both parties, who may also summon other expert witnesses at the trial, but the court may impose reasonable limitations upon the number of witnesses who may give opinion evidence on the same subject.

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

(3) ACCUSED MAY BE COMMITTED TO HOSPITAL. Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation, but the court may proceed under s. 957.13. In case of commitment to a hospital the court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for the purpose of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of the said chief physician who may be cross-examined regarding the report by counsel for both parties. It shall be the duty of the sheriff to convey the accused to and from the place of commitment, and if the sheriff fails to call for the accused upon expiration of the time fixed by the court the accused shall be retained in custody in the hospital or asylum and if the accused is not removed upon the expiration of the time fixed by the court the superintendent shall give notice thereof by registered mail to the judge and the sheriff; and the county shall pay to the hospital or asylum for the keep and maintenance of the accused the sum of $10 per day after the expiration of the time fixed by the court until the accused is removed.

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

**History:** 1951 c. 316; 1955 c. 660.

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 (1), 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.

# CHAPTER 958.

## APPEALS, NEW TRIALS AND WRITS OF ERROR.



**958.01 Appeal from justice's court.** Every defendant convicted before a justice of the peace may appeal to the circuit court by giving the justice notice thereof in writing within 5 days. He shall be committed to abide the sentence of the justice until he gives bail in such reasonable sum and with such sureties as the justice requires, with condition to appear at the court appealed to and prosecute his appeal and abide the sentence of the appellate court and in the meantime to keep the peace and be of good behavior.

**History:** 1955 c. 660.

A writ of certiorari without a supersedeas does not operate to stay a judgment in a criminal case. There is no statutory authority for filing an undertaking for the purpose of staying a judgment when a writ of certiorari is taken from justice court. 38 Atty. Gen. 537.

**958.02 Duty of justice.** On such appeal the justice shall make a copy of the conviction and the other proceedings in the action and transmit the same with the bail bonds to the clerk of the appellate court. The fees of the justice shall be paid by the county.

**History:** 1955 c. 660.

**958.03 Fees not advanced on appeal.** The appellant shall not be required to advance any fees, but if he is convicted in the appellate court or if sentenced for failure to prosecute his appeal, he may be required to pay the whole or any part of the costs.

**History:** 1955 c. 660.

**958.04 Failure to prosecute; judgment for costs.** (1) DEFAULT. If the appellant fails to diligently prosecute his appeal, he may be defaulted on his bail bond and the appellate court may sentence him as if he had been convicted in that court; and process may issue to bring him into court. If he is fined, judgment shall be for the fine and for the costs in both courts against him and his sureties.

(2) APPEAL DISMISSED. If the defendant fails to bring the action to trial before the end of the term following the one during which his appeal was taken, the appeal may be dismissed; and the judgment of the lower court enforced.

**History:** 1955 c. 660.

**958.05 Forfeiture; how informer paid.** In an action brought upon such a bail bond the penalty thereof may be forfeited, or if by leave of court such penalty had been paid without an action or before judgment is given and if by law any forfeiture accrues to any person, the court may award to him such sum as he may be entitled to out of such forfeiture.

**History:** 1955 c. 660.

**958.06 New trial; service of affidavits; writ of error.** (1) Within one year after the trial and on motion of the defendant the court may grant a new trial for any cause for which a new trial may be granted in civil cases, but on such terms and conditions as the court directs. The motion shall be signed by the defendant or his attorney and shall set forth grounds upon which the defendant relies for a new trial. The motion shall be filed with the clerk of the court at least 20 days before the argument of the motion, but the court may, by order, fix a shorter time. If the trial judge is disabled or no longer in office, his successor or another judge may hear and determine the motion.

(2) If the defendant desires to use affidavits upon his motion, copies of the same shall be served on the district attorney at least 20 days before the argument of the motion or such shorter time as the court designates. If a new trial is denied, the supreme court shall issue a writ of error on the application of the defendant, and may review the order refusing a new trial and may render such judgment as it deems proper.

(3) A new trial shall proceed in all respects as if there had been no former trial. On the new trial the defendant may be convicted of any crime charged in the indictment or

information irrespective of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to on the new trial.

**History:** 1955 c. 660.

Where, among other things, the defendant's affidavit in support of his motion for a new trial on the ground of newly discovered evidence failed to show that any diligence to find the evidence before the trial had been used, the denial of such motion was not an abuse of discretion. State v. Abdella, 261 W 393, 52 NW (2d) 924.

An unauthorized communication to the jury or a member thereof, not made in open court and a part of the record, is ground for the granting of a new trial, in a criminal or in a civil case. State v. Cotter, 262 W 168, 54 NW (2d) 43.

A question whether certain instructions to the jury were erroneous, not raised by the defendants' motion for a new trial, cannot be raised for the first time on appeal. State v. Biller, 262 W 472, 55 NW (2d) 414.

Where the trial court granted a new trial because of an alleged mistake made by the jury in its verdicts, and the court was in error in so doing, the ordering of the new trial will not be sustained as having been granted on the discretionary ground of being in the interest of justice, inasmuch as the trial court did not ascribe such latter ground as the basis for its order. State v. Biller, 262 W 472, 55 NW (2d) 414.

Whether a new trial in the interest of justice should be granted to the defendants in the instant case on the ground of alleged newly discovered evidence, claimed to tend to impeach the minor involved as a witness and to raise a serious question as to her mental competency, presented a question peculiarly for the discretion of the trial court, which is held not to have abused its discretion in denying the application for a new trial. State v. Driscoll, 263 W 230, 56 NW (2d) 788.

A contention that the evidence does not sustain a conviction for second-degree murder cannot be considered by the supreme court on review in the absence of a motion to set aside the verdict and grant a new trial made before sentence and judgment. Ferry v. State, 266 W 508, 63 NW (2d) 741.

To entitle an appellant in a criminal case to present to the appellate court such matters as alleged errors in the charge to the jury or in the verdict submitted to the jury, the allegations of error must first be presented for the consideration of the trial court. State v. Vinson, 269 W 305, 68 NW (2d) 712, 70 NW (2d) 1.

Although the question of the trial court's error in failing to advise the defendant of her right to counsel was not raised in the court below, the supreme court, deeming that justice demands that it exercise its discretionary powers under 251.09, reverses the judgment of conviction and remands the cause for a new trial. State v. Greco, 271 W 54, 72 NW (2d) 661.

**958.07 Writ of error coram nobis.** The writ of error coram nobis may be issued by the trial court at any time upon the verified petition of the defendant showing sufficient grounds therefor, which may be supported by one or more affidavits. The petition and writ shall be served on the district attorney, who may move to quash the writ or make return thereto, or both. The court may hear and determine the writ either upon the affidavits submitted by the parties or upon testimony or both, in its discretion. The party aggrieved may have the determination of the trial court reviewed by the supreme court upon appeal or writ of error.

**History:** 1955 c. 660.

On an appeal from an order denying a petition for a writ of error coram nobis to determine whether a witness for the state, in a prosecution for assault and armed robbery resulting in a conviction, was insane at the time of the trial, the supreme court will determine whether there was other proof ample to sustain the conviction since, if there was, the admission of the testimony of the allegedly insane witness must be held harmless. State v. Stelloh, 262 W 114, 53 NW (2d) 700.

The writ of error coram nobis is highly discretionary, and the determination of the court to which the application was made will not be reversed unless it very clearly appears that discretion was abused. Wilson v. State, 273 W 522, 78 NW (2d) 917.

**958.08 Reporting case to supreme court.** (1) WHEN AUTHORIZED. If there is a conviction, and a question of law arose upon the trial which in the opinion of the court is so important or doubtful as to require the decision of the supreme court, the trial court shall, if the defendant consents, report the question to the supreme court, and further proceedings shall be stayed in the trial court.

(2) BAIL. A defendant (other than one accused of a crime punishable by imprisonment for life) for whose benefit a report is made as provided in sub. (1) may give bail in such sum as the judge orders, with sufficient sureties for his appearance in the supreme court at the next term thereof, and for his good behavior in the meantime.

(3) COMMITMENT; WRIT OF ERROR. If the defendant does not give bail, he shall be committed to jail to await the decision of the supreme court. The clerk of the trial court shall file a certified copy of the record and proceedings in the case in the supreme court. After the case is remanded by the supreme court, the trial court shall render such judgment or make such order thereon as law and justice require. The proceedings here prescribed shall not deprive the defendant of a writ of error.

**History:** 1955 c. 660.

**958.11 How writ of error issues.** In criminal cases writs of error shall issue of course out of, and shall be returnable to the supreme court, but they shall not stay execution of judgment except as provided in s. 958.14.

**History:** 1955 c. 660.

**958.115 Bills of exceptions.** The laws relating to serving, settling and signing bills of exceptions in civil actions shall apply in criminal cases, but the time for serving a proposed bill of exceptions shall be one year from the time sentence is imposed.

**History:** 1955 c. 660.

**958.12 State's appeal.** (1) A writ of error or appeal may be taken by the state from any:

(a) Final order or judgment adverse to the state made before jeopardy has attached or after waiver thereof;

(b) Order granting a new trial;

(c) Judgment and sentence or order of probation not authorized by law;

(d) Judgment adverse to the state, upon questions of law arising upon the trial, with the permission of the trial judge, in the same manner and with the same effect as if taken by the defendant. A judgment acquitting the defendant of all or part of the charge shall be deemed adverse to the state.

(2) Whenever the defendant appeals or prosecutes a writ of error, the state may move to review rulings of which it complains, in the manner provided by s. 274.12.

**History:** 1955 c. 660.

A judge of a circuit court, in issuing a warrant of arrest on a criminal complaint, and in sitting at the preliminary examination, was acting in the capacity of a magistrate, and not in the capacity of a court, and his order dismissing the complaint and discharging the accused persons from custody following the preliminary examination, although in form "By the court" and signed as "Judge," was an order of a magistrate and not of a court, and was not appealable to the supreme court by the state under 958.12. State v. Friedl, 259 W 110, 47 NW (2d) 306.

In a prosecution for murder, the jury's verdict of not guilty by reason of insanity at the time of the commission of the offense, and the trial court's commitment of the defendant to a state hospital for the criminal insane pursuant to such verdict, constituted an acquittal and discharge of the defendant, terminating jeopardy, so that where the district attorney, although present in the courtroom when such verdict was returned and the trial court made its pronouncement of commitment, did not then present an application to the trial judge for permission to appeal and was not shown to have been denied the opportunity to do so, and did not present such an application until a later date, the state could not take an appeal under (1) (d). State v. King, 262 W 193, 54 NW (2d) 181.

Application for permission to take a writ of error or appeal from a judgment of acquittal, if opportunity therefor is given to him, must be made by the prosecutor promptly and before the defendant, having been put in jeopardy, has been discharged. State v. King, 262 W 193, 54 NW (2d) 181.

The provision of (1) (b), giving the state the right to appeal from an order granting a new trial in a criminal case, is not unconstitutional. State v. Biller, 262 W 472, 55 NW (2d) 414.

The provision in (1) (c), authorizing the state to take a writ of error or appeal from a judgment and sentence not authorized by law, is not unconstitutional as violating the provision in sec. 8, art. I, that no person for the same offense shall be put twice in jeopardy of punishment. State v. Stang Tank Line, 264 W 570, 59 NW (2d) 800.

See note to 52.35, citing State ex rel. Syarto v. Barber, 268 W 74, 66 NW (2d) 696.

**958.13 Appeals; time for taking.** In lieu of prosecuting a writ of error, either party may appeal to the supreme court in the manner provided in civil cases. Either party has one year, after entry of the order or judgment appealed from, to serve notice of appeal or procure the issuance of a writ of error.

**History:** 1955 c. 660.

**958.14 Stay of execution.** If a defendant appeals or procures a writ of error, the trial court may in its discretion, by order, stay execution of the judgment before the record is filed in the supreme court if a substantial question of law, other than the sufficiency of evidence, is presented by the record. After the record is filed in the supreme court, a justice of that court may, by order, stay execution if upon the record there is a reasonable possibility that the judgment might be reversed. No stay shall be granted except upon reasonable notice to the district attorney or the attorney general. If a stay is granted, the defendant shall give bail in such sum as the court or the justice ordering the stay requires, with sufficient sureties for his appearance in the supreme court at the current or next term thereof to prosecute his appeal or writ of error and to abide the sentence thereon.

**History:** 1955 c. 254, 660.

Trial courts do not have inherent jurisdiction to impose sentences and then stay their execution, and the courts can no more usurp the legislative and executive fields by refusing to impose a sentence prescribed by statute than they can do so by imposing such sentence and then suspending or remitting all or a part of the execution. State v. Stang Tank Line, 264 W 570, 59 NW (2d) 800.