

CHAPTER 353.

GENERAL PROVISIONS CONCERNING CRIMES.

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353.01 Conviction, what necessary to. No person indicted or informed against for an offense shall be convicted thereof unless by confession of his guilt in open court, or by admitting the truth of the charge against him by his plea or demurrer, or by the verdict accepted and recorded in court.

Note: 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.

Person arrested on felony charge who purported to plead guilty to warrant or complaint in Rock county municipal court was not "convicted" where court ordered payment of costs and restitution and deferred sentence for one year, without ordering that information be filed and defendant plead thereto as required by 357.25 and no further disposition was made of case. 29 Atty. Gen. 299.

353.02 Second indictment. No person shall be held to answer on a second indictment or information for an offense of which he has been acquitted by the jury upon the facts and merits on a former trial; but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offense.

353.03 Acquittal because of variance. If any person who is indicted or informed against for an offense shall, on his trial, be acquitted upon the ground of a variance between the indictment or information and the proof or upon any exception to the form or to the substance of the indictment or information, he may be arraigned again on a new indictment or information and may be tried and convicted for the same offense notwithstanding such former acquittal.

353.04 No punishment but upon conviction or plea. No person who is charged with an offense against the law shall be punished for such offense unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the cause and of the person or jurisdiction to award sentence upon a plea of guilty.

353.05 Parties to crime; pleading and proof. Every person concerned in the commission of an offense, whether he directly commits the offense or aids or abets in or hires, counsels or otherwise procures its commission, may be indicted or informed against as principal and tried thereon either separately or with others concerned, and may be convicted of and sentenced for any degree of the offense charged or any offense included in the charge, whether the person directly committing the offense has been convicted or acquitted, or convicted of some other degree of the offense or of some other offense based upon the same occurrence, or has not been apprehended or is not amenable to justice or for any other reason has not been tried, or is a corporation not subject to prosecution for the offense. It shall not be deemed a variance if a person indicted or informed against for the commission of an offense shall be proved to have aided or abetted in or hired, counseled or otherwise procured its commission by another, nor shall proof of the guilt or innocence of the person directly committing the offense be required for the conviction of any other person concerned therein. [1945 c. 260]

Note: The fact that the defendant was tried on a charge of murder in the first degree, instead of as an aider and abettor, and that the judge's charge to the jury may have assumed that one who had never been brought to trial was the murderer, was not prejudicial to the defendant, since the crime of aiding and abetting carries the same penalty, under 353.05, Stats. 1941, as that of the principal crime and conviction of the principal is not a condition to holding the accessory. The subjects of the charge to the jury and the proper conduct of a murder trial are discussed at considerable length. State v. DeHart, 242 W 562, 8 NW (2d) 360.

An aider is one who is actually or constructively present at the commission of the offense, and such a person is a principal. Where B. and L. conspired to rob a third person and both went to the place of the holdup together, and L. fatally shot the victim, B. was an aider in the commission of murder, and a principal, so that the prosecution of B. under 353.05, Stats. 1943, for having aided in the commission of murder, was not subject to the 6-year statute of limitations, 353.21, which excepts murder, nor to any limitation in view of 353.20. State v. Bachmeyer, 247 W 294, 19 NW (2d) 261.

353.06 [Repealed by 1945 c. 260]

353.07 In what court. Any person charged with the offense mentioned in section 353.06 may be indicted or informed against, tried and punished in the same court and in the same county where the principal felon might be indicted or informed against and tried, although the offense of counseling, hiring or procuring the commission of such felony may have been committed either within or without the limits of the state.

353.08 Accessory after the fact. Every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender who, after the commission of any felony, shall harbor, conceal or maintain or assist any principal felon or accessory before the fact, or shall give such offender any other aid, knowing that he had committed a felony or had been accessory thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial or punishment, shall be deemed an accessory after the fact and shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding two hundred dollars.

353.09 Trial of. Every person who shall become an accessory after the fact to any felony, either at common law or by any statute made or which shall hereafter be made, may be indicted or informed against, convicted and punished, whether the principal felon shall or shall not have been convicted previously or shall or shall not be amenable to justice, by any court having jurisdiction to try the principal felon and either in the county where such person shall have become an accessory or in the county where such principal felony shall have been committed.

353.10 Offenses punishable where. Offenses committed on the boundary lines of two counties or within one hundred rods of the dividing line between them may be alleged in the indictment or information to have been committed in either of them, and may be prosecuted and punished in either county, and the court of either such county whose process shall have been first served upon the defendant shall have priority of jurisdiction.

353.11 Same. If any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in one county, by means whereof death shall ensue in another county, the offense may be prosecuted in either county.

Note: See note to 340.16, citing 26 Atty. Gen. 601.

353.12 Trial to be where. If any such mortal wound shall be inflicted or other violence or injury done or poison administered without the limits of this state, by means whereof death shall ensue in any county of this state, such offense may be prosecuted and punished in the county where such death may happen.

353.13 Possession of property, what sufficient. In the prosecution of any offense committed upon or in relation to or in any way affecting any real estate, or any offense committed by stealing, embezzling, destroying, injuring or fraudulently receiving or concealing any money, goods or other personal estate it shall be sufficient and shall not be deemed a variance if it be proved on the trial that at the time when the offense was committed either the actual or constructive possession or the general or special property in the whole or any part of such real or personal estate was in the person or community alleged in the indictment, information or other accusation to be the owner thereof.

353.14 Stealing elsewhere, property brought here. Every person who shall feloniously steal the property of another, in any other state or country, and shall bring the same into this state may be convicted and punished in the same manner as if such larceny had been committed in this state: and in every such case such larceny may be charged to have been committed in any town, city or county into or through which such stolen property shall have been brought: and every person so prosecuted may plead a former conviction or acquittal for the same offense in any other state or country, and if such plea be admitted or established it shall be a bar to any further or other proceedings against such person for the same offense.

353.15 Trial of receiver of stolen property. In any prosecution for the offense of buying, receiving or aiding in the concealment of any stolen money or other property known to have been stolen it shall not be necessary to aver, nor on the trial thereof to prove, that the person who stole such property has been convicted.

353.16 Officer to secure property. The officer who shall arrest any person charged as principal or accessory in any robbery or larceny shall, if possible, secure the property alleged to have been stolen, and if found shall be answerable for the same, and he shall annex a schedule thereof to his return of the warrant, and upon conviction of the offender the stolen property shall be restored to the owner.

353.17 Compensation. Upon any conviction of burglary, robbery or larceny the court may order a meet recompense to the prosecutor and also to the officer who has secured and kept the stolen property, not exceeding their actual expenses and a reasonable allowance for their time and trouble, to be paid by the county treasurer.

353.18 Proof as to forgery and counterfeiting of bills, etc. In all prosecutions for forging or counterfeiting bank bills or notes, or for uttering, publishing or tendering in payment as true any forged or counterfeit bank bills or notes, or for being possessed thereof with intent to utter and pass them as true or false, the testimony of the president and cashier of the bank by which they purport to have been issued may be dispensed with if their place of residence shall be out of this state or more than forty miles from the place of trial, and the testimony of any person acquainted with the signature of the president or cashier of such banks or who has knowledge of the difference in the appearance of the true and counterfeit bills or notes thereof may be admitted to prove that any such bills or notes are counterfeit.

353.19 Evidence of forgery of public securities. In all prosecutions for forging or counterfeiting any note, certificate, bill of credit, treasury note, public security, bond or other security issued on behalf of the United States or on behalf of any state or territory of the United States, or for uttering, publishing or tendering in payment as true any such forged or counterfeit note, certificate, bill of credit, treasury note, public security, bond or other security or for being possessed thereof with intent to utter and pass the same as true or false, the certificate under oath of the secretary of the treasury or of the treasurer of the United States, or of the secretary or treasurer of any state or territory on whose behalf such note, certificate, bill of credit, treasury note, public security, bond or other security purports to have been issued shall be admitted as evidence for the purpose of proving the same to be forged or counterfeit.

353.20 Murder, no limitation. An indictment or information for the crime of murder may be found or filed at any time after the death of the person alleged to have been killed.

353.21 Limitation as to other felonies. Any prosecution for an offense which may be punished by imprisonment in the state prison, except murder, must be commenced within 6 years after the commission thereof unless otherwise provided by law. [1943 c. 51]

353.22 Same as to less offenses. Any prosecution for an offense not punishable by imprisonment in the state prison must be commenced within 3 years after the commission thereof, unless otherwise provided by law. [1943 c. 51]

353.23 Computation of time. (1) Any period of time during which the party charged with any offense was not usually and publicly a resident within this state or during which any prosecution against him for such offense was pending, shall not be computed as any part of the time of limitation mentioned in sections 353.21, 353.22 and subsection (2) hereof.

(2) Notwithstanding the expiration of the time limited by sections 353.21 and 353.22, any prosecution for embezzlement or larceny by bailee may be commenced within one year after discovery by the aggrieved party of the facts constituting the offense. This subsection shall not extend the time limited by sections 353.21 and 353.22 more than 5 years in any such case.

(3) A prosecution shall be deemed to be commenced and pending within the meaning of sections 353.21 to 353.23 from and after the taking of the earliest action authorized by law to initiate criminal proceedings, including (a) the issuance of a warrant by a magistrate upon a complaint duly made, pursuant to section 360.02 or 361.02, (b) the finding of an indictment by a grand jury or (c) the filing of an information against a corporation. [1943 c. 51]

353.24 Informers, when rewarded. On conviction of any person for any offense in respect to bribery, forgery, counterfeiting, gambling, houses of ill fame, obscene literature, game and fish, in case the whole or any part of the sentence shall be a fine, a part of such fine when paid may be awarded to the person or persons who informed against and

prosecuted any such offender to conviction, in the discretion of the court, but no part of such fine shall be paid to any public officer whose duty it is to inform against or prosecute such offender.

Note: It is not necessary for informer to sign complaint as long as he is willing and ready to sign it and to testify, in order to be entitled to consideration for reward. 23 Atty. Gen. 469.

Where fine has been paid into county treasury, county treasurer may not later pay out any part of same to informer, even though judgment of court imposing fine ordered such payment, without informer filing claim against county and same being allowed in usual manner. 27 Atty. Gen. 171.

Where fine is paid to sheriff by one com-

mitted to jail, sheriff must remit full fine to county treasurer under 360.35. If such fine is remitted to state treasurer by county treasurer without deduction of informer's fee, as provided in judgment, such fee may be refunded to county treasurer by state under 20.06 (2). 27 Atty. Gen. 422.

Deputy sheriffs are not entitled to informers' fees in case of arrests for violations of chapter 29 regardless of whether such arrests are made pursuant to request of conservation commission or its deputies under 29.07. 28 Atty. Gen. 299.

353.25 Imprisonment for nonpayment of fine; costs, how paid. When a fine is imposed as the whole or any part of the punishment for any offense by any law the court shall also sentence the defendant to pay the costs of the prosecution and the costs incurred by the county at request of the defendant, and to be committed to the county jail until the fine and costs are paid or discharged; but the court shall limit the time of such imprisonment in each case, in addition to any other imprisonment, in its discretion, in no case, however, to exceed six months; and the court may also issue an execution against the property of the defendant for said fine and costs. In all criminal cases when the costs cannot be collected from the defendant on his or her conviction or when the defendant shall be acquitted such costs shall be paid from the county treasury.

Note: Expenses of temporarily lodging probation violator in county jail are proper charge against county if probationer was convicted in that county. 22 Atty. Gen. 66.

Under this section court may commit defendant to county jail for not to exceed six months, until fine imposed is paid, but he cannot commit him to state prison for such purpose. 25 Atty. Gen. 377.

County is liable for all costs of prosecution of criminal case, regardless of whether some of such costs are made necessary because local municipality maintains no jail and constable must incarcerate his prisoners in county jail pending issuance of warrant. 30 Atty. Gen. 488.

Where trial court commits accused to a hospital for mental examination pursuant to 357.12 (3), the county is liable for the expenses thereof as part of the costs in the criminal case under 353.25. 34 Atty. Gen. 414.

Fees of witnesses in criminal case who testified only on counts of which defendant was acquitted are not taxable against him on conviction and fine on other counts, under 353.25. Witness fees in criminal case in justice court are not subject to \$15 limitation in 307.02 (1). Jurors' fees are taxable costs against defendant in justice court criminal case. 36 Atty. Gen. 62.

353.26 Common-law punishment. All punishments prescribed by the common law for any offense specified in the statutes of this state, and the punishment whereof is prescribed therein, are prohibited.

353.27 Penalty and place of imprisonment when none expressed. (1) **PENALTY.** Any person who shall be convicted of any offense the punishment of which is not prescribed by any statute of this state shall be punished only by imprisonment in the county jail not more than one year or by fine not exceeding \$250.

(2) **PLACE OF IMPRISONMENT.** When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, (a) a sentence of less than one year shall be to the county jail, (b) a sentence of more than one year shall be to the state prison and the minimum under the indeterminate sentence law shall be one year, and (c) a sentence of one year may be to either the state prison or the county jail. But in any proper case sentence and commitment may nevertheless be to the state reformatory, the Wisconsin home for women, the Wisconsin school for boys, the Wisconsin school for girls or any house of correction or other institution, as provided by law. [1945 c. 154, 158; 1947 c. 143]

353.28 Part of crime punishable same as whole crime. Any person who commits an act or who omits to do an act which act or omission constitutes a part of a crime by the laws of this state shall be punished the same as if he had committed the whole of such crime within this state.

353.29 Part of crime committed in this state punishable same as if all committed here. Whenever a person, with intent to commit a crime, does any act or omits to do any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state.

353.30 Benefit of clergy; petit treason and murder. The plea of benefit of clergy and the distinction between murder and petit treason are abolished, and the last-named offense shall be prosecuted and punished as murder.

353.31 Felony. Any offense punishable by imprisonment in the state prison is a felony. [1945 c. 241]

Note: See note to 348.231, citing *Wood v. Plackey*, 202 W 247, 232 NW 564.

As a consequence of this section, defining "felony" to mean an offense punishable "by imprisonment in a state prison," acts or conduct on the part of a corporation which, if committed by an individual, would render

him guilty of a felony, do not as a matter of law constitute such a crime on the part of the corporation, because its nature is such that it cannot as an offender be subjected to punishment by imprisonment. State ex rel. Kropf v. Gilbert, 213 W 196, 251 NW 478.

353.32 Nighttime. The term "nighttime," when used in any statute, ordinance, indictment or information shall be construed to mean the time between one hour after the setting of the sun on one day and one hour before the rising of the same on the following day; and the time of sunset and sunrise shall be ascertained according to the mean solar time of the ninetieth meridian west from Greenwich, commonly known as central time, as given in any published almanac.

353.33 Married women liable. The common-law presumption of coercion when a married woman commits a criminal act in the presence of her husband is abolished. All married women shall be subject to prosecution and punishment for their criminal acts. [1947 c. 148]