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Criminal Procedure under Proposed Federal Rules Compared with Wisconsin Statutes

Brooke Tibbs

CRIMINAL PROCEDURE UNDER PROPOSED FEDERAL RULES COMPARED WITH WISCONSIN STATUTES

BROOKE TIBBS*

BY ORDER of the United States Supreme Court, an Advisory Committee prepared Federal Rules of Criminal Procedure in first and second preliminary draft.[1]

Rule 1 states that the "scope" of the rules is to "govern the procedure * * * in all criminal proceedings" except for extradition and other specified statutory hearings. Rule 2 states that the "purpose" of the proposed Federal rules is as follows: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."

The need for simplification of Federal criminal procedure is recognized by the United States Supreme Court and by the representative advisory committee. Is there need or occasion for simplification and improvement in Wisconsin criminal procedure? Comparison of the present Wisconsin statutes with analogous provisions of the proposed Federal Code is offered in answer to this question.

RULE 3. THE COMPLAINT

The Federal rule and the Wisconsin statutes respectively require that the complaint be "written," and "reduced to writing."[2]

The rule requires the complaint to be on "oath or affirmation." The statutes variously provide that it be "upon oath,"[3] or that examination be "under oath" and complaint be "subscribed."[4]

Neither rule nor statute determine validity of "information and belief" complaints.[5]

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*A.B., Yale University; LL.B., University of Wisconsin; Special Assistant District Attorney, Milwaukee County; Member Executive Committee Milwaukee Bar Association.

[1] Supreme Court Order February 3, 1941, 312 U.S. 717; 1st Draft May 3, 1943; 2d Draft November 19, 1943. References are to 2d Draft. Final draft with minor revisions is being printed and is to be presented to the Supreme Court.

[2] WIS. STAT. (1943) § 361.02, 360.02; Wis. Laws 1899, c. 218.

[3] Milw. Dist. Ct. Act. "§ 9," Wis. Laws 1899, c. 218.

[4] WIS. STAT. (1943) § 361.02, 360.02, 360.03. But see Bianchi v. State, 169 Wis. 75, 92, 171 N.W. 639 (1919) *re* non-necessity of oral examination.

[5] Committee note indicates intended absence of uniformity. Wisconsin Supreme Court holds such complaint valid: State v. Baltes, 183 Wis. 545, 552, 198 N.W. 282 (1924) etc.

Under the rule, complaint is to state "essential facts." Wisconsin statutes variously require that complaint be "in substance in the form hitherto used" in Milwaukee Police or Municipal Courts;[6] that it state "that a criminal offense has been committed."[7]

Other provisions included in the Wisconsin statutes but not in the rule are: requirement of conclusion "against the peace and dignity of the State of Wisconsin";[8] limitation on facts required to be alleged as to certain offenses;[9] statutory exceptions need not be negatived as to certain offenses;[10] requirement that complaint be "filed"[11], service of complaint, with warrant, in prosecutions against corporations,[12] and that a court order "shall stand and be taken as a criminal complaint" in perjury cases.[13]

RULE 4. WARRANT OR SUMMONS UPON COMPLAINT

As to issuance of warrant upon complaint, the rule so provides if it appears from the complaint that there is probable cause to believe an offense has been committed and that the defendant has committed it; the statute so provides "if it shall appear that any such offense has been committed."[14] The rule provides for more than one warrant.[15]

The rule, unlike the statutes, provides that at the government attorney's request, a summons may issue instead of a complaint, defendant to appear "at a stated time and place"—warrant to issue if defendant fails to respond.[16]

The statutes further provide that warrant may also summon witnesses;[17] and that warrants may issue without complaint by order of magistrate when he has knowledge of prospective affray.[18]

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[6] Milw. Dist. Ct. Act "§ 9" Wis Laws 1899, c. 218.
[7] WIS. STAT. (1943) § 361.02. Compare State *ex rel.* Dinneen v. Larson, 231 Wis. 207, 210, 284 N.W. 21 (1939): "substantial statement of offense"; Baldwin v. Hamilton, 3 Wis. 747 (1854) "some approach toward charging a criminal offense"; Schaeffer v. State, 113 Wis. 595, 89 N.W. 481 (1902): "fully" bring the accused within the statute, where offense unknown to common law; Gordon v. State, 158 Wis. 32, 147 N.W. 998 (1914): "substantially" in form of indictment or information.
[8] WIS. STAT. (1943) § 360.03. But compare State v. Huegin, 110 Wis. 189, 85 N.W. 1046 (1901).
[9] WIS. STAT. (1943) § 348.02, 176.21(3), 176.37(2).
[10] WIS. STAT. (1943) § 93.22(3), 161.18.
[11] Milw. Dist. Ct. Act "§ 9, 17," Wis. Laws 1899, c. 218, Wis. Laws 1903, c. 299.
[12] Milw. Dist. Ct. Act "§ 9," Wis. Laws 1899, c. 218.
[13] WIS. STAT. (1943) § 346.04. *Quaere*: applicable where offense not in court's presence?
[14] WIS. STAT. (1943) § 361.02.
[15] Though compare WIS. STAT. (1943) § 361.10 *re* new warrant against person not appearing on recognizance.
[16] Compare Milwaukee District Court "summons" to corporations for ordinance violations; Wis. Laws 1903, c. 299, § 17.
[17] WIS. STAT. (1943) §360.02; 361.02; Wis. Laws 1899, c. 218.
[18] WIS. STAT. (1943) § 362.21; see also § 346.04.

The rule provides that defendant "be arrested and brought before the nearest available commissioner." The statutes require that defendant be brought "forthwith" before a magistrate.[19]

The date of the alleged offense is not indicated on the Federal form of warrant, but is shown in the Justice Court form under the statute.[20]

The Federal rule provides that the warrant be "signed" by the commissioner. Under the general Wisconsin statute "issuance" is by the magistrate.[21] The Milwaukee District and Municipal Court Acts respectively provide that the clerk "shall" issue "all processes" in the judge's name—but "may" issue "warrants on complaint"; and that the clerk "shall" issue all processes with seal and judge's attestation.[22]

As to recital of offense, the rule provides that warrant "describe the offense charged in the complaint." The statutes require recital of the "substance" of the "complaint"[23] or "accusation";[24] the Milwaukee District Court Act further provides that the warrant be "in substance in the form hitherto used" in Milwaukee Police and Municipal Courts.[25] The Milwaukee Municipal Court law provides that its "process" shall "substantially be the same * * * as used in Circuit Court," and also that such court may direct the "form of process not otherwise provided by law."[26]

The rule, unlike the statutes, requires that the warrant or summons, contain defendant's name, or if unknown "any name or description by which he can be identified with reasonable certainty."[27]

The rule provides for service of warrant by marshal or "other officer authorized by law," and of summons, by person authorized to serve civil summons. Under Wisconsin statutes service of warrant is by "sheriff or other officer to whom" it is "directed"[28] or by "peace officer"[29] or by City of Milwaukee police officers,[30] or by "officer to whom addressed."[31]

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[19] WIS. STAT. (1943) § 361.02, 360.03, see also § 360.36.
[20] Rules p. 213; WIS. STAT. (1943) § 360.36.
[21] WIS. STAT. (1943) § 361.02.
[22] "§ 9" Wis. Laws 1899, c. 218; Wis. Laws 1899, c. 368.
[23] WIS. STAT. (1943) § 361.02, 360.02.
[24] Milw. Dist. Ct. Act, *re* Milwaukee County justice of peace, § 2, Wis. Laws 1899, c. 218.
[25] "§ 9," Wis. Laws, c. 218.
[26] Wis. Laws 1879, c. 256, § 2.
[27] Compare optional justice court warrant, "name of the accused or alias" WIS. STAT. (1943) 360.36. However, see Scheer v. Keown, 29 Wis. 586 (1872); also West v. Cabell, 153 U.S. 78, 85, 14 Sup. Ct. 752, 38 L.Ed. 643 (1894) to point that if offender's name is unknown, such fact be stated and "the best description of the person presented which the nature of the case would allow, should have been given;" that the word "alias" is "surplusage."
[28] WIS. STAT. (1943) § 361.03; Milw. Dist. Ct. Act "§ 11," Wis. Laws 1899, c. 218.
[29] WIS. STAT. (1943) § 361.44.
[30] Milw. Dist. Ct. Act "§ 11," Wis. Laws 1899, c. 218.
[31] Milw. Mun. Ct. Act, Wis. Laws 1879, c. 256, § 2.

The Federal rule and Wisconsin statute similarly provide that the officer need not have the warrant in his possession at the time of the arrest, and respectively provide that it be shown to defendant on request "as soon as possible," and "as soon as practicable."[32] The rule, unlike the statute, further expressly provides that if the officer does not have the warrant at the time of arrest, he shall inform defendant "of the offense * * * charged" and the fact of warrant issuance.

Further provisions included only in the rules are for alternative service of the summons personally, by substitute or "by mailing * * * to the defendant's last known address"; also specific requirement for return of the warrant to the issuing magistrate.

RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER[33]

The rule provides that a person arrested be taken before the "nearest available" commissioner or authorized officer, "without unreasonable delay." The statutes provide that such person be taken before the magistrate who issued the warrant unless he is absent or unable to attend, and "as soon as may be"; also that adjournments are limited to 10 days.[34]

The rule further provides that complaint be filed forthwith where arrest is without a warrant.

The rule, unlike the statute, provides for "statement by the commissioner" to the defendant as to his right to counsel and to preliminary examination, and that defendant is not required to make a statement and that any statement may be used against him. The rule provides that defendant "shall" be admitted to bail as provided in the rules.[35] The statute provides that in non-capital cases defendant "may" recognize "to the satisfaction" of the magistrate.[36]

The rule and statute both recognize defendant's right of cross-examination, also that hearing may be waived.[37] The rule and statute provide for defendant's right to "introduce evidence," and to have "witnesses," respectively.[38]

The rule provides that defendant be held to answer if it appears "that there is probable cause to believe that an offense has been committed and that the defendant committed it." The statutes provide for

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[32] WIS. STAT. (1943) § 361.44(2).

[33] As to change of venue, see Rule 23; presence of defendant, Rule 45; right to counsel, Rule 46; bail, Rule 48. The "McNabb Rule" as to exclusion of defendant's statements, was much criticized, and is omitted from this draft of the rules; however, see Ashcraft v. Tennessee, ——U.S.——, 64 Sup. Ct. 921, 88 L. ed. 858, (1944) *re* application of such rule in state court proceedings.

[34] WIS. STAT. (1943) §§ 361.08, 361.12, also 362.04, 361.09.

[35] See Rule 48.

[36] WIS. STAT. (1943) § 361.09.

[37] WIS. STAT. (1943) §§ 362.05, 361.34, 357.22.

[38] WIS. STAT. (1943) § 361.13.

discharge of defendant if it appears "that no offense has been committed or that there is not probable cause for charging the prisoner with the offense."[39]

The statute makes further provision for non-necessity of preliminary examination in cases of fugitives and corporations, and where certain facts have appeared in justice court trial;[40] public "court" hearings with certain exceptions;[41] taxing of costs against complainant under certain circumstances;[42] second examination after prior discharge.[43] Moreover, the statute which provides that testimony be reduced to writing and "signed by the witnesses"—goes on to provide, in effect, that such signature is unnecessary.[44] The Wisconsin statutes variously refer to the magistrate's inability to fix bail in cases of "murder," and when the offense is "punishable by imprisonment for life."[45] And the statutes variously provide for return and filing of the record in ten days, "at or before the time fixed for the appearance of the accused," "forthwith."[46]

RULE 6. GRAND JURY

The grand jury, under the Federal rule, "shall consist of not less than sixteen nor more than twenty-three members"; under the Wisconsin statutes "not less than fifteen nor more than seventeen."[47]

The Federal rule provides for challenge both to the array and to the individual juror "before the administration of the oath to the jurors"; but also that motion to dismiss indictment may be based on objections either to the array or to the qualifications of individual juror "if not previously determined upon challenge." The only pertiment statute provides that "any person held to answer" may object to juror's competency on the ground that he is a prosecutor, complainant or witness.[48]

The rule provides for court appointment of foreman and deputy foreman, and that record be kept by foreman or other juror designated by him. The statute provides that the grand jury may appoint a member as clerk "to preserve minutes."[49]

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[39] WIS. STAT. (1943) § 361.17; compare if "improvidently issued" or "no probable cause therefor." Milw. Dist. Ct. Act "§ 7," Wis. Laws 1901, c. 70.
[40] WIS. STAT. (1943) § 355.18, 355.19, 360.30.
[41] WIS. STAT. (1943) § 256.14, 361.14, 361.15.
[42] WIS. STAT. (1943) § 361.17.
[43] WIS. STAT. (1943) § 355.20. Though compare use of word "discharge" to refer to mere temporary release on bail. WIS. STAT. (1943) § 361.34.
[44] "shall not invalidate": WIS. STAT. (1943) § 361.16.
[45] Compare WIS. STAT. (1943) §§ 361.34, 361.18; see Rule 48.
[46] WIS. STAT. (1943) § 361.27; Milw. Dist. Ct. Act "§§ 12, 6" Wis. Laws 1915, c. 619, 1899, c. 218; WIS. STAT. (1943) § 351.31(1).
[47] WIS. STAT. (1943) § 255.11.
[48] WIS. STAT. (1943) § 255.20.
[49] WIS. STAT. (1943) § 255.22.

The rule provides for presence of government attorneys, witnesses being examined, stenographer and interpreter, but no one shall be present during deliberations or voting. The statute merely provides for the district attorney's presence when required.[50]

The rule prohibits disclosure of proceedings except to government attorneys or, on court direction, in connection with a judicial proceeding, or on motion for dismissal; and also for secrecy of indictment pending arrest. The statutes provide that grand jury report progress to the court from time to time.[51] The secrecy provisions are: a prohibition against disclosure of proceedings except as to how jurors voted; and, if the court so order, the fact of a felony indictment, until the defendant has been arrested, and a mandatory oath to keep secret "the counsel of the State of Wisconsin, your fellows and your own."[52] Specific disclosure is permitted by grand jury members in later court proceedings involving inconsistency of witnesses' testimony or perjury.[53]

The rule and the statutes similarly provide for indictment on concurrence of twelve jurors.[54]

The rule extends jury service beyond the term but limits it to eighteen months; and provides for excusing jurors. The statute provides for recall of the same grand jury during the same term; also for fine of juror neglecting to attend "without any sufficient excuse."[55]

Rule 7. The Indictment and the Information

The rule provides for prosecution by indictment of offenses punishable by death and by imprisonment for more than a year or at hard labor;[56] that on waiver, offenses so punishable by imprisonment may be prosecuted by information; and that other offenses may be prosecuted by indictment or information. Under the Wisconsin statutes prosecutions by indictment or information are alike in respect to offenses, form, defendant's rights, bail, and application of laws generally.[57]

The rule and statute respectively provide that indictment or information "be a plain, concise and definite written statement of the essential facts constituting the offense charged"; and that information "shall be stated in plain, concise language without prolixity or unnecessary repetition."[58] And the rule and statute respectively provide that the information be "signed" and "subscribed" by the prosecuting attorney.[59]

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[50] Wis. Stat. (1943) § 255.23.
[51] Wis. Stat. (1943) § 255.17.
[52] Wis. Stat. (1943) § 255.26, 255.25, 255.19.
[53] Wis. Stat. (1943) § 255.27.
[54] Wis. Stat. (1943) § 255.24.
[55] Wis. Stat. (1943) §§ 255.28, 255.29.
[56] U. S. Const. 5th Am. "infamous crime."
[57] Wis. Stat. (1943) §§ 355.12, 355.14, 355.16, 355.15.
[58] Wis. Stat. (1943) § 355.14.
[59] Wis. Stat. (1943) § 355.13.

The rule provides that the information need not contain any matter not necessary to the statement of facts, or any "formal conclusion." The statute provides that indictments conclude "against the peace and dignity of the State,"[60] but this is held inapplicable to informations.[61]

The statutes, unlike the rule, provide with respect to certain specific crimes that informations may be worded a certain way;[62] and that exceptions, etc., are not required to be negated.[63]

The rule, unlike the statute, expressly provides for incorporation by reference of allegations from one count to another; that a single count may allege "that the means by which the defendant committed offense are unknown or that he committed it in one or more specified ways"; that the statute alleged to be violated be referred to by "official or customary citation," but that error in such citation shall not be ground for dismissal unless prejudicial to defendant. The statute provides that the charge may be "in the words of the statute or in words of substantially the same meaning"; also for abbreviated pleading of judgment or private statute, of written instruments, of intent to defraud and of ownership.[64]

The rule provides for amendment of information where there is no change in the alleged offense and defendant's substantial rights are not prejudiced; also for defendant's right to strike surplusage from an indictment. The statute allows amendment of both indictments and informations for any error or mistake "where the person and the case may be rightly understood by the court," for misnomer, for variance in name or description or ownership or where "not material to the merits of the case."[65] The statute further provides that where mistake "in charging the proper offense" appears at any time before verdict or judgment, defendant shall not be discharged but may be required to answer to the offense.[66]

The rule, unlike the statute, makes specific provision for a bill of particulars, motion therefor to be made within ten days after arraignment.

The statutes, unlike the rule, variously provide that the district attorney file the information "during the term" and "as soon as practicable"; that it be filed within five days after specific indication of guilty plea; that filed indictments and information be recorded; and for replacement of lost indictment or information by court order.[67]

[60] WIS. STAT. (1943) § 355.21; and see WIS. CONST. Art. VII, § 17.
[61] Nichols v. State, 35 Wis. 308 (1874).
[62] Compare WIS. STAT. (1943) §§ 176.28(3), 176.37(2), 343.19, 347.03, 348.403, 353.15, 355.24, 355.31.
[63] Compare WIS. STAT. (1943) §§ 93.22 (3), 161.18.
[64] WIS. STAT. (1943) §§ 355.34, 355.35, 355.28, 355.40, 355.39.
[65] WIS. STAT. (1943) §§ 357.19, 357.18, 357.16. 357.17.
[66] WIS. STAT. (1943) § 355.27. As to general sufficiency of information or indictment see Rule 55 "Harmless Error" and Wisconsin Statutes cited, *post.*
[67] WIS. STAT. (1943) §§ 355.17, 355.13, 355.31 (2), 357.25, 357.20, 355.41, 355.36.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

The rule provides for joinder of offenses in the same indictment or information, whether felonies or misdemeanors or both, if such offenses "are the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." The statute provides for joinder of different offenses and degrees of the same offense "in all cases where the same might be joined by different counts in one indictment."[68] Special statutes authorize joinder of larceny, false pretenses, embezzlement, receiving stolen property; also of larceny, embezzlement, larceny as bailee pursuant to common scheme.[69] The statutes may impliedly recognize prosecution for different degrees of offenses in authorizing conviction of part of the offenses charged, and also for mere assault where felonious intent is charged but not found.[70]

The rule provides for joinder of defendants if alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[71] The only pertinent statute is one authorizing joinder of accessory before the fact with principal felon.[72]

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

The rule provides that warrant shall issue "when" indictment or information is filed; for use of summons at request of Government attorney; and that warrant or summons be delivered to some person authorized by law to execute or serve it. The statute provides that on return of indictment or filing of information "process shall forthwith" issue to arrest the person charged.[73]

The rule provides that the form of such warrant or summons be the same as that upon complaint, except that it is to be signed by the clerk and that it "shall describe the offense charged in the indictment

[68] WIS. STAT. (1943) § 355.14. See Gutenkunst v. State, 218 Wis. 96, 99, 110; 259 N.W. 610 (1935): offenses "of same general character and provided the mode of trial is the same"; "cognate felonies." Compare Schroeder v. State, 222 Wis. 251, 260; 167 N.W. 899 (1936): auto larceny and operating an auto without owner's consent; State v. Jackson, 219 Wis. 13, 18; 261 N.W. 732 (1935), selling liquor without stamps and without license; State v. Leicham, 41 Wis. 565 1877): conversion of personal property and of money.

[69] WIS. STAT. (1943) §§ 355,32, though note use of "or" and "and"; 355.31.

[70] WIS. STAT. (1943) § 357.09, 357.10. And as to judicial approval of joinder of different degrees of offenses, see Pollack v. State, 215 Wis. 200, 210, 254 N.W. 471 (1934): lesser with higher degrees of homicide; State v. Wagner, 239 Wis. 634, 2 N.W. (2d) 229 (1942): various degrees of assault.

[71] 1st draft of rules included phrase "or resulting in," after the word "constituting."

[72] WIS. STAT. (1943) § 353.06.

[73] WIS. STAT. (1943) § 355.02. In proceedings against a corporation, there is implied authority to give a form of summons, a "notice" of indictment or information: WIS. STAT. (1943) § 359.10, referring to default judgment against such corporation.

or information"; also that bail "may be fixed by the Court and endorsed on the warrant".[74]

The rule provides for execution, service and return of such warrant or summons in the manner provided by Rule 4. The statutes provide that in proceedings against a corporation, "notice" be served in the manner of serving a summons in a civil action; also that in connection with arrest on warrant for robbery or larceny, officer's return shall include a schedule of the property, alleged to have been stolen, and secured by the officer.[75]

RULE 10. ARRAIGNMENT

The rule provides that arraignment be in open court. The county court statute provides that arraignment be in open court, and with the sheriff, district attorney and clerk in attendance.[76]

The rule provides that the substance of the charge be read or stated to defendant, and that he be called on to plead. The statutes provide that in county court the county judge or the district attorney "fully explain * * * the exact nature of the offense charged" and "the penalty provided therefor by law"; that in justice court the charge "as stated in the warrant of arrest" be "distinctly read" to defendant,[77] but that "in any case" it is not necessary to ask defendant "how he will be tried."[78]

The rule provides that on defendant's request he be furnished with copy of indictment or information before he is called upon to plead. The statutes provide: with respect to a crime punishable by life imprisonment, the defendant be served with a copy of the indictment or information "as soon as may be" after the finding or filing thereof, "at least twenty-four hours before trial"; with respect to offenses punishable by imprisonment in State Prison, defendant is "entitled" to a copy of the charge and endorsements thereof "without paying any fees therefor,"—without mention as to time.[79] In county court, copy of the information is required to be delivered to defendant within five days after request for filing.[80]

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[74] See Rule 4 "Warrant or Summons upon Complaint," supra.
[75] WIS. STAT. (1943) §§ 359.10, 353.16. Compare issuance of "process" for appellant in criminal action who fails to prosecute his appeal: WIS. STAT. (1943) § 358.04.
[76] WIS. STAT. (1943) § 357.22. See also arraignment in county court "not less than six days" after request: WIS. STAT. (1943) § 357.20, 357.21; in abandonment cases, defendant "shall be arraigned upon" the information: WIS. STAT. (1943) § 351.32 (2).
[77] WIS. STAT. (1943) §§ 357.22, 360.09.
[78] WIS. STAT. (1943) §§ 357.22, 360.09, 355.07.
[79] WIS. STAT. (1943) §§ 355.03, 355.05.
[80] WIS. STAT. (1943) § 357.20.

RULES 11 AND 12. PLEAS; PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

The rule provides that a defendant may plead "not guilty, guilty or, with the consent of the court, nolo contendere"; also that the court may refuse to accept a plea of guilty and shall not accept it without determining that it is made voluntarily and with understanding of the charge. The Wisconsin statutes do not specify proper criminal pleas.

The rule provides that if defendant refuses to plead or the court refuses to accept a guilty plea or a defendant fails to appear, a plea of not guilty shall be entered.

The statutes variously provide that, when defendant refuses to plead or stands mute: in courts of record a plea of not guilty "shall" be entered; in justice court the "fact" of such refusal, together with a not guilty plea, is entered "in its minutes"; in county court "such refusal" is entered on the minutes.[81] And under state practice, in event of default by a corporation, instead of a not guilty plea being entered, the indictment or information "shall be taken as true."[82]

The rule abolishes demurrers, motions to quash, and all pleas other than not guilty, guilty and nolo contendere. Under the rule relief sought under such abolished proceedings is obtained only by motion to dismiss or to grant appropriate relief. The statutes recognize the use of pleas by way of demurrer, plea in abatement, and special plea in bar; plea in "bar" to raise defense of acquittal; "plea in abatement or other dilatory plea"; plea of not guilty because of insanity or feeble-mindedness at time of offense, also at time of trial; and plea of misnomer.[83] The only common law plea which appears to have been abolished is that of benefit of clergy.[84]

The rule provides that all defenses and objections, excepting to jurisdiction and to failure of the indictment or information to charge an offense, may be raised "only" by motion "before" trial; that such motion include all defenses then available. The statute apparently requires that substantially *all* defenses and objections be raised before trial.[85] Plea of insanity or feeble-mindedness is required to be made at arraignment and entry of not guilty plea.[86]

The rule provides that failure to raise the specified objections before trial constitutes waiver, but that relief may be granted from such waiver "for cause shown." The statute provides that, during the trial,

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[81] WIS. STAT. (1943) §§ 355.08, 360.09, 357.23.
[82] WIS. STAT. (1943) § 359.10.
[83] WIS. STAT. (1943) §§ 355.09, 358.12 (1) (2), 353.02, 355.11, 357.11 (1), 357.18. See Brozosky v. State, 197 Wis. 446, 222 N.W. 311 (1928); State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928), recognizing plea of nolo contendere.
[84] WIS. STAT. (1943) § 353.30.
[85] WIS. STAT. (1943) § 355.09.
[86] WIS. STAT. (1943) § 357.11 (1).

the court "may, in its discretion" grant relief from the waiver created by failure to timely raise objection—but that application therefor shall constitute waiver of jeopardy.[87]

The rule, unlike the statute, provides that any defense motion be made before entry of plea, or thereafter and within reasonable time before trial as the court may fix.[88]

The rule provides that hearing on motion be before the court unless a jury trial be required by constitution or statute; and that determination may be on affidavits or in other manner as directed by the court. A statute provides that abatement or other dilatory pleas may be refused "until the truth thereof shall be proved by affidavit or other evidence."[89]

The rule, unlike the statute, provides that if motion be determined adversely to defendant, plea previously entered shall stand, and, if he had not previously pleaded, he shall be permitted to do so; and that if motion be granted based on defect in institution or prosecution of the charge, the court may order defendant held "for a specified time" pending filing of new charge.[90]

RULES 13 AND 14. RELIEF FROM PREJUDICIAL JOINDER; TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS

The rule, unlike the Wisconsin statutes, provides that where there is prejudicial joinder of offenses or of defendants, the court may order separation; provided that severance of defendants be granted only before trial.[91]

The rule, further unlike the statutes, provides for joint trial of two or more indictments or informations, if the offenses and defendants could have been joined in a single charge.

RULE 15. PRE-TRIAL PROCEDURE

Under both the rule and the Wisconsin statutes provision is made for pre-trial procedure in criminal actions.[92]

The rule and statutes similarly allow the court to call a conference to simplify the issues; to save unnecessary proof by obtaining admis-

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[87] WIS. STAT. (1943) 355.09. See also § 269.46: Relief within a year for mistake, inadvertence, surprise or excusable neglect; applicable to criminal proceedings: Spoo v. State, 219 Wis. 285, 262 N.W. 696 (1935).

[88] See Spoo v. State, 219 Wis. 285, 262 N.W. 696 (1935).

[89] WIS. STAT. (1943) § 355.11.

[90] Compare WIS. STAT. (1943) § 292.23 as to power of court, on habeas corpus, to remand prisoner if he appear guilty of crime although the commitment be irregular.

[91] Compare Gutenkunst v. State, 218 Wis. 96, 259 N.W. 610 (1935); Scott v. State 211 Wis. 548, 248 N.W. 473 (1933) as to election before or after evidence presented.

[92] WIS. STAT. (1943) § 269.65: "in any action."

sion of fact and documents; to consider the number of expert witnesses; and to consider other matters as may aid in disposing of the proceeding; similarly provide that order recite the results of the conference; and that such order control subsequent proceedings subject to modification at trial to prevent manifest injustice.

The rule goes beyond the statute in providing that the procedure may be invoked by the court at any time after the filing of the indictment or information; for defendant's right to be present; that the rule can be invoked only where defendant is represented by counsel; and that "character witnesses or other witnesses who are to give testimony of cumulative nature", in addition to expert witnessess, shall be a matter for consideration.

The statute, unlike the rule, provides that the court may "direct"—instead of "invite"—the attorneys to appear for such conference; that the order recite, among other things, the amendments allowed to the pleadings; and that the order expressly "limit the issues for trial to those not disposed of by admissions or agreements of counsel".

RULE 16. NOTICE OF ALIBI: SPECIFICATIONS OF TIME AND PLACE

The rule and the Wisconsin statute similarly provide for notice of alibi being given by the defendant to the prosecuting attorney.[93] The rule provides for giving "specifications of place where (defendant) was at the time specified" by the prosecution; the statute provides that the notice state "particularly the place defendant claims to have been when the offense is alleged to have been committed".

The rule provides that the notice be given "not less than three days before trial", or at any time before trial, if the government delayed in specifying the time and place of offense.

If such notice is not given: under the rule, the court "may exclude the evidence" unless it finds that the failure of notice was "excusable" or that the admission of evidence "would be in the interest of justice"; under the statute, the alibi evidence "shall not be received" unless the court "for good cause shown" shall otherwise order.

The rule, unlike the statute, provides that the prosecution may be required to state "with greater particularity than the indictment or information, the time and place at which the offense is alleged * * to have been committed."

RULE 17. DEPOSITIONS

The rule provides for taking deposition of a witness who "may be unable to attend or prevented from attending a trial or hearing." The Wisconsin statutes similarly provide for depositions, "in any criminal or quasi-criminal action or examination in a court of record or

[93] WIS. STAT. (1943) § 355.085.

before a judge thereof", of a "material" witness where there is "imminent danger of death" or who resides or is to be without the state at the time of hearing and where his attendance cannot "by the use of due diligence" be procured for such hearing.[94]

The rule provides that the court "may order" such deposition "if it appears" that the grounds therefor exist. The statute requires that the court or judge be "satisfied that due diligence has been used" in making the application.

The rule, unlike the statute, provides for deposition to be made on application of a witness himself; also for production of "any designated books, papers, documents or tangible objects, not privileged."

Under the rule it appears that order for deposition may be obtained without notice—although after order and notice for taking deposition, time therefor may be extended or shortened on motion. Under the statute, notice of application for deposition order is required to be served on the district attorney.

After order has been made for the deposition: under the rule, "reasonable" notice is given to "every other party"; under the statute, notice is given "to the adverse party, his attorney or agent".[95]

Appointment of counsel for a defendant without counsel, is provided under the rule; no express provision is made under the deposition statute.

Regarding appearance or production of defendant at deposition hearing when he is in custody: under the rule, he is required to be produced when the deposition is taken at the instance of the government; under the statute, only "at the request of the district attorney" is such appearance mandatory;—notice is given defendant that he is "required" to personally attend the hearing, and that failure to do so will constitute waiver of right to face witness.

Regarding defendant's presence when he is not in custody: under the rule, he has the "right to be present at the examination", the government being required to pay travel and subsistence expenses to the defendant and his attorney; under the statute, payment is made merely of "witness fees for travel and attendance".

Under the rule, use of the deposition depends upon whether the witness is dead or out of the United States, or unable to attend because of sickness or infirmity, or unable to be procured through subpoena. Under the statute, use of deposition is permitted only if "the reason for taking it" or other sufficient cause "exists".[96]

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[94] WIS. STAT. (1943) § 326.06.
[95] WIS. STAT. (1943) § 326.09.
[96] WIS. STAT. (1943) § 326.13.

Under the rule apparently the deposition is to be filed "promptly".[97] Under the statute it is contemplated that filing be made "at least five days before the time set for the trial".[98]

Under the rule objections to "receiving in evidence" a deposition or part thereof, may be made at trial.[99] Under the statute objections to the "competency of a witness or to the propriety of any question put to him, or the admissibility of any testimony given by him" may be made "when the deposition, is produced"; but objection to validity or admissibility of any deposition is required to be made "before entering on the trial".[100]

The interrogatories, under the rule, may be "written" where the deposition is taken at defendant's instance. Under the statute interrogatories may be "oral or written" as the court may order. Under both the rule and the statute, the deposition is required to be subscribed, though the statute also provides for waiver of signature by stipulation.[101]

RULE 18. DISCOVERY AND INSPECTION

The rule provides that defendant may compel the government's attorney to permit inspection and copying of "books, papers, documents or tangible objects, obtained from or belonging to the defendant or constituting evidence" and which are "material".[102] The Wisconsin statutes contain a general inspection provision, apparently applicable to criminal actions, authorizing order for either party to obtain from the other inspection of "any books and documents in his possession or under his control containing evidence relating to the action".[103]

The rule, unlike the statute, provides that application for inspection may be made after defendant has been "arraigned".[104]

The rule provides that inspection may be ordered "upon a showing" of materiality and "that the request is reasonable". The statute provides for inspection "upon due notice and cause shown".

The statutes, unlike the rules, provide that defendant charged with a crime "punishable by imprisonment in the state prison for life" be furnished with a "list of the jurors".[105]

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[97] Reference to FEDERAL RULES OF CIVIL PRACTICE, §§ 30, 31.
[98] WIS. STAT. (1943) § 326.06.
[99] Rule 17, subsec. (3) FEDERAL RULE OF CIVIL PROCEDURE. See 26(e), 32(c).
[100] WIS. STAT. (1943) §§ 326.16, 326.15.
[101] WIS. STAT. (1943) § 326.10.
[102] 1st Draft of Rules contained "not privileged" in place of phrase "obtained from * * constituting evidence."
[103] WIS. STAT. (1943) § 269.57(1). See also § 357.08 R.S. authorizing "view" by jury in criminal cases.
[104] 2d Draft of Rules substitutes "after he has been arraigned" for "after he has been taken into custody."
[105] WIS. STAT. (1943) § 355.04. However, see 18 U. S.C.A. § 562, referred to in notes to Rules 10, 2d Draft; Rule 19, 1st Draft.

RULE 19. SUBPOENA

The rule provides that subpoena "shall" be issued by the clerk under the seal of the court, except when by a Commissioner in a proceeding before him.[106] Under the Wisconsin statutes, a subpoena "need not be sealed" and may be issued by various persons including judge, attorney general, district attorney or person acting in his stead, and form is provided.[107] However, the Milwaukee District and Municipal Court Acts provide that the clerk "shall" issue all processes under his hand and the seal of the court, and attested in the name of the judge, and that they "shall be in substance in the form hitherto used" in the Milwaukee Police and Municipal Courts.[108]

Under the rule an indigent defendant may obtain a subpoena by order of court; motion therefor shall state the name and address of the witness, the expected testimony and its materiality, defendant's inability to safely go to trial without the witness, and to pay his fees; and the witness is to be paid as in the case of one subpoenaed by the government. Under the Wisconsin statute, subpoena may be obtained by defendant "upon satisfactory proof" of inability to procure the witness's attendance for defense, proof to be by oath or affidavit of defendant or his attorney and as the court "may deem proper and necessary"; and, as under the rule, the witness is paid his fees as state witness.[109] Another statute further similarly provides that in case of defendant charged with a crime punishable by imprisonment for life, he "shall also have process to summon such witnesses as are necessary to his defense at the expense of the state".[110]

The rule provides that subpoena "may direct production of books, papers, or other objects designated therein", subject to being quashed on motion made "promptly" where compliance would be unreasonable or oppressive; and also provides for inspection of such books etc. by the parties and their attorneys.[111] The statute provides for production of merely "lawful instruments of evidence".[112]

The rule provides for service of subpoena by anyone not a party and not less than 18 years of age, by delivering and tendering to the person named a copy of the subpoena and fee for one day's attendance and mileage; but such tender not being required where witnesses are subpoenaed on behalf of the government or of an indigent defendant. The general Wisconsin statute provides for service "by any person"; but the

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[106] 1st Draft of rules provided that clerk "may" issue subpoena.
[107] WIS. STAT. (1943) §§ 325.01, 325.02.
[108] "§ 9," Wis. Laws 1899, c. 218; Wis. Laws 1929, c. 368.
[109] WIS. STAT. (1943) § 325.10.
[110] WIS. STAT. (1943) § 355.04. See Wis. Constit. Art I, § 7 *re* compulsory process for witnesses.
[111] Compare Rule 18, Discovery and Inspection.
[112] WIS. STAT. (1943) § 325.01(1).

Milwaukee District Court Act provides that the sheriff "shall" serve its processes and that City of Milwaukee police officers "may serve its processes" in state cases arising within the city.[113] The statute further provides that service shall be made by exhibiting or reading the subpoena, or giving or leaving copy; but that in any criminal action no witness "on behalf of either party" is "entitled to any fee in advance"; and the Milwaukee District Court Act contains a somewhat similar provision that witnesses shall attend such court and all criminal prosecutions "without any payment of fees in advance or tender therof, upon the process of the court duly served".[114] Payment of fees is made by certificate of the clerk of the court delivered to the County Treasurer.[115] And the statute further provides for extra fees for poor or non-resident witnesses upon the service of court process, and by court order.[116]

The rule provides that on deposition the person is required to attend "only in the county wherein he resides or is employed, or transacts his business in person"; and that a non-resident of a district is required to attend only in the county where he is served or within 40 miles of such place, or at other place fixed by the court. The statute provides that a witness may be compelled to give deposition "at any place within 20 miles of his abode".[117]

The rule further provides that failure to obey subpoena "without adequate excuse" may be deemed contempt.[118] The statute provides that "inexcusable failure" of witness to attend a court of record shall be contempt, punishable by fine not exceeding $20; in a court not of record, punishable by a fine of the costs of apprehension, unless he shall show reasonable cause for failure.[119]

RULE 20. — PROCEEDINGS IN THE DISTRICT OF THE OFFENSE

The rule provides that all proceedings be had in the district and division in which the offense was committed except as otherwise provided.[120]

Under the Wisconsin statute "all criminal cases shall be tried in the county in which the offense was committed" except as otherwise provided.[121] Various minor statutory exceptions relate to larceny of

[113] WIS. STAT. (1943) § 325.03; "§ 11," Wis. Laws 1899, c. 218.
[114] WIS. STAT. (1943) §§ 325.03; 325.06 (2); "§ 10" Wis. Laws 1941, c. 226.
[115] WIS. STAT. (1943) § 325.08.
[116] WIS. STAT. (1943) § 325.09.
[117] WIS. STAT. (1943) § 326.08. See also § 325.33 *re* subpoena of non-residents in criminal cases.
[118] See also Rule 44—Criminal Contempt.
[119] WIS. STAT. (1943) § 325.11 (3) (4).
[120] Compare U. S. CONST. Art. III, § 2, clause 3, requiring that trial be held "in the state where the said crime shall have been committed"; and Amendment 6 requiring trial in the "state and district" where the crime was committed.
[121] WIS. STAT. (1943) § 356.01.

property in transit; trial of an accessory before the fact; offenses within 100 rods of the dividing line between counties; homicides where wound is inflicted and death occurs in different counties; and bringing stolen property into this state.[122]

RULES 21 AND 22. TRANSFER WITHIN THE DISTRICT; AND TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

The rules provide that, with consent, proceedings may be had in any division of a district, and, where plea is guilty or nolo contendere, in a district other than that in which indictment or information is pending. There appears to be no analogous Wisconsin statute.[123]

RULE 23. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL

The rules do not provide for transfer of the case for personal prejudice of the judge.[124] Wisconsin statutes provide, in criminal proceedings on indictment or information, an absolute right to one change of venue "on account of prejudice" of the judge; and that, in lieu of changing the county, an outside judge may be called in.[125]

The rule provides that where, in the place of trial there is "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial," the court may transfer the proceeding "to another district or division." Under the only analogous Wisconsin statute, in a criminal case involving an offense punishable "by imprisonment in the state prison," where a fair and impartial trial cannot be had in the county, transfer may be made to "some adjoining county."[126]

The statutes, unlike the rule, include provisions that venue change be "once and no more"; and that the case be prosecuted by the District Attorney of the county where the charge was originally brought.[127]

The rule provides that on change of place of trial, all papers or duplicates shall be transferred and the prosecution continue. The statute provides that, where change is ordered as to some but not all defendants, certified copies of papers shall be transmitted in lieu of originals.[128]

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[122] WIS. STAT. (1943) §§ 356.02, 353.07, 353.10, 353.11, 353.12, and 353.14.

[123] Compare WIS. STAT. (1943) § 360.06 *re* transfer of justice court proceedings within the county.

[124] Though see 28 U.S.C.A. § 25 *re* filing of affidavit stating "personal bias or prejudice" of judge, facts and reasons for belief, accompanied by counsel's certificate of good faith.

[125] WIS. STAT. (1943) §§ 356.03 (1) (2). Somewhat similar provisions are made for preliminary examinations; peace bond hearings; and Milwaukee Municipal Court. WIS. STAT. (1943) §§ 361.35(1); 362.22; Wis. Laws 1895, c. 7, § 6, Wis. Laws 1909, c. 453.

[126] WIS. STAT. (1943) § 356.01.

[127] WIS. STAT. (1943) §§ 356.01, 356.04.

[128] WIS. STAT. (1943) § 365.09.

The Wisconsin statutes, unlike the rules, recognize change of place of trial as to some but not all defendants where charge is one "upon which separate trial may properly be had."[129] And the Milwaukee Municipal Court Act expressly provides that where change of place of trial is applied for "by one or more but not all of defendants," or in any case "where separate trial has not been previously awarded," change of place of trial shall be ordered "as to all of the defendants * * * as if all had joined in such application."[130]

The statutes further unlike the rules include provisions for advancing trial in county of change;[131] and for recognizing witnesses to appear in the court of transfer.[131a]

RULE 24. TIME OF MOTION TO TRANSFER

The rule provides that motion for transfer be made "at or before arraignment or other time as the court or rules may prescribe." The general Wisconsin statute provides that in criminal actions generally, motion for change on account of judge's prejudice shall not be awarded after the next term succeeding that at which the accused shall have been arraigned, except where facts were previously unknown.[132] The statute relating to preliminary examinations provides that request for venue change be made "before the commencement of the examination."[133] The justice court statute provides that request for venue change be made "before (defendant) pleads to said complaint."[134]

RULE 25. TRIAL BY JURY OR BY THE COURT

The rule provides for waiver of jury "in writing with the approval of the court and the consent of the government." The Wisconsin statute generally provides that defendant consent to trial without a jury "in writing, or by statement in open court, entered in the minutes."[135] The Milwaukee Municipal Court Act provides that, excepting on charge of murder, jury trial may be waived "by written consent filed in open court."[136] However, the Milwaukee District Court Act provides "if no jury shall be demanded it shall be deemed a waiver

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[129] WIS. STAT. (1943) § 356.09, 356.10.
[130] Wis Laws 1895, c. 7, § 6, Wis. Laws 1909, c. 453.
[131] WIS. STAT. (1943) § 356.06.
[131a] WIS. STAT. (1943) §§ 356.06, 356.07.
[132] WIS. STAT. (1943) § 356.03.
[133] WIS. STAT. (1943) § 361.35.
[134] WIS. STAT. (1943) § 360.06.
[135] WIS. STAT. (1943) § 357.01. However, apparently such waiver may not extend to capital cases: Oborn v. State, 143 Wis. 249, 126 N.W. 737 (1910); Post v. State, 197 Wis. 457, 222 N.W. 224 (1928). See Murphy v. State, 124 Wis. 635, 102 N.W. 1087 (1905) recognizing court power to direct verdict against defendant on special issue raised by plea in bar.
[136] Wis. Laws 1895, c. 45.

of a jury trial"; and in justice court a jury is called "if a jury be demanded."[137]

The statutes, unlike the rules, contain the following provisions: on plea of insanity at time of offense, such special issue "shall" be tried by the jury with a plea of not guilty; on issue of insanity at time of trial or before commitment, inquisition shall be "in a summary manner * * * by a jury or otherwise"; in abandonment cases upon not guilty plea, jury trial shall be "forthwith"; and on charges for a crime punishable by imprisonment for life, defendant has right to obtain list of jurors twenty-four hours before trial.[138]

The rule provides for juries of twelve, but, with court approval, "at any time before verdict" the parties may stipulate to a jury of "any number less than twelve."[139] The general Wisconsin statute provides for a jury of less than twelve "whenever the accused, in writing or by statement in open court entered in the minutes," consents thereto; under the Milwaukee District Court Act, the accused may demand a jury "of not more than twelve nor less than six men, and shall designate the number at the time of the demand."[139a]

The rule, unlike the statutes, provides that in a case tried without a jury, the court shall make a general finding "and may in addition find the facts * * * specially."

Miscellaneous statutory provisions relating to jury trial procedure, not contained in the rules, are the following: on appeal in peace bond cases, trial is "without a jury"; in justice court, on guilty plea, the court shall "thereupon" convict defendant and render judgment, but on a not guilty plea, where the jury disagrees, new trial shall likewise be had by jury; in Milwaukee Municipal Court, clerk or a deputy "shall" be present at "all" trials and proceedings, and the reporter "shall attend" upon the regular term of court and report trials and proceedings when directed by the judge.[140]

RULE 26. TRIAL JURORS

The rule provides that the court may permit the parties to examine the jurors, or "may itself conduct the examination"; in such latter event the court may submit questions by the parties "as it deems proper." The Wisconsin statutes provide that "challenge of jurors for

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[137] "§ 10," Wis. Laws 1899, c. 218; WIS. STAT. (1943) § 360.12, 360.10. Compare WIS. CONST. Art. I, § 5: waiver of jury trial "in the manner prescribed by law."

[138] WIS. STAT. (1943) §§ 357.11 (1), 357.13 (1), 351.31 (2), 355.04.

[139] 1st draft omitted the phrase "at any time before verdict."

[139a] WIS. STAT. (1943) § 357.01; "§ 10" Wis. Laws 1941, c. 226.

[140] Wis. Laws 1907, c. 473; WIS. STAT. (1943) § 362.13, 360.11, 360.16; Wis. Laws 1929, c. 368, Wis. Laws 1907, c. 473.

cause" shall be the same in criminal as in civil cases.[141] And the civil procedure statute provides for examination by the court "on request of either party" to determine relationship, interest, opinions, or bias or prejudice; for the introduction of evidence in support of party's objections to juror; and for striking juror if he "does not stand indifferent"; also that such statute does not abridge "in any manner the right of either party * * * to examine any person * * * in regard to his qualifications."[142]

The rule provides for twenty peremptory challenges by each side where the charge is punishable by death, six where the offense is punishable by more than a year's imprisonment, and three in other cases; also additional challenges where there is more than one defendant, within limits of six to ten. The general Wisconsin statute provides for twelve peremptory challenges where the charge is punishable by life imprisonment, and for four in all other cases; and where there is more than one defendant, a division of challenges "as equally as practicable between defendants" with additional challenges within certain limits in the court's discretion. [143] The Milwaukee District Court Act provides for three peremptory challenges by each party, the clerk to strike by lot if a party fails to do so.[144] The justice court statutes provide: challenges for cause as in civil cases; each party may strike six names apparently by way of peremptory challenge; if a party elect not to strike, the court directs "some suitable and disinterested person" to do so; talesmen may be called apparently subject only to challenge for cause.[145] The police justice statute provides for selection of juries in criminal cases as in justice courts "except that either side may challenge two talesmen peremptorily."[146]

The statutes further contain provisions not included in the rules: twenty jurors shall be called and remain in the box; the State shall have the first challenge; on decline to challenge, clerk shall do so by lot.[147]

The rule provides that the court "may" call not more than four alternate jurors, presumably in all criminal cases; the statute provides for calling of alternates only "whenever in the opinion of the court the trial of a defendant in a homicide case is likely to be a protracted one" and limits the number of alternates to "one or two."[148] The rule provides that alternate jurors be drawn, have qualifications, and take the same oath, as regular jurors; the statute provides that the court may call alternates "after" the jury is impaneled and sworn. The rule pro-

[141] WIS. STAT. (1943) § 357.14.
[142] WIS. STAT. (1943) § 270.16.
[143] WIS. STAT. (1943) § 357.03.
[144] "§ 10m," Wis. Laws 1917, c. 600.
[145] WIS. STAT. (1943) §§ 360.17, 360.12, 360.13, 360.15.
[146] WIS. STAT. (1943) § 62.24 (3) (d).
[147] WIS. STAT. (1943) § 357.04.
[148] WIS. STAT. (1943) § 357.065.

vides for one peremptory challenge for each two alternate jurors; the statute provides for a peremptory challenge "to each alternate juror."

The rule provides that alternates replace regular jurors "prior to the time the jury retires to consider its verdict," and for discharge after the jury so retires.[149] The statute provides for alternate to replace a regular juror who "dies or is discharged before the final submission of the cause"; and for discharge "upon the final submission of the cause to the jury." The rule provides that alternates be sworn to replace jurors "in the order in which they are called"; the statute provides that if there are two alternate jurors "the court shall select one by lot."

RULE 27. JUDGE; DISABILITY

The rule provides that in the event of disability of the judge to act after verdict any other judge "regularly sitting in or assigned to the court" may perform his duties. One Wisconsin statute provides that no action shall be discontinued by "the occurrence of any vacancy" in the office of a judge or by election of a new judge; however, it does not empower anyone to act except "the persons so elected."[150] And another statute provides for settlement of a bill of exceptions by "the presiding judge of the court" if the trial judge "shall die, remove from the state or become incapacitated to act."[151] The Milwaukee Municipal Court Act provides merely that circuit judges may act upon request of the municipal judge.[152]

RULE 28. EVIDENCE

The rule provides that testimony be taken "orally in open court" unless otherwise provided by Act of Congress or the rules. It further provides that admissibility of evidence and competency of witnesses be governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[153] The Wisconsin statutes apparently contain no analogous provision.

Miscellaneous criminal evidence statutes not included in the rules are: qualification of interested person as a witness; competency of party as witness, and absence of presumption against him in the event of failure to testify; relieving State of proving certain facts in certain cases; duty of defendant to negative exceptions in certain cases; application of account book evidence rule to criminal proceedings; and rec-

[149] 1st draft provided that alternates were not to be discharged "until the jury is discharged."
[150] WIS. STAT. (1943) § 256.08.
[151] WIS. STAT. (1943) § 270.48 (1), which applies to criminal actions: § 358.11.
[152] Wis. Laws 1917, c. 597.
[153] 1st draft of rules did not include phrase "in the light of reason and experience."

ord method for State to prove title to real estate in criminal proceedings.[154]

RULE 29. PROOF OF OFFICIAL RECORD

The rule, unlike the statutes, provides for proof of entry, or contents, or lack, of official records "as in civil actions."[155]

RULE 30. EXPERT WITNESSES

The rule provides for appointment of experts by the court after hearing "to show cause," and that nominations may be requested by the parties. The Wisconsin statute provides that when "expert opinion evidence becomes necessary or desirable" the court may appoint expert witnesses "after notice to the parties and a hearing."[156]

The rule provides that the court may appoint an expert agreed upon by the parties and witnesses of its own selection.[157] The statute provides merely for appointment of "one or more disinterested qualified experts * * * not exceeding three."

The rule provides that the expert witness shall not be appointed unless he consents to act, and that he shall be informed of his duties "at a conference" at which the parties may be present. The statute requires merely that the experts take an oath before entering upon their investigation.

The rule provides that the expert "shall advise the parties of his finding" and may "thereafter" be called to testify by the court or by any party. The statute makes no provision for findings or report prior to hearing excepting only in mental examinations where the court may require a "written brief report under oath" to be "filed with the clerk at such time as may be fixed by the court" and which the court may permit to be read at the trial.

At the trial, both under the rule and the statute, the witness is subject to cross examination. And the statute further requires that the fact of court appointment of experts shall be made known to the jury.

Under the rule and the statute the court fixes "reasonable compensation," or "compensation" respectively, for the expert witness.[158] Under the statute it is unlawful and contempt of court for the expert to receive other compensation.

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[154] WIS. STAT. (1943) §§ 325.13, 176.37 (2), 343.19, 353.15, 161.18, 93.22 (3), 357.14, 327.25, 328.36.

[155] However, as to legislative intent, Chapters 327 and 328 of the WIS. STAT. headed "Documentary and Record Evidence" and "Presumptions and Judicial Notices," are contained under title "Provisions Common to Actions and Proceedings in *all* Courts."

[156] WIS. STAT. (1943) § 357.12 (1).

[157] 1st draft rules required that the court "shall" appoint any expert agreed upon by the parties.

[158] Note to rule cites Wisconsin and California statutes in support of court determination of compensation for experts; also cites Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930) as sustaining constitutionality of the rule generally.

Both the rule and statute provide that the parties may summon other expert witnesses.[159] The statute further provides that the court may impose reasonable limitation on the number of experts who are to give opinion evidence on the same subject.

The statute, unlike the rules, contains provision that no expert testimony shall be offered by defense as to mental condition of accused without opportunity for examination by prosecution.[160]

RULE 31. MOTION FOR ACQUITTAL

The rule provides that motions for judgment of acquittal shall be substituted for motions for directed verdict which are abolished, such motion being granted "after the evidence on either side is closed if the evidence is insufficient to sustain the conviction"; and that if defendant's motion be not granted, defendant may offer evidence without having reserved the right. The rule further provides for reservation of decision on the motion and decision later either before or after return of verdict; and for renewal of the motion, if it is denied, within five days after jury discharge;[161] and that the motion may include, in the alternative, a motion for new trial. There appears to be no analogous Wisconsin statute.

RULE 32. INSTRUCTIONS

The rule provides for filing of written requests for instructions "at the close of the evidence or such earlier time during trial as the court reasonably directs";[162] and that at the same time copies of such request "shall be furnished to adverse parties." The Wisconsin statutes, applying civil rules, provide merely that requests for instructions "must be submitted in writing before the argument to the jury is begun," unless excused by special circumstances.[163]

The rule provides that the court "shall inform counsel" of its proposed action upon requests "prior to their arguments to the jury." The statute merely provides that the charge either be written by the court beforehand or taken down by a reporter.

The statute contains provisions: that instructions asked by counsel "shall be given without change or refused in full"; and that "any comments to the jury upon the law or facts in any action" by the judge,

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[159] 1st draft of rules included requirement that parties give each other notice of intention to call any expert witnesses other than those appointed by the court.
[160] WIS. STAT. (1943) § 357.12 (2).
[161] 1st draft of rules fixed ten days after jury discharge.
[162] 1st draft of rules had phrase "unless further time is granted" in place of "or such earlier time etc."; revision apparently preventing request for instructions at any time after close of the evidence.
[163] WIS. STAT. (1943) §§ 357.14, 270.21.

shall be reduced to writing and taken down, and for new trial in the event of failure in this regard.[164]

The general statutes further provide that the reporter transcribe and file the charge "immediately" and "without special compensation"; the Milwaukee Municipal Court Act provides that the instructions be transcribed and filed with the clerk "as soon as may be," free of charge; and the Milwaukee District Court Act provides that reporter transcribe "as soon as may be" the jury charge in such cases as he shall have been directed to report.[165]

The rule, unlike the statutes, provides that objections to the charge be made "before the jury retires" and that the objector state "distinctly the matter to which he objects and the grounds of his objection," with opportunity to object out of jury hearing.[166]

The statutes contain a provision not in the rules, that on the return of the jury into court without verdict agreement, "the court may state anew the evidence or any part of it, and may explain to them the law anew, applicable to the case," but that only if the jury requests "some further explanation of the law," shall it be sent out a second time.[167]

RULE 33. VERDICT

The rule provides that a verdict be unanimous and returned in open court.[168] The only analogous statute is that relating to justice court which requires that a jury verdict be returned "publicly."[169]

The rule, unlike the statutes, provides that the jury may return a verdict as to some and not all of the defendants, and that retrial may be had as to such other defendants.

The rule provides that defendant may be found guilty of a less offense where it is "necessarily included" in the charge, or of an "attempt" to commit such offense which is criminal by statute. The only analogous statutes provide for acquittal and conviction variously of part of the offenses charged if such offense "be substantially charged"; that in cases of assault with intent to commit a felony, the jury may convict of the assault alone.[170]

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[164] WIS. STAT. (1943) § 270.21.

[165] WIS. STAT. (1943) § 270.22; Wis. Laws 1919, c. 151 § 4; "§ 12," Wis. Laws 1915, c. 619.

[166] Comment note describes the rule as permitting objection for failure to give requested instructions, failure to give essential instructions though not requested, and for giving of erroneous instructions.

[167] WIS. STAT. (1943) § 270.23.

[168] Comment note points out that no provision is made with respect to sealed verdicts.

[169] WIS. STAT. (1943) § 360.20. See also the Justice Court and Milwaukee District Court Acts which respectively provide that a jury shall be discharged where it "shall fail to agree," and where it agrees "after being kept a reasonable time": WIS. STAT. (1943) § 360.16; "§ 10," Wis. Laws 1941, c. 226.

[170] WIS. STAT. (1943) §§ 357.09, 357.10.

The rule provides for poll of the jury at the request of any party or "upon the court's own motion"; and that if the poll shows nonconcurrence, the jury may be directed to retire or discharged. The Wisconsin statutes contain no analogous provisions.[171]

RULE 34. SENTENCE AND JUDGMENT

The rule provides that sentence shall be imposed "without unreasonable delay." The only pertinent Wisconsin statutes provides that in abandonment cases, on guilty plea, sentence shall be "immediately awarded"; that in Justice Court, on guilty plea, the court shall "thereupon" convict defendant and enter judgment; and in County Court, on guilty plea, the court "shall pass sentence."[172] The rule further makes provision that, pending sentence, the court may commit the defendant or alter bail.

The rule, unlike the statutes, provides that before sentence the defendant shall have opportunity "to make a statement in his own behalf and to present any information in mitigation of punishment."

The rule provides that the conviction judgment shall state "the plea, the verdict or finding, and the adjudication and sentence." The only analogous Wisconsin statute is that relating to guilty plea in County Court, which provides that defendant's "request, information, plea, sentence, judgment, and the minutes of all the proceedings, be entered in the court"; and in Justice Court the provision that a conviction certificate briefly stating "the offense charged and the conviction and judgment thereon" and collection of fine, be filed within 20 days with the Clerk of the Circuit Court.[173]

The rule provides that the judgment be signed by the judge and entered by the clerk. The Milwaukee Municipal and District Court acts, respectively, provide that the clerk "shall" and "may" enter judgments.[174]

The rule provides that the probation service "shall" make presentence investigation and report to court before imposition of sentence "unless the court otherwise directs." The Wisconsin statutes provide for presentence and preprobation investigation "as may be required" by the courts; also that, where persons are convicted, the court "may ascertain defendant's previous convictions, and that the District Attorney and Sheriff aid in such investigation."[174a] The rule, unlike the

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[171] See Bliss v. State, 117 Wis. 596, 94 N.W. 325 (1903) confirming right of poll at request of parties.

[172] WIS. STAT. (1943) §§ 351.31(2), 360.11, 357.23.

[173] WIS. STAT. (1943) §§ 357.23, 360.26, 360.27, also 360.36.

[174] Wis. Laws 1929, c. 368; "§ 9," Wis. Laws 1899, c. 218. For various provisions to be included in a "judgment," and meanings of the term, see WIS. STAT. (1943) §§ 360.21, 358.07, 358.04, 353.17, 359.01, 360.24.

[174a] WIS. STAT. (1943) §§ 57.02(3); 359.15.

statutes, provides that the report contain not only defendant's criminal record, but information as to his characteristics, his financial condition, circumstances affecting his behavior, and other information required by the court; and that after determination of guilt, report should be available to the attorneys for the parties, and other persons having legitimate interest.

The rule, unlike the statutes, provides that a plea of guilty or nolo contendere may be withdrawn only before sentence is imposed, except that sentence may be set aside and withdrawal permitted to correct "manifest injustice."[175]

The rule provides for probation as to any offense not punishable by death or life imprisonment. The statutes provide for probation in cases of felony convictions except for fifteen specified offenses, in cases of misdemeanor and abandonment, and is cases of minors with certain exceptions.[176]

RULE 35. NEW TRIAL

The rule provides that a new trial may be granted "in the interests of justice." One statute provides for new trial "for any cause for which by law a new trial may be granted or when it shall appear to the court that justice has not been done."[177] Other statutes provide that motion for new trial may be made "upon the same grounds provided by law in civil cases"; presumably that such motion can be made "because of error in the trial or because verdict is contrary to law or to the evidence * * * or in the interest of justice."[178]

The rule, unlike the statutes, provides that if a new trial be granted after a trial without a jury, the judgment may be vacated and the court "take additional testimony."

Under the rule the time for making motions for new trial upon grounds other than newly discovered evidence is five days after guilty verdict or finding or at other time fixed by the court during such five day period;[179] but no time limit is fixed for making such motion based on newly discovered evidence or deprivation of a constitutional right. Under the general statute the time for motion for new trial on any grounds is "within one year" after the term of the trial, with provision for filing of the motion "at least 20 days before the argument" unless shorter time be fixed by the court; while under the Milwaukee District Court act motion must be made "within 90 days after judgment" and be filed at least 5 days before argument, or shorter time as the court may fix.[180]

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[175] 1st draft of rules omitted provision for withdrawal of plea after sentence.
[176] WIS. STAT. (1943) §§ 57.01, 57.04, 57.05.
[177] WIS. STAT. (1943) § 358.06.
[178] WIS. STAT. (1943) §§ 358.11, 270.49.
[179] 1st draft of rules fixed period at three days.
[180] WIS. STAT. (1943) § 358.06.

The rule, unlike the statute, makes further provision that when the motion is made on the ground of newly discovered evidence and an appeal is pending, the motion may not be granted until remand of the record,—but presumably may be entertained by the trial court in the meanwhile.[181]

RULE 36. ARREST OF JUDGEMENT

The rule, unlike the statutes, provides that judgment shall be arrested if the indictment or information "does not charge an offense or if the court was without jurisdiction of the offense charged"; motion to be made within five days after guilty verdict or finding, or thereafter if extension within such 5 day period.[182]

RULE 37. CORRECTION OR REDUCTION OF SENTENCE

The rule provides for correction of an "illegal" sentence at any time; also for reduction of a sentence within 60 days after its imposition or after its confirmation by an appellate court. The only similar statutory provision appears to be the State's right to prosecute a writ of error from a sentence "not authorized by law."[183]

RULE 38. CLERICAL MISTAKES

The rule provides that mistakes or errors in the record "arising from oversight or omission" may be corrected at any time and after such notice as the court may order. The statutes contain no such direct and clear provision, but do provide: that "a defect or omission in the appeal papers" may be supplied by the court; that "any error or defect in the pleading or proceedings" not affecting susbstantial rights may be disregarded; for amendment to correct "mistake * * * in charging the proper offense."[184]

RULE 39. TAKING APPEAL AND A PETITION FOR WRIT OF CERTIORARI

The rule provides that appeal be taken "by filing with the clerk" notices of appeal in duplicate; notices to be signed by appellant or his attorney, or the clerk.[184a] The Wisconsin statute provides that appeal be taken "by serving a notice of appeal, signed by the appellant or his attorney, on the adverse party and on the clerk of court."[185]

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[181] See Comment note, p. 131.
[182] Compare WIS. STAT. (1943) § 358.12(5) authorizing State to take writ of error from order in arrest of judgment. And see State v. Slowe, 230 Wis. 406, 284 N.W. 4 (1939) recognizing motion in arrest of judgment made after verdict and before judgment.
[183] WIS. STAT. (1943) § 358.12 (7).
[184] WIS. STAT. (1943) §§ 269.51 (1), 274.37, 355.37.
[184a] Comment note states that this practice is "common" in state procedure.
[185] Civil procedure WIS. STAT. (1943) § 274.11 (1).

The rule provides for abolishment of "assignments of error." The statutes retain "writs of error," likewise "exceptions."[186]

The rule provides that appeal by defendant be taken within ten days after entry of the judgment or order, or after order denying motion for new trial; appeal by government to be taken within thirty days. The Wisconsin statutes variously provide as follows: generally one year for taking writ of error with provision for extension to two years in the event of certain disabilities; two years for taking such writ after denial of motion for new trial; one year generally for writ of error or appeal; five days for justice court appeal; ten days for Milwaukee District Court appeal; no fixed period for "examinations and review of Milwaukee Municipal Court judgments" except "as Circuit Court judgments"; "before the end of the term" for allowance of exceptions.[187]

The rule, unlike the statute, provides, that defendant be advised of his right to appeal; and that the clerk file appeal notice on defendant's request.[188]

The rule provides for filing certiorari petition in accord with such rules and within thirty to sixty days. The only pertinent statutes merely authorize such writ by the Supreme Court, record to be as per writ of error.[189]

The statutes, unlike the rules, make provision for certifying important or doubtful questions of law to the Supreme Court; although such certification can be had only with defendant's consent and only after conviction regardless of consent of all parties.[190]

RULE 40. STAY OF EXECUTION AND RELIEF PENDING REVIEW[191]

The rule provides for stay of death sentences if an appeal is taken, and of imprisonment sentences if appeal is taken and defendant elects with court approval to remain in detention or is admitted to bail. The Wisconsin statutes provide for stay only where the conviction is not "of an offense punishable by imprisonment for life," and then only on certificate that "there is reasonable doubt that the judgement should stand."[192] However, the statutes also contain provision that "if exceptions are allowed before the end of the term, thereupon all further proceedings in that court shall be stayed" unless exceptions be found frivolous; also that if, after conviction, questions of law be reported

[186] WIS. STAT. (1943) §§ 358.11, 358.12, 358.10.
[187] WIS. STAT. (1943) §§ 358.11; 274.01(1); 358.06(2); 358.13; 360.23; "§ 18" Am. Wis. Laws 1899, c. 218; Wis. Laws 1879, c. 256, Wis. Laws 1895, c. 7; WIS. STAT. (1943) § 358.07.
[188] See Rule 46, Appointment of Counsel. Compare WIS. STAT. (1943) § 358.03 requiring no advance of fees by appellant.
[189] WIS. STAT. (1943) §§ 251.10, 251.253.
[190] WIS. STAT. (1943) § 358.08; State v. Kaiser, 214 Wis. 44, 252 N.W. 273 (1934).
[191] As to Bail, see Rule 48.

by the judge, "thereupon all proceedings in that court shall be stayed."[193]

The rule does not require court order for stay, although it does state that relief which might have been granted by the District Court may be granted by the appellate court only on a showing that prior application to District Court was impractical or was denied. The statutes provide that the trial court, before filing the record in the Supreme Court, and the Supreme Court thereafter "have power by express order" to stay execution of judgment.[194] The rule provides that application for relief pending review "shall be upon notice"; the statute requires "reasonable prior notice to the prosecuting attorney or attorney general" of application for stay.[195]

RULE 41. SUPERVISION OF APPEAL

The rules provide that control of proceedings is in the appellate court "from the time the notice of appeal is filed." The only pertinent statute provides for stay by the appellate court after the record is filed in such court.[196]

The rule provides for preparation and form of record as in civil actions. The statutes variously provide: on writ of error, bill of exceptions is as in civil cases; on exceptions, clerk files certified copy of "record and proceedings"; on justice court appeal, transmission of certified copy of "conviction and other proceedings"; also that peace bond appeal be heard "in the same manner as prescribed for the examining magistrate."[197]

The rule provides that by court order typewritten record may be used in any case.[198] The only pertinent statutes provide that the Supreme Court may by rule provide that no party shall be required to furnish printed record; and that the case and briefs of any "poor and indigent defendant," on request of the Attorney General, may be printed at the expense of the state.[199]

The rules provide that the record of appeal be filed within forty days from date of notice, with extension for cause shown; and that hearing be had not less than thirty days after such filing but as soon thereafter as possible as the calendar will permit, with preference given

[192] WIS. STAT. (1943) § 358.14; see also § 358.11.
[193] WIS. STAT. (1943) §§ 358.07; 358.08.
[194] WIS. STAT. (1943) § 358.14.
[195] WIS. STAT. (1943) § 358.14. *Quaere*: Are the Wisconsin statutes which provide for "stay" of execution, consistent with § 359.07 which provides that no time "while * * case is pending in the Supreme Court" upon writ of error or otherwise shall be computed as part of the term of sentences, apparently regardless of fact of imprisonment or of stay?
[196] WIS. STAT. (1943) § 358.14. Compare Rule 40 *supra*.
[197] WIS. STAT. (1943) §§ 358.11, 358.10, 358.02, 362.13.
[198] 1st draft of rules limited typewritten record to cases where "cause shown."
[199] WIS. STAT. (1943) § 251.18, but no "rule" promulgated thereunder; § 251.19.

to criminal cases. The statutes provide for return to the Supreme Court within 20 days after filing writ or perfecting appeal, for statement of errors 30 days before argument; and that State cases be put at the foot of any assignment, that is, advanced, when submitted by one party.[200]

RULE 43. SEARCH AND SEIZURE[201]

The rule provides for issuance of search warrants by judge or commissioner. The Wisconsin statutes variously authorize issuance by a "magistrate" and by an "officer authorized by law."[202]

Under the rule, property subject to search and seizure is that which constitutes "the fruits" of a law violation or is "designed or intended for use or is, or has been used as a means of committing a criminal offense." The Wisconsin statutes somewhat similarly include general authority to seize property "which has been used in the commission of, or may constitute evidence of, a crime"; also specific provisions for seizure of stolen or embezzled property and of certain other named property.[203]

Under the rule the warrant is issued "only on affidavit * * * establishing" grounds of issuance. The statutes variously require complaint "made on oath" that complainant "believes"; and that a person "shall make oath" that "he has good reason to and does believe" the facts.[204]

The rule authorizes issuance of such warrant if the commissioner is satisfied as to "probable cause to believe" that grounds for application exist. The statutes variously require that the magistrate be "satisfied that there is cause for belief," or that he be "satisfied" that there is reasonable cause.[205]

The rule provides that the warrant include identification of property, the name and description of person and place to be searched. Somewhat similarly the statutes provide that the warrant "designate and describe" the "place and property," or state the "particular house or place" to be searched.[206]

Under the rule the warrant is directed to an authorized civil officer. One statute authorizes issuance to sheriff, deputy, or constable, the other to the same officers and also to "any peace officer."[207]

The rule, unlike the statute, requires that the warrant state the grounds of its issuance and the names of persons upon whose affi-

[200] WIS. STAT. (1943) §§ 251.254, 251.285, 251.283.
[201] Rule 42 "Commitment to another district; removal" omitted as inapplicable to state proceedings.
[202] WIS. STAT. (1943) §§ 363.01, 351.36.
[203] WIS. STAT. (1943) §§ 363.02 (10), 363.01, 363.02 (1)-(9).
[204] WIS. STAT. (1943) §§ 363.01, 363.02, 351.36.
[205] WIS. STAT. (1943) §§ 363.01, 363.02.
[206] WIS. STAT. (1943) §§ 363.03 (1), 363.01.
[207] WIS. STAT. (1943) §§ 351.36, 363.03 (1).

davits it is based; that the warrant command search "forthwith;" that such search be in the daytime unless the affidavits "are positive that the property is on the person or in the place to be searched;" and that the warrant designate the officer to whom it shall be returned.

The statute, unlike the rule, provides that the warrant shall direct the officer to bring before the magistrate "the person in whose possession" the property shall be found.[208]

The rule provides that search warrant be executed within 10 days and by giving a copy of the warrant and receipt for the property to the person from whom it is taken. The only pertinent statutes provide that in execution of one limited type of search warrant, the officers may "break open doors," summon to their aid "the power of the county," and "arrest all persons" present; and that in execution of warrants generally the officer has authority to arrest person in "possession" of the seized property.[209]

The rule, unlike the statute, specifically provides for return of the warrant within 10 days and "promptly."

The rule further requires the making of a reliable inventory and giving of copies to the persons from whom the property is taken. The only pertinent statute is that relating solely to the seizure of animal-baiting property which requires that, at the time of seizure, the officer state his name and residence and the time and place at which application for property disposition will be made; and that the officer file an affidavit showing the time and place of seizure, description of the property, name of the owner, and the reason to believe existence of law violation. The statute, unlike the rule, provides for delivery of property to the magistrate to be kept under court order.[210]

The rule, unlike the statute, provides that motion for return of seized property and to suppress evidence may be made on four grounds relating to the warrant: its insufficiency, seizure of property not therein described, lack of probable cause for issuance, and illegal execution. And the rule, unlike the statute, further provides that the judge or commissioner "shall" take testimony on such motion to suppress, excepting only when the motion is brought for insufficiency of the warrant on its face.

The rule provides that if motion to suppress be granted, the property shall not be admissible in evidence, also that it shall be restored "unless subject to confiscation." The only pertinent statutes relate to the situation after trial, and provide that stolen or embezzled property be restored to the owner and that other property be "destroyed under

[208] WIS. STAT. 1943) § 363.03 (1).
[209] WIS. STAT. (1943) §§ 351.36, 363.03 (1).
[210] WIS. STAT. (1943) § 363.04.

the direction of the court or magistrate," excepting property involved in animal-baiting, which is to be returned in absence of conviction.[211]

The rule, unlike the statute, specifically provides that any person aggrieved may, within 10 days, apply for review of decision on the motion to suppress; that such motion shall be made before the trial if opportunity therefor has been afforded, and further, that the term "property" includes "any * * * tangible objects."

RULE 44. CRIMINAL CONTEMPT

The rule provides for summary punishment, without notice or hearing, of a contempt committed in the actual presence of the court, order to recite the fact and be signed by the judge. The general Wisconsin statute provides for punishment summarily of contempt committed "in the immediate view and presence of the court;" although the Justice Court statute provides that no person shall be punished for contempt "until an opportunity shall be given him to be heard in his defense."[212]

Under the rule contempts other than those committed in the court's presence are prosecuted on notice allowing reasonable time for defense and stating essential facts. Similarly under the statute in such case the party is notified of the accusation and has reasonable time to make defense.[213]

The rule, unlike the statute, provides for trial by jury where authorized by statute; and that a judge is disqualified from presiding at a contempt hearing involving "disrespect to or criticism of" such judge.

RULE 45. PRESENCE OF DEFENDANT

Under the rule defendant has the right to be present at the arraignment, "at every stage" of the trial, and at sentence.[214] Under the Wisconsin statutes apparently defendant is entitled to be present at least "during the trial."[215]

Under the rule trial may be had, under certain circumstances, in defendant's absence: in non-death cases, his "voluntary absence is immaterial"; in cases punishable by imprisonment of not more than a year or by fine, with defendant's "written consent," all proceedings through trial may be had in his absence. Under the general statute, in felony cases it is mandatory that defendant be personally present "during the

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[211] WIS. STAT. (1943) §§ 363.04, 363.03 (3).

[212] WIS. STAT. (1943) §§ 256.04, 300.11; compare § 176.28 (2) providing for commitment of person in liquor cases "if he shall refuse to testify."

[213] WIS. STAT. (1943) § 256.04. Compare §§ 256.07, 295.17, authorizing prosecution both by contempt and by indictment or information.

[214] Compare comment to rule, that defendant may be excluded from the court room during a law argument.

[215] WIS. STAT. (1943) §§ 357.07, 360.19.

trial;" trial of "smaller offenses" may be had in defendant's absence but in the presence of his attorney at his request and by leave of court; —although the justice court statute provides that the jury "shall" hear proofs "in the presence of the accused."[216]

RULE 46. APPOINTMENT OF COUNSEL

The rule, unlike the Wisconsin statutes, expressly provides that a defendant appearing without counsel shall be advised of his right to counsel.

Under the rule, where a defendant is in court and is not "able" to obtain counsel, the court "shall" appoint counsel for him unless he elects to proceed otherwise. Under the statute, where the defendant is "charged with any offense" before a court of record and "destitute of means" the court "may" appoint counsel, such appointment to be "in time" for taking deposition.[217]

RULE 47. TIME

Under both rule and statute time is extended one day when the last day is Sunday or a legal holiday. Under the rule, Sundays and holidays are excluded when the period is less than seven days; under the statute there is such exclusion when the period is expressed in hours.[218]

The rule, unlike the statute, expressly provides that a half holiday is not a holiday.

The rule contains further provisions not included in the statutes: time may be enlarged without notice if application be made during the period originally prescribed, and on notice when the application is made thereafter and where omission was due to "excusable neglect;" no period of time is affected by the expiration of a term of court; motions are to be made on five days' notice unless a different period is fixed by court order; motions may be *ex parte* for cause shown; supporting affidavits are to be served not less than one day before the hearing except by court order; and service by mail may allow the other party an additional three day period to act.

RULE 48. BAIL[219]

Under the rule, a person arraigned, before conviction is entitled to bail for any offense excepting in death cases where it is discretionary with the court. The Wisconsin statutes variously define bailable

[216] WIS. STAT. (1943) §§ 357.07, 360.19.
[217] WIS. STAT. (1943) § 357.26 (1), (2).
[218] WIS. STAT. (1943) § 370.01 (24). And see Ridgley v. State, 7 Wis. 661, 663 (1858) *re* exclusion of Sunday in civil cases under statutory period of less than a week.
[219] Comment note refers to confusion in use of terms "recognizance," "undertaking," and "bond"; also the fact of surveys showing need for simplification in state bail bond systems.

offenses: offenses "punishable by imprisonment for life" are bailable only by the Supreme Court or presiding circuit judge; on waiver of preliminary examination all cases except "murder" are bailable; on adjournment of preliminary, charges not for "a capital offense" are bailable; "all felony cases, including murder" are bailable in the Milwaukee District Court.[220] Where the offense is bailable, general power to admit to bail lies in any judge of a court of record, and on bind-over or change of venue, in a magistrate.[221] Under certain statutes the basis of bail is defined to be "the ends of public justice.[222]

Under the rule, if a "substantial question" is involved on review, bail may be allowed. Under the statutes, on appeal for offenses not punishable by life imprisonment, bail may be allowed on judicial certificate that "there is reasonable doubt that the judgment should stand."[223]

Under the rule, on review, bail may be allowed by the trial or appellate courts. Under the statutes: on writs of error or appeals, bail may be fixed by the trial court before filing of the record, and by the Supreme Court or justice thereafter; on a certification of questions, the trial judge is empowered to fix bail without limitation of time; on appeals from justice court it is likewise the trial justice that fixes bail.[224]

Under the rule, bail may be required of a material witness whom it is impracticable to subpoena. The statutes variously provide as follows: where a prisoner is admitted to bail or committed, bail may be required of such witness as the magistrate "shall deem material;" in peace bond cases bail may be required from such witnesses as the magistrate "may think necessary to support the complaint;" on change of venue from Milwaukee Municipal Court the recognizance that may be required is that of merely "witnesses.[225]

Under the rule the amount of bail is as fixed by the court or commissioner. Under the statute amount of bail which may be required of a married woman or minor as witness is limited to $50;[226] and the statute further provides for additional bail being required.[227] Under the

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[220] WIS. STAT. (1943) §§ 361.19, 361.34, 361.09; "§ 6 a m," Wis. Laws 1921, c. 483. Compare WIS. CONST. art. I § 8 providing that all persons shall be bailable "except for capital offenses when the proof is evident or the presumption great"; and *In re* Perry, 19 Wis. 676 (1865) as to absence of "capital" offenses in Wisconsin.

[221] WIS. STAT. (1943) §§ 361.26, 361.18, 356.05. Compare use of term "court or judge."

[222] Justice Court: WIS. STAT. (1943) § 360.01 (2); Milw. Dist. Ct. "§ 15" Wis. Laws 1899, c. 218.

[223] WIS. STAT. (1943) § 358.14. See also WIS. STAT. (1943) § 358.01: apparently unqualified right to bail on appeal from Justice Court.

[224] WIS. STAT. (1943) §§ 358.14, and 358.11, 358.09, 358.01.

[225] WIS. STAT. (1943) §§ 361.22, 362.12; Wis. Laws 1895, c. 7, § 6; Wis. Laws 1909, c. 453.

[226] WIS. STAT. (1943) § 361.24.

[227] WIS. STAT. (1943) § 361.23.

rule, the amount of bail is such as "will insure the presence" of the defendant; considerations are the circumstances, evidence, defendant's financial ability and his character. The statutes variously provide that the sum shall be such "as will secure the appearance" of the accused, or a "reasonable sum."[228]

The rule, unlike the statute, makes provision for release of the witness after his detention "for an unreasonable length of time."

Under the rule, the bond executed by defendant is to be "for his appearance." The statutes variously provide: for his appearance at the pending of next term or all terms, and that he "shall do and receive what may by the court be then and there enjoined upon him, and not depart the court without leave;" for his appearance and to abide the sentence of the court and "in the meantime, keep the peace and be of good behavior;" for his appearance and in "substance in the form hitherto used" in the Milwaukee Police and Municipal Courts.[229]

Under the rule, one or more sureties may be required. The statutes variously require that sureties or bail be "sufficient;" or "as said justice shall require"; or "to the satisfaction of the magistrate."[230] The rule, unlike the statute, expressly provides that in proper cases no security need be required.

Under the rule, on appeal the bail is deposited in the court from which the bail is taken. The statutes provide that recognizance in murder cases be transmitted to the Circuit Court; in peace bond cases, it be filed in the Circuit Court; in District Court cases, it be transmitted to the Municipal Court instead of the Circuit Court.[231]

The statutes contain a further provision that a defect in form of recognizance shall not prevent recovery thereon if it "sufficiently appear" at what court the person was bound to appear, and that it was taken before an authorized officer.[232]

Under the rule, sureties "shall" justify by affidavit which may be required to set forth and describe other property and liabilities. Under the statutes: a surety company may act in place of individual sureties, excepting in murder cases and on bail bonds for a witness; in murder cases individual sureties are required to justify by showing ownership of real estate in double the amount involved.[233]

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[228] WIS. STAT. (1943) § 361.20 (1), 358.01.
[229] WIS. STAT. (1943) §§ 361.39, 358.01, 358.14; Milw. Dist. Ct. "§ 9" Wis. Laws 1899, c. 218. See also §§ 361.36, —.38.
[230] WIS. STAT. (1943) § 361.04, 361.18, 358.01, 361.09.
[231] WIS. STAT. (1943) §§ 361.20 (2), 362.16; Milw. Dist. Ct. "§ 6" Wis. Laws 1899, c. 218.
[232] WIS. STAT. (1943) § 361.33.
[233] WIS. STAT. (1943) §§ 361.42, 361.20 (1). Compare § 361.40 R.S., form of oath provided for sureties in all cases contains justification solely by real estate; also similar Milwaukee County practice.

Under the rule, on breach of bond condition, forfeitures of the bond "shall" be declared. The statutes variously provide that, on the breach of bond, default "shall" be "recorded;" and certified; "certified and returned" to the Circuit Court.[234] However, the statutes also provide that failure to "note or record" default shall not defeat or bar action on recognizance.[235]

The rule, unlike the statute, expressly provides that forfeiture may be set aside.

The rule further provides that on a forfeiture—which has not been set aside—the court "shall on motion enter a judgment of default * * * without the necessity of an independent action." The statutes, on the other hand, require that "action" shall be commenced on the bond.[236] The statutes further provide that, except where certified to Circuit Court in murder cases, a recognizance is not a lien on real estate or anything more than evidence of debt.[237]

Remission of penalty in whole or in part is provided under both rule and statute.[238]

Exoneration of sureties, under the rule is granted on cash deposit or by "timely surrender of the defendant." Under the statute the court "may" exonerate on surrender of the principal.[239]

The statutes, unlike the rules, make express provision for arrest of principal by sureties; also for discretionary discharge of sureties where a matter is disposed of by civil satisfaction.[240]

RULE 49. MOTIONS

The rules provide that application to court for an order shall be by motion in writing unless the court permits it to be made orally. The motion shall state its grounds and the relief sought, and may be supported by affidavit.[241] The only analogous Wisconsin statute is one providing that affidavit may be required in proof of dilatory plea.[242]

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234 WIS. STAT. (1943) §§ 361.30, 361.10, 360.29. Compare § 358.04 R.S.: appellant shall be "defaulted" on recognizance on failure to prosecute appeal.

235 WIS. STAT. (1943) § 361.33.

236 WIS. STAT. (1943) § 361.30; also § 358.05; also *re* Milw. Mun. Ct. WIS. STAT. (1898) § 2499; Wis. Laws 1879, c. 256; Wis. Laws 1895, c. 7. Compare § 358.04 R.S.: appellant who fails to prosecute appeal "shall be defaulted on his recognizance," and "judgment shall be rendered" for fine and costs against sureties.

237 WIS. STAT. (1943) § 261.21; also, *re* Milw. Mun. Ct.; WIS. STAT. (1878) § 2499; Wis. Laws 1879, c. 256; Wis. Laws 1895, c. 7.

238 WIS. STAT. (1943) § 361.32. Compare § 362.19 providing remission of only "portion" of penalty in peace bond cases.

239 WIS. STAT. (1943) § 361.43. Compare § 362.20: in peace bond cases court "shall" exonerate sureties on such surrender.

240 WIS. STAT. (1943) §§ 361.43 (1), 361.28, and 361.29.

241 Comment note states distinction from civil rule in that motion may be oral, need not be stated "with particularity," and may be supported by affidavits.

242 WIS. STAT. (1943) § 355.11. General motion procedure is provided only in c. 269 of the statutes under Title XXV headed "Procedure in Civil Actions."

RULE 50. DISMISSAL

The rules provide for dismissal of charge by the Government attorney filing "statement of the reasons therefor;" although under the rule such dismissal may be made during the trial only with defendant's consent.[243] The statutes contain no similar provision.[244]

RULE 51. SERVICE AND FILING OF PAPERS

The rule provides that motions and similar papers be served on adverse parties; that service be made on the attorney unless the court order.[245] The rule further provides: that notice of orders be given by the clerk by mail; for the filing of all papers served; and that filing be as in civil actions. The statutes contain no such provisions.[246]

RULE 52. COMMUNICATIONS BY COUNSEL TO JUDGE

The rule, unlike the statutes, provides that copies of all communications submitted by counsel be delivered simultaneously to the judge and to adverse counsel; also that the judge shall not confer with either counsel regarding merits of case, except in the presence of or with the consent of the other counsel.[247]

RULE 53. CALENDARS

The rule provides preference in placing criminal trials on appropriate calendars. Analogous statutes provide that Circuit Court criminal actions be placed on the calendar of the current term; also that after six months imprisonment a person shall be tried "as soon as the next term of court."[248]

RULE 54. EXCEPTIONS UNNECESSARY

The rule provides that exceptions are unnecessary; that at the time of ruling or order, a party need only "make known to the court" "the action which he desires or his objection" and "the grounds therefor;"

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[243] Comment note indicates this as substantially *nolle prosequi.*

[244] See Montgomery v. State, 128 Wis. 183, 107 N.W. 14 (1906) recognizing plea of *nolle prosequi* before trial in justice court assault case as not constituting jeopardy. Compare: WIS. STAT. (1943) §§ 355.01, 355.06, 361.28, providing optional discharge where no indictment or information is filed, also in case of civil satisfaction of misdemeanor; also WIS. STAT. (1943) § 355.19 providing discharge of fugitive after acquittal or without trial.

[245] Comment note indicates that service upon a party without court order is noncompliance.

[246] Analogous civil rules contained under Title XXV "Procedure in Civil Actions" are not adopted by WIS. STAT. § 357.14, which applies only certain specified civil rules to criminal cases.

[247] Comment note indicates accord with American Bar Association *Canons of Judicial Ethics.*

[248] WIS. STAT. (1943) §§ 252.09, 355.10.

also for making objection later if at earliest opportunity.[249] The statutes, on the other hand, expressly provide for "written" exceptions after conviction; also for bill of exceptions, at least on writ of error.[250]

RULE 55. HARMLESS ERROR AND PLAIN ERROR

The rule provides for disregard of any error, etc. "which does not affect substantial rights." Wisconsin statutes variously provide: for disregard of omissions where the defendant is not misled or prejudiced, of omissions of formal words, of failure to refer to the statute violated, of any defect of form not tending to defendant's prejudice; that there shall be no reversal for error where the "case may be rightly understood;" and that an information is sufficient if the essential facts "can be understood therefrom."[251] Somewhat analogous statutes allow amendment for misnomer; for variance between indictment or information and proof in certain respects, and also where "not material to the merits."[252]

The rule makes further provision that "plain" errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.[253] One analogous statute empowers the Supreme Court to reverse a judgment or order "regardless of the question whether proper motions, objections, or exceptions appear in the record or not."[254]

RULE 56. REGULATION OF CONDUCT IN COURTROOM

The rules, unlike the statutes, prohibit photographs and radio broadcasting of court proceedings.[255]

RULE 57. APPLICATION AND EXCEPTION

The rules provide their inapplicability to various proceedings including extraditions, forfeitures, collections of fines and penalties; and their applicability to peace bond proceedings. Analogous statutes variously provide for limited application of civil rules in criminal cases; for limited application of general rules to cases in the justice court; for application of general rules to cases in the justice court; for application of Circuit Court rules to Milwaukee Municipal Court "unless

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[249] And comment note states "bills of exceptions are not required."
[250] WIS. STAT. (1943) §§ 358.07-.09, 358.11. Compare § 270.39 obviating necessity for exceptions, but which is under Title XXV "Procedure in Civil Actions."
[251] WIS. STAT. (1943) §§ 355.23, 357.19, 355.22.
[252] WIS. STAT. (1943) §§ 357.16-.18.
[253] Comment note indicates purpose, in accord with United States Supreme Court decisions, to relieve harshness of the general rule that appellate courts will consider only objections made at trial.
[254] WIS. STAT. (1943) § 251.09.
[255] Compare WIS. STAT. (1943) §§ 360.19, 256.14, providing for public hearings.

inapplicable," "as near as practicable;" for application of justice court practice to Milwaukee District Court "as far as applicable."[256]

The rule further provides, among other things, that the term oath includes affirmations;[257] and that the terms "demurrer," "motions to quash," "plea in abatement," "plea in bar," and "special plea in bar," mean the motions referred to in rule 12.

RULES 58, 59 AND 60. RECORDS; COURTS AND CLERKS; RULES OF COURT

The rules provide that records be kept by court clerks as directed by the administrative office, with the approval of conference of judges. The Wisconsin statutes make no similar provision. Somewhat relevant statutes provide: for "filing" of transcript of "evidence and proceedings" in cases of commitment to state institutions or House of Correction; that misdemeanor cases need not be reported unless the court so order; for County Court certification of sentence from the "record"; for Circuit Court certification of "conviction;" and for justice court certification of conviction as evidence.[258]

The rule, unlike the statutes, provides that the court "shall be deemed always open" for filing papers.[259] Under both rule and statute the clerk's office is to be open during business hours on all days except Sundays and holidays.[260]

The rules further provide that lower courts may make other rules, also may proceed "in any lawful manner," not inconsistent with the rules or statutes.

RULES 61, 62 AND 63. FORMS; EFFECTIVE DATE, AND TITLE

The rules contain an appendix of forms which are "illustrative and not mandatory."[261] The Wisconsin statutes contain certain forms which "may" be used for only limited purposes.[262]

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[256] WIS. STAT. (1943) §§ 357.14, 360.04 Wis. Laws 1879 c. 256, § 2; "§ 6." Wis. Laws 1899, c. 218.

[257] Compare WIS. STAT. (1943) § 326.04, providing for "declaration or affirmation" in place of oath.

[258] WIS. STAT. (1943) §§ 252.20, Milw. Dist. Ct. Act "§ 12," Wis. Laws 1915, c. 619; WIS. STAT. (1943) §§ 357.24, 359.02-04, 360.28.

[259] Comment note indicates that after office hours, papers may be filed with the clerk or judge personally.

[260] WIS. STAT. (1943) § 59.14.

[261] Comment note refers to the "important place" of forms under modern rules and statutes. Forms include indictments and informations for certain offenses, arrest warrant, summons, search warrant, motion for return and suppression of evidence, appearance bond, indictment waiver, motion to dismiss, subpoenas to testify and produce warrant for arrest of witness, motions for new trial and in arrest of judgment, judgment and commitment, notice of appeal, statement of docket entries.

[262] Complaint, recognizance, warrant, certification of conviction, execution, commitments, and order to bring up prisoner, in Justice Court; also general forms of recognizance and bail bonds for appearance at pending term, from term to term, at present or next term, and oath of sureties: WIS. STAT. (1943) §§ 360.03, 360.08, 360.36, 361.37, 361.40.

The rules are to take effect three months subsequent to Congressional adjournment or at a later specified date; and are to govern all proceedings thereafter commenced, and, "so far as just and practicable," proceedings then pending. They may be cited as "Federal Rules of Criminal Procedure."

PRESENT AND FUTURE OF CRIMINAL PROCEDURE IN WISCONSIN

The above comparison, we submit, sharply emphasizes deficiencies in the statutes governing Wisconsin criminal procedure. Many essential matters are omitted entirely; other subjects are only partially covered. The comparison likewise shows many inconsistencies, many repetitions, and a surprising lack of order in the statutes. The effect of these deficiencies in criminal procedure is to becloud, delay and defeat Wisconsin criminal justice.

The *only* purpose of criminal procedure is to facilitate application of substantive criminal law. If that procedure is complicated or uncertain, it results in protracted litigation in the trial courts and in numerous appeals. It means a waste of time and money to both litigant and the State.

In all phases of law, certainty is desirable though somewhat difficult to obtain. In the law of criminal procedure, certainty is vital and *can* be realized. In matters of substitution of motions for common law pleas, standardization of forms of complaints, informations, and warrants, simplification of bail bond procedure, uniformity in appointment and use of expert witnesses, determination of power and manner of jury waiver, clarification of procedure and rights in search and seizure, service and filing of papers, and many others—Wisconsin statutory law can be improved, stated and simplified. The result would be a certainty and uniformity which would allow proper application of the substantive law.

Criminal procedure is essentially a matter understood by lawyers and lawyers alone. If there is to be modernization or improvement in this field, it must come from the bar. If the bar acts to effect such improvement, it will eliminate unnecessary expense in the administration of criminal justice—and accord with what the public has a right to expect of the bar. And such improvement and simplification will further serve as inducement to lawyers generally to engage in practice of criminal law—a field they are now hesitant to enter because of technical and obscure rules of practice.

The Supreme Court of the United States and its able advisory committee have shown the need and the way to improvement of criminal procedure under Federal laws. The melange of statutes which purport to govern Wisconsin criminal procedure require real revision. Whether by "code" or otherwise, improvement can and should be made in this vital field of criminal law.