 (2), Stats. 1967, and that the plea was not voluntarily entered, had the burden of proving a manifest injustice with respect to both issues by clear and convincing evidence before entitlement to such relief. Drake v. State, 45 W (2d) 226, 172 NW (2d) 664.

Where defendant and a coactor, charged with burglary, retained the same counsel, and waiving a preliminary hearing defendant entered a plea of nolo contendere, withdrawal of the plea could not be validly based on alleged denial of effective assistance of counsel because both were represented by one attorney, the record being devoid of a showing that any conflict of interest arose. Witzel v. State, 45 W (2d) 295, 172 NW (2d) 692.

971.09 History: 1969 c. 255; Stats. 1969 s. 971.09.

Comment of Judicial Council, 1969: Present s. 956.01 (13). [Bill 603-A]

Editor's Note: An opinion published in 47 Atty. Gen. 312 has to do with the question of maintenance charges in the case of a prisoner who pleaded guilty to an offense committed in another county and is sentenced for such offense to the county jail of the county in which he pleaded guilty.

971.10 History. 1969 c. 255; Stats. 1969 s. 971.10.

Comment of Judicial Council, 1969: This section is the first Wisconsin attempt to make a meaningful effort to expedite the trial of cases. The President's Crime Commission proposed that the period from arrest to trial of a felony be not more than 4 months. Sub. (2) (a) provides that trial of a felony shall commence 90 days after either party demands trial following the filing of an information. This is an attempt to give the state a right to move for a speedy trial. Recognizing crowded court calendars in certain jurisdictions, sub. (2) (b) is an attempt to insure that cases are promptly tried and it is anticipated that occasional judicial manpower will have to be shifted to meet the requirements of this section. Experience indicates that there are relatively few defendants who are ultimately interested in speedy trials. The section is flexible enough to accommodate those defendants and provide a vehicle for the State to assert its rights in this area. Far too much time and effort are wasted when trials are unnecessarily delayed. Some states provide for trial within fixed periods after arrest and if trial is not held a defendant is absolutely discharged. (See Ill. Rev. Stat. Ch. 38 s. 103-5 (a) which provides a 120-day limitation.) California provides 15 days for the filing of an information after a bind over and then 60 days from the filing of the information to trial. (See Cal. Pen. Code s. 1,382.) If populous states such as these can adhere to these requirements it would seem that Wisconsin could enact similar timetables. The A. B. A. "Minimum Standards on Speedy Trial", s. 2.1, recommends that a defendant's right to a speedy trial be expressed in terms of days or months. While this section sets up a specific timetable for felonies and misdemeanors, it should be noted that sub. (4) provides that the only sanction for failure to comply is the release of a defendant from custody or from the obligation of his bond. The constitutional requirements of a speedy trial are in no way

modified by this section. (See Commodore v. State, 33 Wis. 2d 373, 147 N.W. 2d 283 and State v. Reynolds, 28 Wis. 2d 350, 137 N.W. 2d 14.) [Bill 603-A]

On rights of the accused (speedy public trial) see notes to sec. 7, art. I.

955.10, Stats. 1961, cannot form the basis for dismissal of criminal charges on grounds of denial of the constitutional right to a speedy trial. Kopacka v. State, 22 W (2d) 457, 126 NW (2d) 78.

971.11 History: 1969 c. 255; Stats. 1969 s. 971.11.

Comment of Judicial Council, 1969: This is present s. 955.22 modified to shorten the period for bringing a case on for trial from 180 to 120 days in felonies and from 180 to 90 days in misdemeanors. It should be noted that these periods are different than those contained in s. 971.10 but because there are transportation and communication problems involved with prisoners physically held in other jurisdictions, more time is needed. [Bill 603-A]

A case should not be dismissed after 180 days where defendant had moved to suppress evidence within that period and the motion was still pending, since the motion in effect was for a continuance. State v. Fogle, 25 W (2d) 257, 130 NW (2d) 871.

971.12 History: 1969 c. 255; Stats. 1969 s. 971.12.

Comment of Judicial Council, 1969: Sub. (1) is F.R.Cr.P. 8 (a) restated. Sub. (2) is F.R.Cr.P. 8 (b). Sub. (3) is taken from F.R.Cr.P. 14 and in addition provides a mechanism to insure that trials will be conducted in conformity with Bruton v. United States, 391 US 123, 88 Sup. Ct. 1620, which prohibits the use at a trial of a statement of a codefendant which implicates another defendant. Sub. (4) is F.R.Cr.P. 13. [Bill 603-A]

Where different grades of the same general offense are defined, certain special circumstances being included as essential elements in the definition of the higher grade, and excluded by negative words in the definition of the lower grade, an information charging the lower grade need not negative the presence of such circumstances. State v. Kane, 63 W 260, 23 NW 488.

Counts stating separate and distinct offenses may be joined in the same information. Whether the court shall direct the district attorney to elect which one he will rely upon on the trial is very much in its discretion. If the indications are that separate offenses were committed in the same locality about the same time and circumstances point to the accused as having been guilty thereof, there is no abuse of discretion in refusing to require an election. Martin v. State, 79 W 165, 174, 48 NW 119.

Felonies and misdemeanors forming a part of the same transaction may be joined. Porath v. State, 90 W 527, 63 NW 1061.

One 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 the offenses are of the same general character and the mode of trial is the same. Gutenkunst v. State, 218 W 96, 259 NW 610.

An information charging the offenses of selling liquor without stamps on the container and of selling without a license, although only a single transaction was involved, was not bad for duplicity, since the 2 offenses charged were separate and distinct. The state was not required to elect upon which count it would proceed, since the 2 separate crimes involved could be charged on the same information. State v. Jackson, 219 W 13, 261 NW 732.

It is accepted practice to charge both the attempt and the commission of the crime in the information. Johnson v. State, 254 W 320, 36 NW (2d) 86.

The trial court has jurisdiction and power to consolidate for trial and to try separate indictments against separate defendants at one and the same time when the defendants are informed against separately for the same crime, but whether they should be so tried is a matter of discretion with the trial court. State ex rel. Nickl v. Beilfuss, 15 W (2d) 428, 113 NW (2d) 103. See also Jung v. State, 32 W (2d) 541, 145 NW (2d) 684.

Consolidation for trial, after a hearing, of the cases of 3 accused prosecuted as principals for burglary and theft did not constitute an abuse of discretion where it appeared that the charges against all were identical and arose out of the same events, that the same witnesses were to be called in the case of each, and that no apparent antagonism was shown in connection with the defenses of any of them. Cullen v. State, 26 W (2d) 652, 133 NW (2d) 284.

While it would seem that under some circumstances a joinder of different crimes in the same information might be prejudicial, that situation cannot arise where the offenses, be they felonies, misdemeanors, or both, are of the same or similar character, or are based on the same act or transaction, or in 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. State v. Kramer, 45 W (2d) 20, 171 NW (2d) 919.

971.13 History: 1969 c. 255; Stats. 1969 s. 971.13.

Comment of Judicial Council, 1969: This is ALI Model Penal Code 4.04. Compare this with present s. 957.13 (2), which basically contains the same criteria. [Bill 603-A]

A trial in a criminal case should be indefinitely postponed if the defendant's mental condition renders him incapable of conferring with his attorneys in his own behalf and, in connection therewith, the matter of the defendant's ability to distinguish between right and wrong at the time of trial is material as long as that ability remains a test of his sanity. Wilson v. State, 273 W 522, 78 NW (2d) 917.

971.14 History: 1969 c. 255; Stats. 1969 s. 971.14.

Comment of Judicial Council, 1969: This section is derived from ALI M.P.C. 4.06, present s. 957.13 and the decision in State v. McCredden, 33 Wis. 2d 661. Before commitment of an incompetent defendant, a hearing must be had to establish probable cause that a

crime was committed. When probable cause is determined the court conducts a summary hearing after having appointed one or more doctors to examine the defendant. The doctor(s) must file written reports available to all parties and the court prior to the hearing and if no party contests the result the report may be the basis for the determination. This would be particularly appropriate where the report indicates that the defendant is competent. The rehearing provisions of s. 957.13 are retained.

Sub. (6) permits legal issues to be resolved even if the defendant is incompetent since some matters are purely legal in nature and motions which might result in freeing a defendant from the criminal court's jurisdiction should be permitted at any time. In such cases the Department would presumably proceed against a defendant under Ch. 51. [Bill 603-A]

Sec. 4700, R. S. 1878, is in affirmance of the common-law power of the courts, and is in aid of the provision of the constitution securing to the accused a fair and impartial trial. French v. State, 93 W 325, 336, 67 NW 706.

Under sec. 4700, Stats. 1898, it is the duty of the trial court, at any stage of the proceedings, upon proper application, if informed that there is a probability that defendant is then insane, to make inquisition and determine that question before another step is taken in the trial, even though delay and embarrassment in the regular proceedings of the court should thereby result. Steward v. State, 124 W 623, 102 NW 1079.

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.

On the record in the instant case, the inquiry which the trial court made into the defendant's sanity, with the aid of a court-appointed psychiatrist, was sufficient under 957.13, Stats. 1957, where the court is advised as to probable insanity by the district attorney and not by defense counsel, and if no written report is requested by the trial court of a medical expert appointed by it, an oath before the expert's examination of the defendant is not required where the expert takes an oath as a witness before he testifies concerning the defendant's mental condition. A defendant is presumed to be sane until credible evidence proves otherwise, and the mere fact of an inquiry or advice as to the probability of insanity does not overcome the presumption. State v. Schweider, 5 W (2d) 627, 94 NW (2d) 154.

The trial judge could appoint a general practioner to examine defendant as to competency to stand trial rather than a psychiatrist. Cullen v. State, 26 W (2d) 652, 133 NW (2d) 284.

The legislature intended to impose broad discretion upon the trial judge in determining mental capacity to stand trial; thus the method of making inquisition under 957.13, Stats. 1965. Williamson v. State, 31 W (2d) 677, 143 NW (2d) 486.

See note to sec. 1, art. I, on equality, and note to 970.03, citing State v. McCredden, 33 W (2d) 661, 148 NW (2d) 33.

Under 357.13, Stats. 1945, the trial court has jurisdiction to determine insanity or feeble-mindedness of a person on probation under 57.04. 36 Atty. Gen. 68.

See note to 971.17, citing 37 Atty. Gen. 531.

When defendant's sanity an issue. Boileau, 41 WBB, No. 2.

971.15 History: 1969 c. 255; Stats. 1969 s. 971.15.

Comment of Judicial Council, 1969: This is ALI, M.P.C. 4.01 and 4.03. State v. Shoffner, 31 Wis. 2d 412, 143 NW 2d 458, permits a defendant to have an option as to whether to accept the test found in this section or the ancient M'Naughten right and wrong test. It is the Council's view that the option given by Shoffner was designed to permit Wisconsin to experience a period of trial using both tests. The ALI summation is a more modern attempt to deal with a complex problem. Its language is more meaningful both to the doctor who testifies and to the trier of fact. The ALI rule has been recently adopted by half of the Federal Circuits and by a growing number of states in the last few years. (For example, see Ill, Anno Ch. 38, 6-2, Vt. Stat. Ann. Tit. 13 Sec. 4801, Mo. Stat. Ann. 552.030, Md. Stat. Chap. 709, Mont. Rev. Code Sec. 95-501.) Numerous other states' courts have expressed dissatisfaction with M'Naughten and the legislatures of several states are considering the adoption of the ALI test. [Bill 603-A]

Editor's Note: Legal rules for resolving questions as to the mental responsibility of defendants in criminal cases have been stated by the supreme court in the following cases (among others): State v. Wilner, 40 W 304; Terrill v. State, 74 W 278, 42 NW 243; French v. State, 93 W 325, 67 NW 706; Hempton v. State, 111 W 127, 86 NW 596; Oborn v. State, 143 W 249, 126 NW 737; Jessner v. State, 202 W 184, 231 NW 634; Oehler v. State, 202 W 530, 232 NW 866; State v. Johnson, 233 W 668, 290 NW 159; Simecek v. State, 243 W 439, 10 NW (2d) 161; Kwosek v. State, 8 W (2d) 640, 100 NW (2d) 339, 101 NW (2d) 703; State v. Esser, 16 W (2d) 567, 115 NW (2d) 505; Brook v. State, 21 W (2d) 32, 123 NW (2d) 535; State v. Shoffner, 31 W (2d) 412, 143 NW (2d) 458; Simpson v. State, 32 W (2d) 195, 145 NW (2d) 206; and Curl v. State, 40 W (2d) 474, 162 NW (2d) 77.

The concept that the psychological problems or emotional disorders of a legally sane person may be a determinant of his intent, his intoxication, or test of his guilt, is not in the criminal statutes or criminal law. Curl v. State, 40 W (2d) 474, 162 NW (2d) 77.

In the law the dividing line as to accountability or nonaccountability due to mental condition is the test of sanity, whatever the legal definition of these terms may be or come to be, and personality disturbances or emotional disorders that fall short of insanity are not required areas of court inquiry, particularly not in that portion of a bifurcated trial on the issue of guilt. Curl v. State, 40 W (2d) 474, 162 NW (2d) 77.

Functional approach to "right and wrong" test for insanity. Krembs, 22 MLR 61.

The "right and wrong" test of insanity as a defense. 30 MLR 62.

Insanity as a defense. 45 MLR 477.

A new approach to the defense of insanity. 50 MLR 688.

The psychiatrist's role in determining accountability for crimes. Pouros, 52 MLR 380.

Recent developments on criminal responsibility. Hallows, 34 WBB, No. 6.

A critique of current psychiatric roles in the legal process. Halleck, 1966 WLR 379.

Burden of proof for insanity defense. 1969 WLR 969.

971.16 History: 1969 c. 255; Stats. 1969 s. 971.16.

Comment of Judicial Council, 1969: The examination of a defendant on the issue of his mental responsibility is essentially the same as in current practice. However, sub. (2) requires that 10 days before trial any examining physician shall file a report with counsel and the court stating his opinion of the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct with the requirements of law. It is believed that this requirement will result in focusing the issue for trial and in many cases eliminate the issue of mental responsibility from the trial. All experts' testimony are frequently in agreement and if this can be determined prior to trial, the necessity for calling a large number of witnesses who will give the same testimony can be eliminated. A defendant may also, if confronted with unanimously unfavorable reports, abandon a defense of mental irresponsibility. [Bill 603-A]

On prosecutions (self-incrimination) see notes to sec. 8, art. I.

See note to 971.14, citing State v. Schweider, 5 W (2d) 627, 94 NW (2d) 154.

To obtain the full benefit of compulsory mental examination it should not be limited in scope to the observation of physical characteristics of the subject, but may encompass inquiries concerning past conduct of the accused and requires testimonial response to questions which would be within the privilege of self-incrimination. The submission to a compulsory mental examination under the plea of insanity does not constitute a waiver of privilege against self-incrimination. State ex rel. LaFollette v. Raskin, 34 W (2d) 607, 150 NW (2d) 318.

The language of 957.27 (1), Stats. 1963, which in relevant part provides that whenever, in any criminal case, expert opinion evidence becomes necessary or desirable the judge of the trial court may appoint one or more disinterested qualified experts, suggests that the judge has broad discretion to determine when experts should be appointed as witnesses and who are "disinterested qualified experts". Nelson v. State, 35 W (2d) 797, 151 NW (2d) 694.

Costs for expert witnesses appointed by the court under 357.12 (1), Stats. 1933, cannot be charged against the estate of one examined who has not been found guilty of the offense charged. 24 Atty. Gen. 409.

Commitment of an accused person under 357.12 (3), Stats. 1935, 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.

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

Physicians employed by Mendota state hospital and appointed as expert witnesses in a criminal case where the defendant pleaded insanity, who attended the trial and testified as expert witnesses, are entitled to such compensation as the court may allow pursuant to 357.12 (1), Stats. 1949, where the time spent by them during the trial was charged against their vacations and other time off to which they were entitled. Mendota state hospital is not required to furnish service of such experts without charge. 40 Atty. Gen. 156.

Use of expert witnesses appointed by the court. Fronzoi, 29 MLR 49.

971.17 History: 1969 c. 255; Stats. 1969 s. 971.17.

Comment of Judicial Council, 1969: This section is based upon ALI M.P.C. 4.08 and s. 957.11. Two new provisions not currently found in existing Wisconsin law are contained in this section. Sub. (2) requires that a defendant prove that he may be safely discharged or released without danger to himself and others. Dangerousness is a better criterion for continued control. Although a defendant's mental disease may have improved, he should not be released if, because of factors in his personality or background, he would still be dangerous to himself and society. Further, he may be released for a period of up to 5 years on such conditions as are considered necessary to control his conduct and to insure outpatient treatment.

Sub. (3) limits the period of conditional release to 5 years.

Sub. (4) provides that when the maximum term a defendant could have been imprisoned for the offense charged has elapsed, he must be discharged. For example, a defendant charged with burglary can be retained no longer than 10 years. At the expiration of this term the Department must proceed against a defendant under Ch. 51 or discharge him. [Bill 603-A]

The trial upon both issues is as one, and accused need not make a motion to set aside the verdict, and no motion for a new trial need be made until conviction upon a plea of not guilty. Proceedings on both issues may be inserted in a bill of exceptions, and all exceptions taken upon either issue may be reviewed in the supreme court upon writ of error; and any error which prejudiced the accused on the issue of insanity must reverse the final judgment. Bennett v. State, 57 W 69, 14 NW 912.

It is not necessary that a verdict on the question of insanity to the effect that there was reasonable doubt of the sanity of the defendant should be submitted. All that is required is that the question of insanity or reasonable doubt of sanity should be submitted to the jury in some form. Steward v. State, 124 W 623, 102 NW 1079.

It is error to state to the jury while they are deliberating upon the question of sanity

that if they found defendant sane they would pass upon the question of his guilt. The presumption is in favor of sanity and the jury must so find unless the evidence leaves them in reasonable doubt on the subject. It is in fact incumbent upon the defendant to produce the evidence to overcome this presumption. Duthey v. State, 131 W 178, 111 NW 222.

An affidavit of counsel for defendant that before trial he filed a plea of insanity, which affidavit was not made a part of the record, cannot be considered in the appellate court. And where the record contains no indication that in the trial court the defendant or his counsel made any claim that the former was insane at the time of the commission of the alleged offense, it cannot be held that error intervened by a refusal to submit to the jury a special issue as to insanity. McVey v. State, 169 W 72, 171 NW 666.

Where insanity is a defense to a charge of murder, physicians as experts may give their opinion as to the sanity at the time of the killing, based on the testimony given by the defendant in court, and their opinion upon an ultimate fact to be determined by the jury is admissible under proper instructions. Tendrup v. State, 193 W 482, 214 NW 356.

The purpose of 371.11, Stats. 1935, 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.

A person acquitted on the ground of insanity existing at the time of the commission of the act is entitled to all of the protection of constitutional rights as if acquitted on any other ground. State v. King, 262 W 193, 54 NW (2d) 181.

The omission, from instructions on reasonable doubt of the defendant's sanity, of a requested statement that reasonable doubt may arise as well from evidence introduced by the state, or by the circumstances of the act charged, as from the evidence of the defense, was not prejudicial error, where the trial court told the jury in several portions of the instructions given that the jury was to consider all the evidence in the case on the issue of insanity. Zenou v. State, 4 W (2d) 655, 91 NW (2d) 208.

Testimony offered by the defense, that electroencephalographic tests showed an organic abnormality in defendant's brain, was properly rejected in the absence of an offer of medical opinion, based on such tests, facts as to defendant's background and circumstances of the alleged offense, as to defendant's mental capacity or condition at the time of the offense; and further, the offered testimony suggested no reason why defendant could not form an intent to burn a building, and did not tend to rebut the presumption that he intended the natural and probable consequences of his acts. If the offered testimony, together with other expert testimony, had sufficiently tended to prove that at the time of the offense the defendant was subject to a compulsion or irresistible impulse by reason of the abnormality of his brain, the testimony should have been admitted, since, even under the right-wrong test for insanity, no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense. State v. Carlson, 5 W (2d) 595, 93 NW (2d) 354.

The burden of proof on the special issue of insanity in criminal cases is imposed on the state if there is evidence which raises a reasonable doubt of the defendant's sanity. The jury need not be satisfied that the elements required by the definition of the defense of insanity in a criminal case are present in fact, and a defendant succeeds if he is able to raise a reasonable doubt that they may be present. State v. Esser, 16 W (2d) 567, 115 NW (2d) 505.

While the supreme court would prefer that upon request the trial court instruct the jury in a criminal trial where the issue of insanity was raised that a finding of not guilty because of insanity will not free the defendant but subject him to hospitalization as required by 957.11 (3) and (4), Stats. 1963, refusal to give such instruction does not constitute prejudicial error. State v. Shoffner, 31 W (2d) 412, 143 NW (2d) 458.

The statutes do not provide for release from custody of persons committed subject to 357.11 and 357.13 (4), without action by the committing magistrate or jury, except as to persons committed to the Central and Winnebago state hospitals who may be paroled as provided in 51.21 (6). 37 Atty. Gen. 531.

A criminal defendant found not guilty because insane must be committed to the Central hospital or other institution designated by the department of public welfare notwithstanding that he is presently sane. He can be discharged only by the committing court upon a finding that he is not likely to have such a recurrence of insanity as would result in criminal conduct. 38 Atty. Gen. 181.

See note to 51.18, citing 46 Atty. Gen. 43.

971.175 History: 1969 c. 255; Stats. 1969 s. 971.175.

Comment of Judicial Council, 1969: This section recognizes the bifurcated trial provisions mandated by the decision in State ex rel. LaFollette v. Raskin, 34 Wis. 2d 607, 150 NW 2d 318. [Bill 603-A]

See note to sec. 8, art. I, on limitations imposed by the Fourteenth Amendment, citing State ex rel. La Follette v. Raskin, 34 W (2d) 607, 150 NW (2d) 318.

971.18 History: 1969 c. 255; Stats. 1969 s. 971.18.

Comment of Judicial Council, 1969: This is taken from ALI M.P.C. 4.09. (See also LaFollette v. Raskin, 34 Wis. 2d 607, 150 NW 2d 318.) [Bill 603-A]

971.19 History: 1969 c. 255; Stats. 1969 s. 971.19.

Comment of Judicial Council, 1969: This is a restatement of s. 956.01. Sub. (4) is a broadened provision designed to cover motor vehicles, trains and airplanes. Sub. (5) is designed to solve a problem found in some homicide cases where the exact location of the killing cannot be established. [Bill 603-A]

On rights of accused (place of trial) see notes to sec. 7, art. I.

An indictment which charged that the accused "did wilfully and maliciously burn" a certain building, omitting to aver that it was "there situate", was fatally defective, the offense of arson being local in its nature, and in such case failing to show that the building was in the county in which the indictment was found. State v. Gaffrey, 3 Pin. 369.

Where one enters a moving freight car in one county, with intent to commit a larceny in such car, and with the same intent continues in the car until it passes into another county, and there commits the intended larceny, there is in law a fresh entry in the latter county, and the offense is indictable there under sec. 4409, R. S. 1878. Powell v. State, 52 W 217, 9 NW 17.

In a prosecution for homicide which occurred in the vicinity of a stone quarry, references in the evidence to a quarry in the county, in connection with a view of the premises by the court and jury, were sufficient to establish the venue of the offense within the county, where there was no controversy as to that fact raised at the trial. Manna v. State, 179 W 384, 192 NW 160.

Under sec. 4454, Stats. 1923, the offense of forgery is committed at the time of falsely making a note, if it is done with the intent to injure or defraud, it being unnecessary, to constitute the offense, that the forged instrument be actually uttered; and hence the offense is committed in the county in which the note was falsely made, and not where it was uttered. Zeidler v. State, 189 W 44, 206 NW 872.

Direct proof of venue in a criminal case should be made, but its absence will not defeat a conviction where the inference of venue may properly be drawn from circumstantial evidence, and it is sufficiently proved if there is reference in the evidence to the locality known or probably familiar to the jury where the act constituting the offense was committed, from which they may reasonably conclude that the place was in the county alleged. Piper v. State, 202 W 58, 231 NW 162.

"The law that criminal cases shall be tried in the county where the offense was committed does not require the use of any prescribed formula in establishing venue. The state meets the requirements placed upon it when it has been made to appear definitely that the offense was committed in the county where the trial is being conducted or from which the case has been properly transferred. And this may be by specific statement or by proof of facts from which such inference reasonably follows." Farino v. State, 203 W 374, 378, 234 NW 366, 367-368.

In a prosecution for pandering, an information alleging that the defendant accepted earnings of a woman engaged in prostitution in a named city and county, without alleging or locating the place of such acceptance, was defective as not showing venue. State v. Dowling, 205 W 314, 237 NW 98.

If the embezzlement charge consists in failing to account, the venue should be laid in the county where the defendant was under obligation to account, or where he declined to do so upon proper demand. Podell v. State, 228 W 513, 279 NW 653.

In determining whether venue has been proved in a criminal case, the entire evidence, including that offered by the defendant, must be considered. Although direct proof of venue should be made, absence of it does not defeat conviction where inference of it may properly be drawn from circumstantial evidence. In a prosecution in Kenosha county on charges of having received bribes in the city of Kenosha, the evidence, although not in the form of direct proof of venue, was sufficient to establish that both offenses of which the defendant was convicted were committed in the city of Kenosha and in Kenosha county. State v. Coates, 262 W 469, 55 NW (2d) 353.

Although venue, like the elements of a crime, must be proved beyond a reasonable doubt, it may be established by proof of facts and circumstances from which it may be inferred. Smazal v. State, 31 W (2d) 360, 142 NW (2d) 808.

In a prosecution for forgery of a check in violation of 943.38 (1), where venue was the sole issue and the facts were otherwise uncontested, defendant was not entitled to prevail under evidence which established that he forged the maker's name to the check, that he cashed it on the day of its date in the county in which the venue was laid, that the check was drawn on a bank within that county, that the alleged maker (by whom defendant falsely asserted he was employed) was a resident thereof, and that defendant offered no proof to refute any of the inferences which could reasonably be drawn from those facts. Smazal v. State, 31 W (2d) 360, 142 NW (2d) 808.

In a prosecution for forgery and uttering, where the sufficiency of the evidence to establish venue was challenged, the fact that the record did not reveal that the action was tried in the district where the crime was committed could not avail the defendant where the court could take judicial notice of that fact. State v. Christopherson, 36 W (2d) 574, 153 NW (2d) 631.

Venue is not an element of the crime of murder, but merely refers to the place of trial and constitutes a matter of procedure designating the geographic division of the state in which the action is to be tried. State v. Dombrowski, 44 W (2d) 486, 171 NW (2d) 349.

One who, as bailee, converts to his own use property of another left in his custody, may be prosecuted for either larceny as bailee or embezzlement. The county in which the conversion took place is the proper county in which to bring such prosecution. 1 Atty. Gen. 161.

Where one of the joint owners of a debt collects the entire debt and converts it to his own use he is guilty of embezzlement. One charged with the offense of embezzlement may be prosecuted in any county in which he had possession of the property embezzled. 3 Atty. Gen. 229.

A convict escaping from a prison camp may be prosecuted therefor in the county in which the state prison is located. 6 Atty. Gen. 97.

Polygamy must be prosecuted where the

second marriage took place. 1 Atty. Gen. 168; 9 Atty. Gen. 251.

Where a man is hit by a train in Illinois but dies in Wisconsin, the person responsible for the death may be prosecuted in Wisconsin under 353.12, Stats. 1927. 17 Atty. Gen. 122.

353.10, Stats. 1927, which provides that offenses committed within 100 rods of a county line may be prosecuted in either county includes within its purview a proceeding for issuing a search warrant. 17 Atty. Gen. 495.

A prosecution under 343.20, Stats. 1931, for the crime of embezzlement, must be in the county where the person charged had possession of the property or thing alleged to have been embezzled and not in the county where demand was made. 21 Atty. Gen. 1051.

Prosecution of a person under 343.18, Stats. 1933, forbidding one to take, use and operate a car without the owner's consent, may be in the county where the person so operated the car although the taking actually occurred in another county. 22 Atty. Gen. 904.

Under 353.11, Stats. 1937, an attempt to commit an abortion or cause a miscarriage in one county which results in death of the expectant mother in another county may be prosecuted in either county. 26 Atty. Gen. 601.

Where A employs B in one county and authorizes him to sign checks on A for a specific purpose, and B goes into an adjoining county and signs a check on A for his own purpose, contrary to his authority, B is guilty of either embezzlement or larceny, if the check is paid. Venue in a prosecution should be laid in the county where the check was signed and delivered rather than in the county where B was employed by A. 28 Atty. Gen. 426.

Venue of the offense of taking and detaining a minor contrary to 340.55, Stats. 1947, is in the county from which the minor was taken. 37 Atty. Gen. 401.

The offense of contributing to the delinquency of a child contrary to 351.20, Stats. 1947, is a continuing offense which may be prosecuted in any county in which acts were committed by defendant resulting in delinquency of the child. 37 Atty. Gen. 401.

971.20 History: 1969 c. 255; Stats. 1969 s. 971.20.

Comment of Judicial Council, 1969: This is new terminology replacing present s. 956.03 (1). "Affidavit of Prejudice" has normally not meant prejudice since most defendants have no knowledge of the judge and have filed the affidavit solely for tactical purposes usually on an attorney's advice. This terminology is felt to be more accurate. (See Ill. Rev. Code Chap. 38, s. 114-5, Mont. Rev. Code 95-1709.) [Bill 603-A]

Editor's Note: Prior statutory provisions governing the filing of an affidavit of prejudice and changing the place of trial on account of the alleged prejudice of the presiding judge were considered in the following cases (among others): State v. Rowan, 35 W 303; Winn v. State, 82 W 571, 52 NW 775; Baker v. State, 88 W 140, 59 NW 570; State ex rel. Schutz v. Williams, 137 W 236, 106 NW 286; Murphy v. State, 131 W 420, 111 NW 511; Dietz v. State, 149 W 462, 136 NW 166; In re Application of Alloway, 256 W 412, 41 NW (2d) 360; and Meverden v. State, 258 W 628, 46 NW (2d) 836. See also 26 Atty. Gen. 429.

971.21 History: 1969 c. 255; Stats. 1969 s. 971.21.

Comment of Judicial Council, 1969: New. The Council feels that this provision, which prohibits a judge from conducting both a preliminary examination and a trial, is needed. Most judges presently routinely refuse to conduct both proceedings. Sufficient manpower exists in all but a few counties to implement this section and the number of felony trials in the remaining counties is so small that this section will not have any appreciable effect. In those smaller counties, the overwhelming number of cases are disposed of by guilty pleas and it is believed that the parties will routinely consent to the judge who conducts the preliminary handling the guilty plea. It is not only a question of fairness but of the appearance of fairness. [Bill 603-A]

A trial judge who hears a habeas corpus proceeding testing the sufficiency of the evidence on the bind-over does not thereby disqualify himself from hearing the criminal proceeding, nor must he disqualify himself from hearing the criminal case for that reason. State v. Schweider, 5 W (2d) 627, 94 NW (2d) 154.

971.22 History: 1969 c. 255; Stats. 1969 s. 971.22.

Comment of Judicial Council, 1969: This is a modification of the current s. 956.03 (3). It should be noted that the judge who grants a motion under this section will conduct the trial in the county where the case is transferred. He shall also determine where the defendant, if in custody, and the records of the case shall be kept. With regard to the criteria for granting a motion under this section, see State v. Nutley, 24 Wis. 2d 527, 129 NW 2d 155, and State v. Woodington, 31 Wis. 2d 151, 142 NW 2d 810. [Bill 603-A]

Editor's Note: 956.03 (3), Stats. 1967, specified that a change of venue based on community prejudice should be permitted only in felony cases; this provision was construed in State v. Groppi, 41 W (2d) 312, 164 NW (2d) 266.

See note to sec. 7, art. I, on trial by jury, citing Bennett v. State, 57 W 69, 14 NW 912.

A defendant who has been convicted on a complaint in justice's court and who has appealed to the circuit court is not entitled to a change. Boldt v. State, 72 W 7, 38 NW 177.

The court to which the venue has been changed does not fail to acquire jurisdiction because of 2 months' delay in acting upon the application for a change; nor because the clerk omitted to transmit his minutes with the other papers in the case; nor because the court neglected to require the accused to enter into a recognizance for his appearance in the court to which the change was taken. State v. Compton, 77 W 460, 46 NW 535.

If a motion for a change of venue is opposed by nearly as many affidavits as are presented in favor of it, there is no error in denying it. After such a motion is decided there is no error in denying the filing of additional affidavits in support of it, no excuse

being shown for not filing them at the proper time. Perrin v. State, 81 W 135, 50 NW 516.

"The right to a change of venue depends entirely upon the statute. It is not guaranteed by Cons. art. I, sec. 7, or any other provision of the constitution. As the right exists only by virtue of the statute, a change of venue can be had only upon the terms the statute prescribes." French v. State, 93 W 325, 335, 67 NW 706, 709. See also: Hanley v. State, 125 W 396, 104 NW 57; Oborn v. State, 143 W 249, 126 NW 737; and State ex rel. Carpenter v. Backus, 165 W 179, 161 NW 759.

Where the affidavits as to the fact of community prejudice were conflicting, the denial of a motion for change of venue on account of prejudice of the people of the county was not error. Montgomery v. State, 128 W 183, 107 NW 14.

Where there was no sufficient showing that a fair trial could not be had in the county where the action was pending, there was no abuse of discretion in refusing the change. Bianchi v. State, 169 W 75, 171 NW 639.

Although the issue for trial in a criminal case is not joined in the preliminary proceedings before the examining magistrate, a case is pending in which a change of venue may be ordered on the ground of the prejudice of the people. Thies v. State, 178 W 98, 189 NW 539.

The application of the defendant in a prosecution for a violation of the prohibition act for a change of venue, filed after the jury had been sworn and defendant was in jeopardy, was properly denied. State ex rel. Basford v. Maxfield, 195 W 271, 218 NW 206.

Abuse of discretion in denying a change of venue for prejudice was not shown, where a jury was obtained without difficulty, and 2 of 3 co-defendants tried jointly were acquitted. State v. Smith, 201 W 8, 229 NW 51.

The granting of a motion for a change of venue based on prejudice in the community is discretionary, and a denial thereof affords no ground for reversal unless it clearly appears that there was an abuse of discretion. Schroeder v. State, 222 W 251, 267 NW 899.

A change of the place of trial for community prejudice, largely because of mass-media reports to another county, exposed to the same reports was not an abuse of discretion, because residents of the second county would not be likely to know the victims personally. State v. Nutley, 24 W (2d) 527, 129 NW (2d) 155.

The remedies in publicity cases are change of venue, continuance, and careful selection of a jury. State v. Woodington, 31 W (2d) 151, 142 NW (2d) 810.

Under 956.03 (3), Stats. 1961, prejudice is not proved simply by introducing 3 newspaper stories, where the trial judge denies the motion and a jury is impanelled quickly and without difficulty. Miller v. State, 35 W (2d) 777, 151 NW (2d) 688.

The language in 956.03 (3), Stats. 1961, that a trial court may order a change of venue because of community prejudice, makes it clear that a motion for change of the place of trial is addressed to the discretion of the trial court, and the supreme court will not interfere unless an abuse of discretion is demonstrated. Miller v. State, 35 W (2d) 777, 151 NW (2d) 688; State v. Laabs, 40 W (2d) 162, 161 NW (2d) 249.

While the difficulty of securing a jury should never be conclusive in reviewing a refusal to change venue in a criminal case, the apparent difficulty or ease of securing a jury can be taken into account in passing upon the alleged abuse of discretion in refusing a change of venue. State v. Herrington, 41 W (2d) 757, 165 NW (2d) 120.

In a prosecution for false imprisonment, injury by conduct regardless of life, armed robbery, and damage to property, denial of defendant's motion for change of venue from a populous county did not constitute abuse of discretion, where the claim of alleged prejudicial pretrial publicity was based solely on a public opinion survey (of an inconclusive nature) by a newspaper reporter. State v. Kramer, 45 W (2d) 20, 171 NW (2d) 919.

971.23 History: 1969 c. 255; Stats. 1969 s. 971.23.

Comment of Judicial Council, 1969: This section is the first Wisconsin statute attempting to afford pretrial discovery to both the State and the defendant. Based primarily upon F.R.Cr.P. 16, it is believed that the section represents an improvement in the existing pretrial procedures while protecting the basic rights of the parties. Limited pretrial discovery should increase the efficient administration of criminal justice in this state by speeding up the disposition of cases, improving the performance of counsel, eliminating the increasing number of pretrial motions and increasing the number of guilty pleas. The section contemplates that most of the discovery provisions are to be implemented without the necessity for motions or court hearings.

Sub. (1) requires the district attorney to provide the defendant with any statements he is alleged to have made. No valid argument exists for refusal to provide a defendant with his own statement and a growing number of jurisdictions require production of such statements. (See State v. Johnson, 145 A 2d 313, Fla. Stat. Ann. s. 925.05.) In practice many district attorneys in Wisconsin, recognizing the influence that such statements have upon a defendant's decision to plead guilty, currently provide defense counsel with such statements.

Sub. (2), providing for the defendant's criminal record to be made available, serves to resolve prior to trial any disputes as to the correctness of such records. The defendant's criminal record comes into play if he takes the stand as a witness or if he is charged as a repeater and, of course, is relevant on sentencing if he is convicted. The production of defendant's statements prior to trial will alert the defense to the necessity of bringing any motions to suppress such statements. (See State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 133 NW 2d 820.)

Sub. (3) is not a requirement for a listing of prosecution witnesses in each case. Some 22 states have requirements which make mandatory a notification prior to trial of witnesses intended to be called by the state. This subsection, modeled after Fla. Cr.P.R. 1.220

(e), is a procedure whereby the defendant may obtain the names of state's witnesses after agreeing to tender to the district attorney the names of all defense witnesses. If the defendant is unwilling to disclose his own witnesses, then he is not entitled to learn the names of the state's witnesses. In those cases where the disclosure of the names of the state's witnesses might cause some danger to the witnesses, or in some other way jeopardize the public interest, sub. (6) provides a vehicle for obtaining a protective order denying such disclosure.

Subs. (4) and (5) are concerned with physical evidence and inspection and testing thereof. Experience under Fed. Rule 16 has demonstrated that this insures fairness and saves considerable time at trial. It is virtually impossible to refute physical evidence without an opportunity in advance to examine it and, as the Sup. Ct. of Okla. said in State v. Lackey, 319 P 2d 610, 614, referring to a laboratory analysis, "Certainly, if it contains factual truth, as we presume it does, the elements thereof are irrefutable. On the other hand, if it shows the defendant was not connected with the tragedy, he is entitled to the benefit of it." When physical testing would destroy an item of evidence, obviously the court will want to preclude any such testing. Sub. (5) gives the court discretion to deny testing. Subs. (4) and (5) are limited to items of evidence which are intended to be introduced at trial and either the state or the defendant may move for an examination of such evidence or for scientific testing.

Sub. (6) provides sufficient flexibility to restrict or defer discovery where there is a likelihood of harm to witnesses or the interference with a continuing investigation. Its implementation is in the discretion of the trial court and contemplates that it will be used only in rare cases and is not intended to permit a denial of disclosure without some factual basis for a request for such denial.

Sub. (8) is a restatement of the present alibi notice statute, s. 955.07. [Bill 603-A]

1. Discovery.
2. Notice of alibi.

1. Discovery.

The basis underlying the distinction between "disclosure" and "discovery" in a criminal case is that discovery emphasizes the right of the defense to obtain access to evidence necessary to prepare its own case, while discovery concerns itself with the duty of the prosecution to make available to the defense the evidence and testimony which, as a minimum standard, is exculpatory based on constitutional standards of due process. Discovery has been left to rule-making power and has not been deemed a constitutional issue. Britton v. State, 44 W (2d) 109, 170 NW (2d) 785. See also: State v. Miller, 35 W (2d) 454, 151 NW (2d) 157; and Cheney v. State, 44 W (2d) 454, 171 NW (2d) 339, 174 NW (2d) 1.

2. Notice of Alibi.

Where a defendant charged with burglary gave notice prior to trial that he intended to rely on an alibi that at the time of the alleged commission of the offense he was moving furniture from Milwaukee to Waukegan, and then abandoned such alibi on the trial and testified instead that at the time in question he was moving furniture from his mother's home in Milwaukee to another street address in Milwaukee, and gave the names of witnesses, the trial court, in the absence of any showing which would have justified a different ruling, properly excluded corroborative evidence offered in support of such new alibi on the ground of failure of substantial compliance with the requirements of 355.07, Stats. 1949. State v. Kopacka, 261 W 70, 51 NW (2d) 495.

The failure of the defendants' trial attorney to give notice of intent to prove an alibi was not prejudicial to the defendants where, although objections to certain questions asked of one defendant were sustained on the ground of such failure, the testimony of other witnesses for the defendants, if believed by the jury, would have placed the defendants at a place other than with the minor involved on the night in question. State v. Driscoll, 263 W 230, 56 NW (2d) 788.

Whether good cause is shown for permitting the receipt of alibi testimony in the absence of advance written notice is a matter within the discretion of the trial court. A refusal to permit alibi testimony was not an abuse of discretion, although there was an admission by the defendant's trial attorney that he was unaware of the statute until the date of the trial. State v. Selbach, 268 W 538, 68 NW (2d) 37.

That the transcript of the preliminary was not available at the time of arraignment afforded no valid excuse for failure to serve timely notice under 955.07, Stats. 1963, where it was clear from the record that both the defendant and his attorney were present at the preliminary hearing, heard the testimony, and knew the exact nature of the charges against the defendant, including when the crimes occurred. Jensen v. State, 36 W (2d) 598, 153 NW (2d) 566.

The wording of the notice-of-alibi statute requires that no alibi testimony may be received in the absence of the required notice, not that no alibi testimony except that of the defendant is to be received, and the phrase, "together with the names and addresses of witnesses to his alibi, if known to the defendant", which is one of the matters to be particularized in the notice, merely adds a supplemental requirement to what a defendant relying on "an alibi as a defense" must include in his notice. State ex rel. Simon v. Burke, 41 W (2d) 129, 163 NW (2d) 177.

Alibi testimony will not be admitted when offered by the defendant or any witness on his behalf unless a notice of alibi has been given in accordance with the statutory procedure. Exclusion of proffered testimony of defendant and his wife that he was at home on the night of the crime, on the grounds that no notice of alibi had been given, could not be urged as error, it being undisputed that there was no compliance with the statute. State v. Escobedo, 44 W (2d) 85, 170 NW (2d) 709.

971.24 History: 1969 c. 255; Stats. 1969 s. 971.24.

Comment of Judicial Council, 1969: This is a restatement of the existing case law in State v. Richards, 21 Wis. 2d 622, 124 NW 2d 684, except that it broadens the decision in that case and requires that the statements of a witness be given to the opposing party prior to the witness' testifying on direct examination. This section does not require that these statements be turned over before the trial begins, but only before the witness testifies, so that the section may be complied with while the trial is going on. Such statements obviously have a value for impeachment and if counsel has them while the witness is testifying, time will be saved, and they may be more efficiently utilized. Such statements should be turned over in the absence of the jury. [Bill 603-A]

971.25 History: 1969 c. 255; Stats. 1969 s. 971.25.

Comment of Judicial Council, 1969: New. The section recognizes that neither party should withhold the fact that a witness has a prior criminal record. (See Wis. J I Cr. 325.) [Bill 603-A]

971.26 History: 1969 c. 255; Stats. 1969 s. 971.26.

Where complaint for extortion charged that the money was extorted "as and for a fee due to them," such allegation was not a material one, failure to prove which was a variance. Hanley v. State, 125 W 396, 104 NW 57.

An information for rape is not fatally defective for failure to contain the words "feloniously" or some equivalent therefor. Brown v. State, 127 W 193, 106 NW 536.

Where a complaint presented to a common council charged that liquor was sold after midnight but was defective in failing to charge that the saloon was open between midnight and 5 a.m., and the saloon keeper appeared and admitted a violation of the ordinance, the defect in the complaint was waived. State ex rel. McKay v. Curtis, 130 W 357, 110 NW 189

Under sec. 2829, Stats. 1898, error in denying the application for a change of venue on account of the prejudice of the judge was cured or should be disregarded, where such judge on his own motion procured the transfer of the cause to another branch of the court, presided over by another judge, thus giving the defendant the relief to which he was entitled on his application. Murphy v. State, 131 W 420, 111 NW 511.

The issuance of a special venire 2 days before the trial began, in anticipation of the fact that a sufficient number of qualified jurors could not be obtained from the regular panel, was not prejudicial to the defendants, and the error or irregularity could be disregarded under sec. 2829, Stats. 1898. Vogel v. State, 138 W 315, 119 NW 190.

An information, which charged that an officer of a bank "abstracted and wilfully misapplied" the bank's funds, could refer only to an offense under 221.39, Stats. 1923, even though it omitted to charge that he did so "with intent to wrong and defraud the bank." Where the issue presented by the state was fully met by the defendant he was deprived of no substantial right or in any way prejudiced, and there was no shifting of the charge to one of embezzlement, because if defendant deemed himself charged under sec. 4418 and desired to confine the trial to that issue, he could have moved to strike out the words "abstracted and wilfully applied." Sprague v. State, 188 W 432, 206 NW 69.

See note to 274.37, on criminal actions, citing Sprague v. State, 188 W 432, 206 NW 69.

The defendant was not prejudiced by the fact that an 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.

A perjury indictment is not fatally defective for failure to allege, along with a 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.

A plea of guilty has the same effect as a verdict of guilty with regard to defective averments of an information or indictment. State ex rel. Wenzlaff v. Burke, 250 W 525, 27 NW (2d) 475.

Where, regardless of the presence or absence of a corrupt motive on the part of a county sheriff, his wilful refusal or nonperformance of duties imposed on him by law by virtue of his office constituted the offenses of which he was accused, the informations filed and the verdicts of guilty rendered were not defective for failing respectively to charge or to find that he acted from corrupt motives. State v. Lombardi, 8 W (2d) 421, 99 NW (2d) 829.

971.27 History: 1969 c. 255; Stats. 1969 s. 971.27.

Comment of Judicial Council, 1969: Present s. 955.36. [Bill 603-A]

971.28 History: 1969 c. 255; Stats. 1969 s. 971.28.

Comment of Judicial Council, 1969: Present s. 955.34. [Bill 603-A]

971.29 History: 1969 c. 255; Stats. 1969 s. 971.29.

Comment of Judicial Council, 1969: This section is a restatement of existing law except that it provides that prior to arraignment the district attorney may amend a complaint or information without leave of the court or notice to the other party. Since the district attorney is in charge of the prosecution he should be permitted to amend his pleadings prior to the time that the defendant has been required to plead. [Bill 603-A]

A variance in spelling surnames in an indictment, forms being *idem sonans,* is not ground for arresting judgment and may be cured by amendment. State v. Lincoln, 17 W 579.

The failure, in an information for receiving stolen goods, to aver who stole the property or to negative knowledge on that subject, may be remedied by amendment. State v. Jenkins, 60 W 599, 19 NW 406.

An information for larceny may be amended so as to conform to the proof as to the ownership and amount of money stolen, the difference in this last respect not being sufficient to affect the penalty. Baker v. State, 88 W 140, 59 NW 570.

The strict rules applicable to the amendment of indictments are not enforced against amendments to informations. Jackson v. State, 91 W 253, 64 NW 838.

An information charging larceny from the land of a certain corporation may be amended by inserting the name of another corporation. Golonbieski v. State, 101 W 333, 77 NW 189.

Amendment of the name of the person from whom the property was stolen was authorized under sec. 4703, Stats. 1898. Fetkenhauer v. State, 112 W 491, 88 NW 294.

An amendment striking out the words "good and lawful money of the United States" where there was no proof as to the exact character of the money alleged to have been embezzled was rightly allowed under sec. 4703, Stats. 1898. Secor v. State, 118 W 621, 95 NW 942.

An information for larceny of a silver watch may be amended by changing it to larceny of a gold watch. Meehan v. State, 119 W 621, 97 NW 173.

Where a defendant had a preliminary examination upon a complaint charging the commission of a crime on August 24, 1918, and he was held for trial and the information charged the commission in the same date, allowing amendment of the information before trial charging the commission of the offense on August 31, 1918, was not prejudicial. Hess v. State, 174 W 96, 181 NW 725.

In a prosecution under 343.44, Stats. 1939, 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.

If there was room under the evidence for a finding that the complainant deputy sheriff was trying to clear the way for the car, rather than trying to keep it from being tipped over as alleged in the complaint, the variance would not be prejudicial, since every element of the crime charged of resisting an officer would be present irrespective of whether the officer's purpose at the time and place mentioned was to accomplish the one object or the other, and the proof would be the same except for the one item of the purpose of his presence. State v. Goyins, 252 W 77, 30 NW (2d) 199.

In the absence of a bill of exceptions disclosing whether a proper motion, raising objection to the sufficiency of the complaint and information for not being couched in the words of the statute, was made, the supreme court will assume that if objection had been properly raised before the trial court the court would have permitted an amendment to conform with the statute, as permitted by 955.09 (8) and 955.14 (3), Stats. 1951; further, under 957.16 (1), after verdict the pleading is deemed amended to conform to the proof if no objection based on such variance was timely raised on the trial. State v. Biller, 262 W 472, 55 NW (2d) 414.

Where a variance, if any, between allegations of the criminal complaint and the proof as to the ownership of the land in question was not material to the merits of the case, and there was no showing that the defendant was misled to his prejudice thereby, and the defendant raised no timely objection at the trial, the variance was properly disregarded. State v. Bednarski, 1 W (2d) 639, 85 NW (2d) 396.

Under 957.16, Stats. 1965, it was permissible for the trial court to amend the charge to conform to the proof, there being no showing that the variance was material to the merits or that the trial court otherwise failed to exercise sound discretion in amending the charge. LaFond v. State, 37 W (2d) 137, 154 NW (2d) 304.

971.30 History: 1969 c. 255; Stats. 1969 s. 971.30.

Comment of Judicial Council, 1969: Sub. (1). See s. 269.27.

Sub. (2) is new. This is designed to make more orderly and formal the motion practice in criminal cases. [Bill 603-A]

971.31 History: 1969 c. 255; Stats. 1969 s. 971.31.

Comment of Judicial Council, 1969: This is a restatement of s. 955.09 with several significant changes.

Sub. (5) (a) places a time limit on the filing of motions. It is hoped that this provision will help to prevent the use of motions as delaying devices in criminal actions.

Sub. (5) (b) limits motions to suppress evidence and objects to the admissibility of statements of a defendant to the trial court thus preventing the same motion being made at preliminary examination and prior to trial.

Sub. (5) (c) changes the decision in State ex rel. LaFollette v. Raskin, 30 Wis. 2d 39, 139 NW 2d 667, which permitted motions based on the insufficiency of the complaint to be made in felony actions at any time prior to pleading. Since preliminary examinations are now to be held before a judge, and in the county court, this threshold objection should be made there or waived.

Sub. (6) places a limit of 72 hours on the period in which a defendant may be held in custody or his bail continued pending filing of new process after a charge is dismissed against him upon a formal defect in the pleadings.

Sub. (10) is a new provision. It permits a defendant to appeal from a guilty plea when, prior to the entry of the guilty plea, the court had denied a motion to suppress evidence. On review, the appellate court can determine whether or not the order denying a suppression of evidence was proper. This subsection, based upon N.Y.Cr. Code s. 813-c., should reduce the number of contested trials since in many situations, the motion to suppress evidence is really determinative of the result of the trial. In such instances defendants usually are only contesting the legality of the search and not whether or not they did, in fact, possess the item seized. S. 974.06 affords a com-

plimentary right to the state and should be read in conjunction with this subsection. [Bill 603-A]

An objection to the sufficiency of an information on a point which could have been obviated on objection before a trial is too late after verdict, as where a change of punctuation would have removed obscurity. Barnum v. State, 92 W 586, 66 NW 617.

A defendant who, after a jury was impaneled, renewed a plea in bar, and who, after the court had required the state to answer or demur to the plea and had overruled defendant's demand that the case be tried by the court, introduced evidence in support of the plea and procured a verdict sustaining it, waived any jeopardy that had theretofore attached. State v. B————, 173 W 608, 179 NW 798.

Striking the words "for sale" from an information charging possession for sale of liquor, and submitting the case on the question of possession, was not error where the proof did not sustain the charge of possession for sale. Halbach v. State, 200 W 145, 227 NW 306.

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 the sufficiency of an information is waived unless taken before the jury is impaneled or testimony taken, the 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 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 the jury is impaneled or testimony is taken, is waived, although the trial court may, in its discretion, entertain an objection at a later time. State v. Bachmeyer, 247 W 294, 19 NW (2d) 261.

The defendant's motion to suppress the evidence seized by police officers from the trunk of her automobile, including the bodies of 2 infants, which motion was first made several weeks after the defendant had been arraigned and entered a plea of not guilty and only 2 days before the trial, and was renewed during the trial, was properly denied on the ground that the defendant was not surprised by the state's possession of such evidence and that the motion to suppress was not timely made. Potman v. State, 259 W 234, 47 NW (2d) 884.

Where a criminal case and record were transferred from the county court of Portage county to the circuit court without the record being certified as provided by the act relating to such county court, but the circuit court had jurisdiction of the subject matter and acquired jurisdiction of the defendant's person by his appearance for trial, the defendant was not prejudiced by the lack of the certificate; further, his appearance, and his failure to make objection until after the trial, constituted a waiver of the objection if the proceeding was defective. State v. Abdella, 261 W 393, 52 NW (2d) 924.

In a prosecution for burglary, where the defendant's motion to quash the information on grounds that the defendant had been held for 72 hours without the issuance of a warrant, and had been forcibly taken from his home without any proper consideration, and had been badly beaten in resisting arrest, was not made until after the trial had begun and the jury had been selected and sworn although the defendant had had ample opportunity to make such a motion before the trial, the defendant's right to object to the prosecution and the sufficiency of the information on such grounds was waived, and the trial court's denial of such motion to quash, which motion was not supported by any proof, was not an abuse of discretion, under 355.09, Stats. 1947. Where the question raised by the defendant's motion to quash the information was not properly before the court, and the evidence received without objection showed beyond a reasonable doubt the defendant's guilt of burglary, the judgment of conviction must be affirmed. Hansen v. State, 262 W 294, 55 NW (2d) 6.

In a prosecution for bribing a public officer, an indictment which failed to cite the number of the statute was defective under 955.14 (2), Stats. 1949, but such defect was waived under 955.09 (3) by failure to raise the objection thereto before trial, a motion made before trial to dismiss the indictment, on the ground that the municipal court was without jurisdiction to try the case, not being sufficient to apprise the court that the defendant's counsel was questioning the indictment on the ground of its failure to cite the number of the statute. State v. Sawyer, 263 W 218, 56 NW (2d) 811.

Entrapment is an affirmative defense bearing on the guilt or innocence of the defendant, and it is a question for the jury to determine on the trial, and it is not to be raised by a plea in bar nor by a motion before trial to suppress the evidence. State v. Hochman, 2 W (2d) 410, 86 NW (2d) 446.

Where the defendant served a motion prior to trial that she would move to suppress the evidence because obtained by illegal means, and the trial court, when the case was called for trial, ruled that it would hear and determine the motion before trying the general issue, but the defendant's counsel was not ready although having had plenty of time and opportunity, and there was no written stipulation that the state would agree to further delay, the court, in refusing to grant further delay, did not abuse its discretion under 955.09 (3) and (5), Stats. 1957. State v. Luczaj, 9 W (2d) 199, 100 NW (2d) 368.

A plea of guilty is like a demurrer in that the defendant admits the facts charged but not the crime. If the insufficiency of the information is of such a nature that no crime known to law has been alleged the defect is not waived by a guilty plea. Where in spite of the insufficiency of an information some crime is alleged, then 955.09 (3) may become operative,

in which event the objection to the sufficiency must be raised before trial or it will be deemed to have been waived. The entering of a plea of guilty is not a trial but the waiver thereof, and in such a case 955.09 (3) does not apply because the requirement of that section has not happened in that there has yet been no trial. (Language in Spoo v. State, 219 Wis. 285 to the contrary, overruled.) State v. Lampe, 26 W (2d) 646, 133 NW (2d) 349.

955.09 (6), Stats. 1963, which authorizes a trial court to proscribe a specified period of time during which a defendant may be held in custody or have his bail continued pending issuance of a new warrant where a complaint has been dismissed because of defect in prior proceedings, does not purport to be a statute of limitations barring institution of a new action if the action is not commenced within the time specified, for the only consequence to the state flowing from such failure is that the prisoner must be released, and if a new prosecution is thereafter commenced the defendant must be located. Blackwell v. State, 42 W (2d) 615, 167 NW (2d) 587.

Defendant's claim that the complaint was vitiated by the arresting officer's statement at the preliminary hearing was devoid of merit where, the contention was made for the first time after the state had put in its case, and hence any error was waived. Williams v. State, 45 W (2d) 44, 172 NW (2d) 31.

971.32 History: 1969 c. 255; Stats. 1969 s. 971.32.

Comment of Judicial Council, 1969: Present s. 955.39. [Bill 603-A]

971.33 History: 1969 c. 255; Stats. 1969 s. 971.33.

Comment of Judicial Council, 1969: Present s. 955.395. [Bill 603-A]

An indictment for arson alleging that accused set fire to a store building occupied by him and owned by M was not bad for variance, because the proof was that the building was owned by M and the lower part occupied by accused and the upper part by another. State v. Kroscher, 24 W 64.

An information charging burglary with intent to steal goods of B was sustained by proof that goods were in his actual possession, though they were in fact the property of C. Neubrandt v. State, 53 W 89, 9 NW 824.

It is sufficient to prove that when the offense of larceny of timber was committed, either actual or constructive possession or general or special property in the whole or any part of the land was in the person or company alleged in the information to be the owner. Golonbieski v. State, 101 W 333, 77 NW 189.

971.34 History: 1969 c. 255; Stats. 1969 s. 971.34.

Comment of Judicial Council, 1969: Present s. 955.40. [Bill 603-A]

971.35 History: 1969 c. 255; Stats. 1969 s. 971.35.

Comment of Judicial Council, 1969: Present s. 955.24. [Bill 603-A]

See note to sec. 7, art. I, on nature of accusation, citing Rowan v. State, 30 W 129, and other cases.

An information which alleges "that J. B., with a club," etc., "inflicted a mortal wound upon the body," etc., "of one H. S. with a premeditated design to effect the death of said H. S., from which mortal wound he did die," and "that J. B., from premeditated design to effect the death of H. S., did the said H. S. feloniously slay, kill and murder," charges the crime of murder in the first degree. Bernhardt v. State, 82 W 23, 51 NW 1009.

The word "wilful" in an information does not supply the necessary element of premeditation required to charge murder in the first degree, the words "malice aforethought" being required by the statute as well as by the common law. In re Carlson, 176 W 538, 186 NW 722.

An indictment or information for manslaughter need not state the offense in the language of sec. 4660, Stats. 1917, "did feloniously kill and slay the deceased," but may be good if it alleges that the accused aided another in wilfully and feloniously murdering the deceased, which includes every element of a charge of first-degree manslaughter. In re Carlson, 176 W 538, 186 NW 722.

An information for murder in the exact language of 355.24, Stats. 1925, is sufficient. Deerkop v. State, 196 W 571, 219 NW 278.

971.36 History: 1969 c. 255; Stats. 1969 s. 971.36.

Comment of Judicial Council, 1969: Present s. 955.31. [Bill 603-A]

An information cannot be sustained by evidence of acts committed before the time stated. State v. Cornhauser, 74 W 42, 41 NW 959.

Embezzlement may be proved by showing a general shortage in defendant's accounts without proving the conversion of a specific item. Secor v. State, 118 W 621, 95 NW 942.

See note to sec. 8, art. I, on double jeopardy, citing Anderson v. State, 221 W 78, 265 NW 210.

955.31 (4) does not apply to preliminary hearings. State v. Fish, 20 W (2d) 431, 122 NW (2d) 381.

CHAPTER 972.

Criminal Trials.

972.01 History: 1969 c. 255; Stats. 1969 s. 972.01.

Comment of Judicial Council, 1969: Substantially present s. 957.14. [Bill 603-A]

Editor's Note: The rules governing the selection of the jury and the charge to the jury in a civil action are set out in various sections of chapters 255 and 270 and in relevant decisions of the supreme court. The notes of decisions set out in three groups below are taken from reports of decisions in criminal actions decided prior to 1970 and are generally consistent with the law applicable to civil actions.

1. Scope of section.
2. Selection of jury.
3. Charge to jury.