CODE OF CRIMINAL PROCEDURE.

An Act to Establish a Code of Criminal Procedure for Dakota Territory.

PRELIMINARY PROVISIONS.

§ 1. **Title of Code.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* This act shall be known as the Code of Criminal Procedure of the Territory of Dakota.

§ 2. **Crime defined—punishments.** A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments:

1. Death.
2. Imprisonment.
3. Fine.
4. Removal from office.
5. Disqualification to hold and enjoy any office of honor, trust, or profit under this territory.

§ 3. **Divison of crimes.** Crimes or public offenses are divided into:

1. Felonies.
2. Misdemeanors.

§ 4. **Felony defined.** A felony is a crime which is, or may be, punishable with death, or by imprisonment in the territorial prison.

§ 5. **Misdemeanor.** Every other crime is a misdemeanor.

§ 6. **Punishment only on conviction.** No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof.

§ 7. **Indictment necessary, except.** Every public offense must be prosecuted by indictment, except:

1. Where proceedings are had for the removal of civil officers of the territory.
2. Offenses arising in the militia, when in actual service, and in the land and naval forces in time of war, or which this territory may keep, with the consent of congress, in time of peace.

3. Offenses tried in justices' and police courts, in cases concerning which, lawful jurisdiction, without the intervention of a grand jury, is, or may be, conferred upon said courts.

§ 8. **Criminal action defined.** The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action.

§ 9. **How prosecuted.** A criminal action is prosecuted in the name of the territory of Dakota as a party, against the person charged with the offense.

§ 10. **Party defendant.** The party prosecuted in a criminal action is designated in this Code as the defendant.

§ 11. **Rights of defendant.** In a criminal action the defendant is entitled:

1. To a speedy and public trial;
2. To be allowed counsel, as in civil actions, or to appear and defend in person and with counsel; and,
3. To produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court.

§ 12. **But one prosecution, except.** No person can be subjected to a second prosecution for a public offense, for which he has once been prosecuted and duly convicted or acquitted, except as hereinafter provided for new trials.

§ 13. **Witness against self—restraint.** No person can be compelled in a criminal action to be witness against himself; nor can a person charged with a public offense be subjected before conviction to any more restraint than is necessary for his detention to answer the charge.

§ 14. **How conviction can be had.** No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer to the indictment, in the case mentioned in section 269, [272,] or upon a judgment of a police or justice's court, in cases in which such judgment may be lawfully given without the intervention of a jury and grand jury.

TITLE I.

OF THE COURTS HAVING JURISDICTION IN CRIMINAL ACTIONS.

§ 15. **Jurisdiction of district court.** There is in each of the three districts of this territory a court denominated the district court, with jurisdiction conferred by the organic act of this territory and other laws of congress, and having, among other things, common-law jurisdiction, and authority for the redress of all wrongs committed against the laws of this territory, affecting persons or property.

§ 16. **District court, where held.** Each of the said district courts may be held, for the trial of criminal actions, in any county or subdivision in the same district as is, or may be, provided by law.

§ 17. **Jurisdiction of district court.** The district court has jurisdiction:

1. To inquire, by the intervention of a grand jury, of all public offenses committed or triable in the county or subdivision for which the court may be held.

2. To inquire into the cause of the detention of all persons imprisoned in the jail of the county or subdivision, or otherwise detained, and to make an order for their recommitment or discharge, or otherwise, according to law.

3. To hear, try, and determine all criminal actions according to law, and to exercise all powers, whether original or appellate, conferred upon it by this Code, or by the other laws of this territory.

§ 18. **Final decisions—how reviewable.** The final decisions of the district courts are reviewable and determinable by the supreme court, according to law, on writs of error allowable by the supreme court, and bringing up for review the record and bills of exceptions.

§ 19. **Jurisdiction of justices of the peace.** Justices of the peace shall have power and jurisdiction throughout their respective counties, as follows:

1. As committing magistrates, under the provisions of this Code, and sections three and one hundred and four of the Justice's Code; and,

2. To exercise such lawful jurisdiction, to try and determine petit misdemeanors, not indictable, as by the organic law and said Jus-

tice's Code, or other laws, is now, or may hereafter be, conferred upon them.

Jurisdiction to fine and imprison for assault and battery, and for petit larceny. See Penal Code Dak. *§ 308*a*. Jurisdiction to punish for using obscene language. See Penal Code Dak. *§ 366*a*. Juvenile offenders. See Pol. Code Dak. Appendix, *c.* 58, *§ 11. Corrupting the waters of Red River of the North, James river, and Rapid creek. Penal Code Dak. *§§ 435*a*–435*i*. Jurisdiction to try and punish offenses in townships, towns, and cities. See Justices' Code Dak. 286.

*§ 19*a*. Any court, justice of the peace, police court, or police magistrate, in cases where such courts have jurisdiction under the laws of this territory, or as provided by the ordinances or charter of any incorporated town or city in the territory, shall have full power and authority to sentence such convict to hard labor, as provided in said section six hundred and forty, or as provided in this act. (*Sess. Laws* 1879, *c.* 36, § 2.)

*? 640*a*.

TITLE II.

OF THE PREVENTION OF PUBLIC OFFENSES.

CHAPTER I.

OF LAWFUL RESISTANCE.

§ 20. **To commission of offense—by whom.** Lawful resistance to the commission of a public offense may be made:

1. By the party about to be injured.
2. By other parties.

§ 21. **By party to be injured.** Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person or his family, or some member thereof.

2. To prevent an illegal attempt, by force, to take or injure property in his lawful possession.

§ 22. **By others.** Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

CHAPTER II.

OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

§ 23. **Public offenses prevented.** Public offenses may be prevented by the intervention of the officers of justice:

1. By requiring security to keep the peace.
2. By forming a police in cities and villages, and by requiring their attendance in exposed places.
3. By suppressing riots.

§ 24. **Persons assisting officers justified.** When the officers of justice are authorized to act in the prevention of public offenses, other persons who by their command act in their aid are justified in so doing.

CHAPTER III.

SECURITY TO KEEP THE PEACE.

§ 25. **Informations, before whom.** An information, verified by the oath of the complainant, may be laid before any of the magistrates mentioned in section ninety-four, that a person has threatened to commit an offense against the person or property of another.

§ 26. **Magistrate must issue warrant.** If it appear from the information that there is just reason to fear the commission of the offense threatened by the person complained of, the magistrate must issue a warrant, directed generally to the sheriff of the county, or any constable, or marshal, or policeman of the city or town, reciting the substance of the information, and commanding the officer forthwith to arrest the person complained of and bring him before the magistrate of the county.

§ 27. **Proceedings if charge controverted.** When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation

thereto. The evidence must, on demand of the defendant, be reduced to writing and subscribed by the witnesses.

§ 28. **Person to be discharged.** If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged.

See *§ 40*a*.

§ 29. **When person must give bond.** If, however, there be just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding one thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to abide the order of the next district court of the county, and in the mean time to keep the peace towards the people of this territory, and particularly towards the complainant.

§ 30. **Where bond is or is not given.** If the undertaking required by the last section be given, the party complained of must be discharged. If he do not give it, the magistrate must commit him to prison, specifying in the warrant the requirement to give security, the amount thereof, and the omission to give the same.

§ 31. **Person may be discharged.** If the person complained of be committed for not giving security, he may be discharged by any justice of the peace of the county, or police or special justice of the city, upon giving the same.

§ 32. **Magistrate to transmit undertaking.** The undertaking must be transmitted by the magistrate to the next district court of the county.

§ 33. **Assault in presence of magistrate.** A person who, in the presence of a court or magistrate, assaults or threatens to assault another, or commit an offense against his person or property, or who contends with another with angry words, may be ordered by the court or magistrate to give security, as provided in section twenty-nine, or, if he refuses to do so, he may be committed, as provided in section thirty.

§ 34. **Person must appear at district court.** A person who has entered into an undertaking to keep the peace must appear on the first day of the next term of the district court of the county. If he do not, the court may forfeit his undertaking and order it to be prosecuted, unless his default be excused.

§ 35. **When person may be discharged.** If the complainant do not appear, the person complained of may be discharged, unless good cause to the contrary be shown.

§ 36. **Proceedings when parties appear.** If both parties appear, the court may hear their proofs and allegations, and may

either discharge the undertaking, or require a new one for a time not exceeding one year.

§ 37. **When undertaking to keep the peace is broken.** An undertaking to keep the peace is broken on the failure of a person complained of to appear at the district court, as provided in section thirty-four, or upon his being convicted of a breach of the peace.

§ 38. **Undertaking prosecuted.** Upon the district attorney producing evidence of such conviction to the district court to which the undertaking is returned, that court must order the undertaking to be prosecuted, and the district attorney must thereupon commence an action upon it in the name of this territory.

§ 39. **What alleged in the action.** In the action, the offense stated in the record of conviction must be alleged as the breach of the undertaking, and such record is conclusive evidence thereof.

§ 40. **Limitation.** Security to keep the peace or to be of good behavior cannot be required, except as prescribed in this chapter.

*§ 40*a*. **Court shall tax costs.** In all cases of security to keep the peace under chapter three of the Code of Criminal Procedure, the court, in addition to the orders mentioned in said chapter, shall tax the costs against the complainant or defendant, or both, as justice may require, and enter judgment therefor, which may be enforced as judgments for costs in criminal cases, and execution may issue therefor. (*Sess. Laws* 1881, *c.* 38, § 1.)

CHAPTER IV.

POLICE IN CITIES, AND THEIR ATTENDANCE AT EXPOSED PLACES.

§ 41. **Organization of police.** The organization and regulation of the police in the cities and villages of this territory are governed by special statutes.

§ 42. **Force to attend public meetings.** The mayor, or other officer having the direction of the police in a city or village, must order a force sufficient to preserve the peace to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended.

CHAPTER V.

SUPPRESSION OF RIOTS.

§ 43. **Officer may command assistance.** When a sheriff or other public officer, authorized to execute process, finds or has reason to apprehend that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he may think proper, and any military company or companies in the county, armed and equipped, to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the resisters, and their aiders and abettors, to be punished according to law.

§ 44. **Officer must report resisters.** The officer must certify to the court from which the process is issued, the names of the resisters and their aiders and abettors, to the end that they may be proceeded against for contempt.

§ 45. **Refusal a misdemeanor.** Every person commanded by a public officer to assist him in the execution of process, as provided in section forty-three, who, without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor.

§ 46. **Governor order additional force.** If it appears to the governor that the power of the county is not sufficient to enable the sheriff to execute process delivered to him, or to suppress riots and to preserve the peace, he must, on the application of the sheriff or the judge, order such a force from any other county or counties as is necessary; and all persons so ordered or summoned by the governor or acting governor are required to attend and act; and any such persons who without lawful cause refuse or neglect to obey the command are guilty of a misdemeanor.

§ 47. **Governor may call on the military.** Under the facts and circumstances mentioned in the last section, and when the civil power of the county is not deemed sufficient, it shall be the duty of the governor to apply to the military authorities of the United States for a force sufficient to execute the laws and to prevent resistance thereto, to suppress riots, execute process, and preserve the peace.

§ 48. **Unlawful assemblage.** Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county, or any sheriff of the subdivision, and his deputies, the officials governing the city or town, or the justices of the peace, and marshals and constables, and police thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the territory, immediately to disperse.

§ 49. **Proceedings if do not disperse.** If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, or cause them to be arrested, that they may be punished according to the law, and for that purpose may command the aid of all persons present or within the county.

§ 50. **Who deemed rioters.** If a person, so commanded to aid the magistrates or officers, neglect to do so, he is deemed one of the rioters and is punishable accordingly.

§ 51. **Officer guilty of misdemeanor.** If a magistrate or officer having notice of an unlawful or riotous assembly, mentioned in section forty-eight, neglect to proceed to the place of the assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same, and arresting the offenders, he is guilty of a misdemeanor.

§ 52. **When officers may disperse same.** If the persons assembled and commanded to disperse do not immediately disperse, any two of the magistrates or officers mentioned in section forty-eight may command the aid of a sufficient number of persons, and may proceed in such manner as in their judgment is necessary to disperse the assembly and arrest the offenders.

§ 53. **Precautions before endangering life.** Every endeavor must be used, both by the magistrates and civil officers, and by the officer commanding the troops, which can be made consistently with the preservation of life, to induce or force the riotors to disperse before an attack is made upon them by which their lives may be endangered.

§ 54. **Penalty for resisting.** A person who, after the publication of a proclamation by the governor or acting governor, or who, after lawful notice as aforesaid to disperse and retire, resists or aids in resisting the execution of process in a county declared to be in a state of riot or insurrection, or who aids or attempts the rescue or escape of another from lawful custody or confinement, or who resists or aids in resisting a force ordered out by the governor or any civil officer, as aforesaid, to quell or suppress an insurrection or riot, is guilty of a felony, and is punishable by imprisonment in the territorial prison for not less than two years.

TITLE III.

OF JUDICIAL PROCEEDINGS FOR THE REMOVAL OF PUBLIC OFFICERS.

CHAPTER I.

OF THE REMOVAL OF CIVIL OFFICERS.

§ 55. **Proceedings.** In addition to the proceedings mentioned in chapter twenty-six of the Code of Civil Procedure and chapter twenty-two of the Political Code, and apart and distinct from any other criminal action or proceedings, the following provisions are adopted to obtain a judgment of removal from office:

§ 56. **Accusation, how presented.** An accusation in writing against any county, township, city, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury to the district court of the county in or for which the officer accused is elected or appointed.

§ 57. **Requisites of accusation.** The accusation must state the offense charged, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.

§ 58. **Duty of judge and attorney.** After receiving the accusation the judge to whom it is delivered must forthwith cause it to be transmitted to the district attorney of the county or subdivision, except when he is the officer accused, who must cause a copy thereof to be served upon the defendant, and require, by written notice of not less than five days, that he appear before the district court of the county or subdivision, and answer the accusation at a specified time. The original accusation must then be filed with the clerk of the court.

§ 59. **Defendant to appear.** The defendant must appear at the time appointed in the notice and answer the accusation, unless, for sufficient cause, the court assigns another day for that purpose. If he do not appear, the court may proceed to hear and determine the accusation in his absence.

§ 60. **Defendant's answer.** The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same.

§ 61. **How objection made.** If he object to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it present intelligibly the ground of the objection.

§ 62. **Denial.** If he deny the truth of the accusation the denial may be oral, and without oath, and must be entered upon the minutes.

§ 63. **Answer.** If an objection to the sufficiency of the accusation be not sustained, the defendant must answer the accusation forthwith.

§ 64. **Judgment or trial.** If the defendant plead guilty, or refuse to answer the accusation, the court must render judgment of conviction against him. If he deny the matters charged, the court must proceed to try the accusation.

§ 65. **Method of trial.** The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor.

§ 66. **Judgment if convicted.** Upon a conviction, the court must pronounce judgment that the defendant be removed from office. But, to warrant a removal, the judgment must be entered upon the minutes, assigning therein the causes of removal.

§ 67. **Removal of territorial officers.** The same proceedings may be had, on like grounds, for the removal of any territorial officer elected by the people of the territory, or appointed by the governor thereof, except delegate to congress and members of the legislative assembly.

§ 68. **What jury to present.** In such proceedings the accusation may be presented by the grand jury of the county or subdivision in which such territorial officer resides, or in which he has his place of office for the usual transaction of his official business.

§ 69. **Removal of district attorney.** The same proceedings may be had on like grounds for the removal of a district attorney, except that the accusation must be delivered by the judge to the clerk, and by him to such person as may be appointed by the judge to act as prosecuting officer in the matter, who is authorized and required to conduct the proceedings.

§ 70. **Other proceedings and penalties.** The same proceedings may be had against any officer within the jurisdiction of the court who is accused of charging and collecting illegal fees for services rendered or to be rendered in his office, or who has refused or neglected to perform the official duties pertaining to his office, or who has rendered himself incompetent to perform his said duties by reason of habitual drunkenness, and upon a conviction thereof the court may pronounce judgment that the defendant be removed from office, or that he pay a fine not exceeding five hundred dollars, in favor of

the informer, with costs of suit; or the court may, in its discretion, pronounce judgment, both for his removal from office and for the payment of the fine and costs.

TITLE IV.

OF THE PROCEEDINGS IN CRIMINAL ACTIONS PROSECUTED BY INDICTMENT TO THE COMMITMENT, INCLUSIVE.

CHAPTER I.

OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.

§ 71. **Who punishable.** Every person is liable to punishment for a public offense, as is prescribed by section fifteen of the Penal Code, except it is by law cognizable exclusively in the courts of the United States.

§ 72. **Offenses consummated within territory.** When the commission of a public offense, commenced without this territory, is consummated within its boundaries, the defendant is liable to punishment therefor in this territory, though he were out of the territory at the time of the commission of the offense charged, if he consummated it in this territory through the intervention of an innocent or guilty agent, or by any other means proceeding directly from himself; and in such case the jurisdiction is in the county in which the offense is consummated.

§ 73. **Jurisdiction in case of duel.** When an inhabitant or resident of this territory, by previous appointment or engagement, fights a duel, or is concerned as second therein, out of the jurisdiction of this territory, and in the duel a wound is inflicted upon a person, whereof he dies in this territory, the jurisdiction of the offense is in the county where the death happened.

§ 74. **When person leaves to evade law.** When an inhabitant of this territory shall have left the same for the purpose of evading the operation of the provisions of the statutes relating to dueling and challenges to fight, with the intent or for the purpose of doing any of the acts prohibited therein, the jurisdiction is in the county in which the offender was an inhabitant when the offense was committed, or in any county in which, in the opinion of the governor, the evidence can be most conveniently obtained and produced, to be designated by him by a written appointment, filed in the office of the clerk of the court of that county.

§ 75. **Offense committed in two counties.** When a public offense is committed, partly in one county and partly in another county, or the acts or effects thereof, constituting or requisite to the offense, occur in two or more counties, the jurisdiction is in either county.

§ 76. **Committed near boundary.** When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

§ 77. **On board vessel.** When an offense is committed in this territory on board a vessel navigating a river, lake or canal, or lying therein in the prosecution of her voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates.

§ 78. **Jursidiction in certain cases.** The jurisdiction of an indictment:

1. For forcibly and without lawful authority seizing and confining another, or inveigling or kidnaping him with intent, against his will, to cause him to be secretly confined or imprisoned in this territory, or to be sent out of the territory, or from one county to another; or,

2. For decoying, or taking, or enticing away a child under the age of twelve years, with intent to detain and conceal it from its parent, guardian, or other person having lawful charge of the child; or,

3. For inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-one years, for the purpose of prostitution; or,

4. For taking away any female under the age of sixteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, either for the purpose of concubinage or prostitution,

Is in any county in which the offense is committed, or into or out of which the person upon whom the offense was committed, may, in the commission of the offense, have been brought, or in which an act was done by the defendant in instigating, procuring, promoting, aiding, or in being an accessory to, the commission of the offense, or in abetting the parties concerned therein.

§ 79. **Bigamy or incest.** When the offense, either of bigamy or of incest, is committed in one county, and the defendant is apprehended in another, the jurisdiction is in either county.

§ 80. **Proceedings in certain cases.** When property taken in one county, by burglary, robbery, larceny, or embezzlement has been brought into another, the jurisdiction of the offense is in either county. But if, before the conviction of the defendant in the latter, he be indicted in the former county, the sheriff of the latter must, upon demand, deliver him to the sheriff of the former county, upon being served with a certified copy of the indictment, and upon a receipt indorsed thereon by the sheriff of the former county, of the delivery of the body of the defendant; and is, on filing the copy of the indictment and the receipt, exonerated from all liability in respect to the custody of the defendant.

§ 81. **Jurisdiction of accessory.** In the case of an accessory in the commission of a public offense, the jurisdiction is in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county.

§ 82. **Conviction or acquittal a bar.** When an act charged as a public offense is within the jurisdiction of another territory, county, or state, as well as this territory, a conviction or acquittal thereof in the former is a bar to a prosecution or indictment therefor in this territory.

§ 83. **Same of two counties.** When an offense is in the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another.

§ 84. **Indictment for escape.** The jurisdiction of an indictment for escaping from prison is in any county of the territory.

§ 85. **Stolen property.** The jurisdiction of an indictment for stealing in any state or country, or other territory, the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this territory, is in any county into or through which such stolen property has been brought.

§ 86. **For murder or manslaughter.** The jurisdiction of an indictment for murder or manslaughter, when the injury which caused the death was inflicted in one county, and the party injured

dies in another county or out of the territory, is in the county where the injury was inflicted.

§ 87. **Against a principal not present.** The jurisdiction of an indictment against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this Code if he were so present and aiding and abetting therein.

CHAPTER II.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

§ 88. **For murder unlimited.** There is no limitation of the time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

§ 89. **Limit in other cases.** In all other cases an indictment for a public offense must be found within three years after its commission.

§ 90. **Defendant's absence.** If, when the offense is committed, the defendant be out of the territory, the indictment may be found within the term herein limited after his coming within the territory, and no time during which the defendant is not an inhabitant of or usually resident within the territory is part of the limitation.

§ 91. **When indictment is found.** An indictment is found, within the meaning of the last three sections, when it is duly presented by the grand jury in open court, and there received and filed.

CHAPTER III.

OF THE INFORMATION.

§ 92. **Information defined.** The information is the allegation in writing, made to a magistrate, that a person has been guilty of some designated public offense.

§ 93. **Magistrate defined.** A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.

§ 94. **Who are magistrates.** The following persons are magistrates:

1. The judges of the supreme court.
2. The district judges.
3. Justices of the peace.
4. Police and other special justices, appointed or elected in a city, village, or town.

CHAPTER IV.

THE WARRANT OF ARREST.

§ 95. **Magistrate must issue.** When an information, verified by oath or affirmation, is laid before the magistrate, of the commission of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, issue a warrant of arrest.

§ 96. **Warrant—form of.** A warrant of arrest is an order in writing, in the name of the territory, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

County of ———.

The Territory of Dakota. To any sheriff, constable, marshal, or policeman, in this territory, (or in the county of ———, or as the case may be:)

Information upon oath having been this day laid before me that the crime of (designating it) has been committed, and accusing C. D. thereof;

You are therefore commanded forthwith to arrest the above named C. D. and bring him before me, at (naming the place,) or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at ———, this ——— day of ———, 18—.

E. F., Justice of the Peace, (or as the case may be.)

§ 97. **Requisites of warrant.** The warrant must specify the name of the defendant, or, if it be unknown to the magistrate, the defendant may be designated therein by any name. It must also state an offense in respect to which the magistrate has authority to issue the warrant, and the time of issuing it, and the county, city, town, or village where it is issued, and be signed by the magistrate, with his name of office.

§ 98. **To whom directed.** The warrant must be directed to and executed by a peace officer.

§ 99. **Peace officer.** A peace officer is a sheriff of a county or subdivision, or constable, marshal, or policeman of a city, town, or village, or township.

§ 100. **Warrant by judges.** If the warrant be issued by a judge of the supreme court, or a district judge, it may be directed generally to any sheriff, constable, marshal, or policeman in the territory, and may be executed by any of those officers to whom it may be delivered.

§ 101. **Execution—other county.** If it be isssued by any other magistrate, it may be directed generally to any sheriff, constable, marshal, or policeman, in the county in which it is issued, and may be executed in that county, or if the defendant be in another county it may be executed therein, upon the written direction of a magistrate of that county, indorsed upon the warrant, signed by him, with his name of office, and dated at the county, city, town, or village where it is made, to the following effect:

This warrant may be executed in the county of ———, (as the case may be.)

§ 102. **Prerequisites to indorsement.** The indorsement mentioned in the last section cannot, however, be made unless upon the oath of a creditable witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. Upon this proof the magistrate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterwards appear that the warrant was illegally or improperly issued.

§ 103. **Duty of officer, if felony.** If the offense charged in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate in the same county, as provided in section one hundred and seven.

§ 104. **If a misdemeanor.** If the offense charged in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, and take bail from him accordingly.

§ 105. **Proceedings if bail taken.** On taking bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and must, without delay, deliver the warrant and undertaking to the clerk of the court at which the defendant is required to appear.

§ 106. **Where bail is not given.** If, on the admission of the defendant to bail, as provided in section one hundred and four, bail be not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or some other magistrate in the same county, as provided in the next section.

§ 107. **When issuing magistrate absent.** When, by the preceding sections of this chapter, the defendant is required to be taken before the magistrate who issued the warrant, he may, if the

magistrate be absent or unable to act, be taken before the nearest or most accessible magistrate in the same county. The officer must at the same time deliver to the magistrate the warrant, with the return indorsed and subscribed by him.

§ 108. **Delay prohibited.** The defendant must in all cases be taken before the magistrate without unnecessary delay.

§ 109. **Before magistrate did not issue.** If the defendant be taken before a magistrate other than the one who issued the warrant, the information on which the warrant was granted must be sent to that magistrate, or if it cannot be procured, the prosecutor and his witness must be summoned to give their testimony anew.

§ 110. **Defendant from other county.** When an information is laid before a magistrate of the commission of a public offense triable in another county of the territory, but showing that the defendant is in the county where the information is laid, the same proceedings must be had as prescribed in this chapter, except that the warrant must require the defendant to be taken before the nearest and most accessible magistrate of the county in which the offense is triable, and the information of the informant with the depositions, if any, of the witnesses who may have been produced, must be delivered by the magistrate to whom the warrant is delivered.

§ 111. **Duty of officer.** The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself.

§ 112. **If offense a misdemeanor.** If the offense charged in the warrant issued pursuant to section one hundred and ten is a misdemeanor, the officer must, upon being required by the defendant, take him before a magistrate of the county in which the warrant was issued, who must admit the defendant to bail, and immediately transmit the warrant, information, depositions, if any, and undertaking, to the clerk of the court in which the defendant is required to appear.

CHAPTER V.

ARREST, BY WHOM AND HOW MADE.

§ 113. **Arrest defined.** Arrest is the taking of a person into custody that he may be held to answer for a public offense.

§ 114. **By whom made.** An arrest may be either:

1. By a peace officer, under a warrant;

2. By a peace officer, without a warrant; or,
3. By a private person.

§ 115. **Aid of officer.** Every person must aid an officer in the execution of a warrant, if the officer require his aid.

§ 116. **Felony, when made—misdemeanor.** If the offense charged is a felony the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate, indorsed upon the warrant.

§ 117. **Arrest, how made.** An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer.

§ 118. **Restraint.** The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention.

§ 119. **Officer must show warrant.** The officer must inform the defendant that he acts under the authority of the warrant, and must also show the warrant, if required.

§ 120. **If defendant resist.** If, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

§ 121. **Officer may break door.** The officer may break open an outer or inner door or window of a dwelling-house to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

§ 122. **Same to liberate.** An officer may break open an outer or inner door or window of a dwelling-house for the purpose of liberating a person who, having entered for the purpose of making an arrest, is detained therein, or when necessary for his own liberation.

§ 123. **Arrest without warrant.** A peace officer may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has in fact been committed, and he has a reasonable cause for believing the person arrested to have committed it.
4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.

§ 124. **May break door.** To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a dwelling-house, if, after notice of his office and purpose, he be refused admittance.

§ 125. **Without warrant at night.** He may also, at night, without a warrant, arrest any person whom he has reasonable cause

for believing to have committed a felony, and is justified in making the arrest though it afterwards appear that the felony had not been committed.

§ 126. **Authority stated.** When arresting a person without a warrant the officer must inform him of his authority and the cause of the arrest, except when he is in the actual commission of a public offense, or is pursued immediately after an escape.

§ 127. **Bystander's arrest.** He may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

§ 128. **Offense in presence of magistrate.** When a public offense is committed in presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

§ 129. **Private person arrest.** A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

§ 130. **Inform person of cause.** He must, before making the arrest, inform the person arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the offense, or when he is arrested on pursuit immediately after its commission.

§ 131. **Private person may break door.** If the person to be arrested have committed a felony, and a private person, after notice of his intention to make the arrest, be refused admittance, he may break open an outer or inner door or window of a dwelling-house for the purpose of making the arrest.

§ 132. **Duty in such cases.** A private person who has arrested another for the commission of a public offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer.

§ 133. **Offensive weapons taken.** Any person making an arrest must take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken.

CHAPTER VI.

RETAKING AFTER AN ESCAPE OR RESCUE.

§ 134. **Pursuit and rearrest.** If a person arrested escape or be rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him, at any time, and in any place in the territory,

§ 135. **May break door or window.** To retake the person escaping or rescued, the person pursuing may, after notice of his intention and refusal of admittance, break open an outer or inner door or window of a dwelling-house.

CHAPTER VII.

EXAMINATION OF THE CASE AND DISCHARGE OF THE DEFENDANT, OR HOLDING HIM TO ANSWER.

§ 136. **Magistrate's duty.** When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had.
Sec. 249.

§ 137. **Allow defendant counsel.** He must also allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to such counsel, in the county or city, as the defendant may name. The officer must, without delay, perform that duty, and shall receive fees therefor as as upon service of a subpœna.
Sec. 249.

§ 138. **Examination.** The magistrate must, immediately after the appearance of counsel, or if none appear, and the defendant require the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case.
Sec. 249.

§ 139. **Adjournment.** The examination must be completed at one session, unless the magistrate, for good cause, adjourn it. The

adjournment cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant.

§ 140. **Disposition of defendant on adjournment.** If an adjournment be had for any cause, the magistrate must commit the defendant for examination, or discharge him from custody upon sufficient bail or upon the deposit of money as provided in this Code, as security for his appearance at the time to which the examination is adjourned.

§ 141. **Commitment for examination.** The commitment for examination is by an indorsement signed by the magistrate on the warrant of arrest, to the following effect:

The within-named A. B., having been brought before me under this warrant, and having failed to give bail for his appearance, is committed to the sheriff of the county of ———, (or to the marshal of the city of ———, as the case may be,) to await examination on the ——— day of ———, 18—, at ——— o'clock, at which time you will have his body before me at my office.

§ 142. **Duty on examination.** At the examination, the magistrate must, in the first place, read to the defendant the information on file before him. He must also, after the commencement of the prosecution, issue subpœnas for any witness required by the prosecutor or the defendant.

§ 143. **Rights of defendant.** The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf. And on demand of the defendant all the testimony in the case must be reduced to writing in the form of depositions.

§ 144. **May produce witnesses.** When the examination of the witnesses on the part of the territory is closed, any witnesses the defendant may produce must be sworn and examined.

*§ 144*a*. **Person charged with crime to be competent witness.** In the trial of all indictments, information, complaints, and other proceedings against persons charged with the commission of any crime, offenses, and misdemeanors before any court or committing magistrate in this territory, the person charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him. (*Sess. Laws* 1879; *c.* 16, § 1.)

§ 145. **Magistrate to keep depositions.** The magistrate or his clerk must keep the depositions taken on the examination, if any have been taken, and the statement of the defendant, if any, until they are returned to the proper court, and must not permit them to be inspected by any person except a judge of a court having jurisdiction of the offense, the district attorney of the county, and the defendant and his counsel.

§ 146. **Violation, misdemeanor.** A violation of the provisions of the last section is punishable as a misdemeanor.

§ 147. **Discharged defendant.** After hearing the proofs and the statement of the defendant, if he have made one, if it appear

either that a public offense has not been committed or that there is no sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged, by an indorsement on the information, over his signature, to the following effect:

There being no sufficient cause to believe the within-named A. B. guilty of the offense within mentioned, I order him to be discharged.

*§ 147*a*. **When court shall tax costs against complainant.** If the defendant on a preliminary examination for a public offense be discharged, as provided in section one hundred and forty-seven of the Code of Criminal Procedure, and if the magistrate find that the prosecution was malicious or without probable cause, he shall enter such judgment on his docket and tax the costs against the complaining witness, which shall be enforced as judgments for costs in criminal cases, and execution may issue therefor. (*Sess. Laws* 1881, *c.* 38, § 2.)

§ 148. **When held to answer.** If, however, it appear from the examination that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner, indorse on the information an order signed by him to the following effect:

It appearing to me that the offense in the within information mentioned (or any other offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer the same.

§ 149. **Proceedings, if not bailable.** If the offense be not bailable, the following words, or words to the same effect, must be added to the indorsement:

And that he is hereby committed to (the sheriff of ———, or to the marshal of the city of ———, or as the case may be.)

§ 150. **When bailable.** If the offense is bailable, and bail is taken by the magistrate, the following words, or words to the same effect, must be added to the indorsement mentioned in section one hundred and forty-eight:

And I have admitted him to bail, to answer, by the undertaking hereto annexed.

§ 151. **If bail not taken.** If the offense is bailable, and the defendant is admitted to bail, but bail have not been taken, the following words, or words to the same effect, must be added to the indorsement mentioned in section one hundred and forty-eight:

And that he is admitted to bail in the sum of ——— dollars, and be committed to the sheriff of the county of ——— (or the marshal of the city of ———, or as the case may be) until said bail be given.

§ 152. **Commitment.** If the magistrate order the defendant to be committed, as provided in sections one hundred and forty-nine and one hundred and fifty-one, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or if that officer be not present, to a peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment.

§ 153. **Form of commitment.** The commitment must be to the following effect:

County of ———.

The territory of Dakota. To the sheriff of the county of ———, (or marshal of the city of ———, or as the case may be:)

An order having been this day made by me that A. B. be held to answer upon a charge of (stating briefly the nature of the offense, with time and place as near as may be,) you are commanded to receive him into your custody, and detain him until he is legally discharged.

Dated at ——— this ——— day of ———, 18—.

C. D., Justice of the Peace, (or as the case may be.)

§ 154. **Witness to give undertaking.** On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him, on the part of the territory, a written undertaking, without surety, to the effect that he will appear and testify at the court to which the information and deposition, if any, are to be sent, or that he will forfeit such sum as the magistrate may fix and determine.

§ 155. **Same, with security.** When the magistrate is satisfied, by proof, on oath, that there is reason to believe that any such witness will not appear and testify, unless security be required, he may order the witness to enter into a written undertaking, with such sureties and in such sum as he may deem proper, for his appearance, as specified in the last section.

§ 156. **Infants and married women.** Infants and married women, who are material witnesses against the defendant, may, in like manner, be required to procure sureties for their appearance, as provided in the last section.

§ 157. **Witness committed.** If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate must commit him to prison until he comply or is legally discharged.

§ 158. **Subsequent security.** When, however, in pursuance of section one hundred and fifty-four, any material witness on the part of the people has been discharged on his undertaking, without surety, if afterwards on the sworn application of the district attorney, or other person, on behalf of the territory, made to the magistrate or to any judge, it satisfactorily appears that the presence of such witness or any other person on the part of the people is material or necessary on the trial in court, such magistrate or judge may compel such witness, or any other material witness on the part of the territory, to give an undertaking, with sureties, to appear on the said trial and give his testimony therein; and, for that purpose, the said magistrate or judge may issue a warrant against any such person, under his hand, with or without seal, directed to a sheriff, marshal, or other officer, to arrest such person and bring him before such magistrate or judge.

§ 159. **Witness may be confined.** And in case the person so arrested shall neglect or refuse to give said undertaking in the manner required by said magistrate or judge, he may issue a warrant of commitment against such person, which shall be delivered to said sheriff, or other officer, whose duty it shall be to convey such person to the jail mentioned in said warrant, and the said person shall remain in confinement until he shall be removed to the grand jury and to the court, for the purpose of giving his testimony, or until he shall have given the undertaking required by said magistrate or judge.

§ 160. **What magistrate must return.** When a magistrate has discharged a defendant, or has held him to answer as provided in sections one hundred and forty-seven and one hundred and forty-eight, he must return immediately to the next district court of the county or subdivision, the warrant, if any, the information, the depositions, if any have been taken, of all the witnesses examined before him, the statement of the defendant, if he have made one, and all undertakings of bail or for the appearance of witnesses taken by him, together with a certified record of the proceedings as they appear on his docket.

TITLE V.

OF PROCEEDINGS AFTER COMMITMENT AND BEFORE INDICTMENT.

CHAPTER I.

PRELIMINARY PROVISIONS.

§ 161. **Public offenses—how prosecuted.** All public offenses triable in the district courts must be prosecuted by indictment, except as provided in the next section.

§ 162. **Removal from office.** When the proceedings are had for the removal of county, township, city, municipal, or territorial officers, they may be commenced by an accusation in writing, as provided in chapter one of title three of this Code.

CHAPTER II.

FORMATION OF THE GRAND JURY.

§ 163. **Grand jury defined.** A grand jury is a body of men consisting of sixteen jurors, impaneled and sworn to inquire into and true presentment make of all public offenses against the territory, committed or triable within the county or subdivision for which the court is holden.

§ 164. **Completing jury.** Whenever challenges to individual grand jurors is allowed, the court shall make an order to the sheriff, deputy sheriff, or coroner to summon without delay, from the body of the county or subdivision, a sufficient number of persons to complete or to form a grand jury.

§ 165. **Twelve jurors find indictment.** No indictment shall be found, nor shall any presentment or accusation be made, without the concurrence of at least twelve grand jurors.

§ 166. **Who may challenge panel.** The territory, or a person held to answer a charge for a public offense, may challenge the panel of a grand jury, or an individual grand juror.

§ 167. **Challenge to panel.** A challenge to the panel may be interposed by either party for one or more of the following causes only:

1. That the requisite number of ballots was not drawn from the jury box of the county or subdivision.
2. That notice of the drawing of the grand jury was not given.
3. That the drawing was not had in the presence of the officers designated by law, or in the manner prescribed by law.

§ 168. **Jury discharged.** If a challenge to the panel be allowed the grand jury must be discharged.

§ 169. **Challenge of juror.** A challenge to an individual grand juror may be interposed by either party for one or more of the following causes only:

1. That he is a minor.
2. That he is not a qualified elector.
3. That he is otherwise disqualified under any of the provisions of chapter nineteen of the Political Code.

4. That he is insane.

5. That he is a prosecutor upon a charge against the defendant.

6. That he is witness on the part of the prosecution, and has been served with process or bound by an undertaking as such.

7. That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging, but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him.

§ 170. **Oral or written.** Challenges may be oral or in writing, and must be tried by the court.

§ 171. **Duty of court and clerk.** The court must allow or disallow the challenge, and the clerk must enter its decision upon the minutes.

§ 172. **Effect of challenge allowed.** If a challenge to an individual grand juror is allowed he cannot be present at, or take part in, the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon.

§ 173. **Violation of last section.** The grand jury must inform the court of a violation of the last section, and it is punishable by the court as a contempt.

§ 174. **Challenge before oath.** Neither the territory nor a person held to answer a charge for a public offense can take advantage of any objection to the panel or to an individual grand juror unless it be by challenge, and before the grand jury is sworn, except that after the grand jury is sworn, and before the indictment is found, the court may, in its discretion, upon a good cause shown, receive and allow a challenge.

§ 175. **Court order another jury.** If the grand jury is discharged by an allowance of a challenge to the whole panel, or if an offense is committed during the sitting of the court, after the regular discharge of the grand jury, or if after such discharge a new indictment becomes requisite by reason of an arrest of judgment, or by the quashing of an indictment, or if from any other good and sufficient cause another grand jury may become necessary, the court may, in its discretion, order that another grand jury be summoned, and the court may to that end forthwith make an order to the county commissioners for the immediate selection and furnishing to the clerk of a list of jurors, and may make such further orders to the clerk, sheriff, and other officers for an immediate compliance with their

duties as may be proper to obtain another grand jury at and during the same term of the court.

§ 176. **Special grand jury.** A grand jury formed and impaneled as to and in a particular case, after a challenge or challenges to individual grand jurors have been allowed, shall only be sworn to act in such particular case, and as to all other cases at the same term of the court the grand jury shall be formed in the usual manner provided by law.

§ 177. **Court to appoint foreman.** From the persons summoned to serve as grand jurors, and appearing, the court must appoint a foreman. The court must also appoint a foreman when a person already appointed is discharged or excused before the grand jury are dismissed.

§ 178. **Oath of foreman.** The following oath must be administered to the foreman of the grand jury:

You, as foreman of this grand jury, shall diligently inquire into, and true presentment make of all public offenses against this territory, committed or triable within this county, (or subdivision,) of which you shall have or can obtain legal evidence. You will keep your own counsel and that of your fellows, and of the territory, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said, nor the manner in which you or any other grand juror may have voted on any matter before you. You shall present no person through malice, hatred, or ill-will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof; but in all your presentments, or indictments, you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God.

§ 179. **Oath to other grand jurors.** The following oath must be immediately thereupon administered to the other grand jurors present:

The same oath which your foreman has now taken before you on his part, you and each of you, shall well and truly observe on your part. So help you God.

§ 180. **Grand jury charged.** The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court must give them such information as it may deem proper as to the nature of their duties, and as to any charges for public offenses returned to the court, or likely to come before the grand jury.

§ 181. **Jury must retire.** The grand jury must then retire to a private room and inquire into the offenses cognizable by them.

§ 182. **Appoint clerk—his duty.** The grand jury must appoint one of their number as clerk, who must preserve minutes of their proceedings, except of the votes of the individual members, and of the evidence given before them.

§ 183. **Jury discharged.** On the completion of the business before them, or whenever the court shall be of opinion that the public interests will not be subserved by a further continuance of the session, the grand jury must be discharged by the court; but whether the business be completed or not, they are discharged by the final adjournment of the court.

CHAPTER III.

POWERS AND DUTIES OF A GRAND JURY.

§ 184. **General powers and duties.** The grand jury has power, and it is their duty, to inquire into all public offenses committed or triable in the county or subdivision, and to present them to the court, either by presentment or indictment, or accusation in writing.

§ 185. **Presentment defined.** A presentment is an informal statement in writing by the grand jury, representing to the court that a public offense has been committed which is triable in the county or subdivision, and that there is reasonable ground for believing that a particular individual, named or described, has committed it.

§ 186. **Indictment defined.** An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a public offense.

§ 187. **Oath to witness.** The foreman may administer an oath to any witness appearing before the grand jury.

§ 188. **Evidence received.** In the investigation of a charge for the purpose of either presentment, or indictment, or accusation, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal, documentary evidence.

§ 189. **Same.** The grand jury can receive none but legal evidence, and the best evidence in degree to the exclusion of hearsay or secondary evidence.

§ 190. **Evidence for defendant.** The grand jury is not bound to hear evidence for the defendant, but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that there is other evidence, they may by and with the consent of the district attorney order such evidence to be produced, and for that purpose the district attorney may issue process for the witnesses.

§ 191. **Indictment to be found.** The grand jury ought to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury.

§ 192. **Member give evidence.** If a member of the grand jury knows, or has reason to believe, that a public offense has been committed which is triable in the county or subdivision, he must declare the same to his fellow jurors, who must thereupon investigate the same.

§ 193. **Subjects of inquiry.** The grand jury must inquire:

1. Into the case of every person imprisoned in the jail of the county or subdivision, on a criminal charge, and not indicted;

2. Into the condition and management of the public prisons in the county or subdivision; and,

3. Into the willful and corrupt misconduct in office of public officers of every description in the county or subdivision.

§ 194. **Access to prisons.** They are also entitled to free access, at all reasonable times, to public prisons, and to the examination, without charge, of all public records in the county.

§ 195. **District attorney privileged.** The grand jury may at all reasonable times ask the advice of the court or of the district attorney. The district attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, and may interrogate witnesses before them whenever he thinks it necessary; but no other person is permitted to be present during their sessions except the members and a witness actually under examination, and no person whomsoever must be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them.

§ 196. **Secrecy.** Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them.

§ 197. **When juror may disclose.** A member of the grand jury may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor.

§ 198. **Juror not questioned.** A grand juror cannot be questioned for anything he may say, or any vote he may give, in the grand jury, relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty in making an accusation or giving testimony to his fellow jurors.

CHAPTER IV.

PRESENTMENT AND PROCEEDINGS THEREON.

§ 199. **Presentment—how found.** A presentment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be signed by the foreman.

§ 200. **How disposed of.** The presentment, when found, must be presented by the foreman, in presence of the grand jury, to the court, and must be filed with the clerk.

§ 201. **Bench warrant may issue.** If the facts stated in the presentment constitute a public offense, triable in the county or subdivision, the court must direct the clerk to issue a bench warrant for the arrest of the defendant.

§ 202. **By clerk.** The clerk, on the application of the judge or district attorney, may accordingly, at any time after the order, whether the court be sitting or not, issue a bench warrant, under his signature and the seal of the court, into one or more counties, or into any part of the territory.

§ 203. **Form of warrant.** The bench warrant, upon presentment, must be substantially in the following form:

County of ———.

The territory of Dakota. To any sheriff, constable, marshal, or policeman in this territory:

A presentment having been made on the ——— day of ——— 18—, to the district court of the county of ——— (or subdivision ———) charging C. D. with the crime of ———, (designating it generally,) you are therefore commanded forthwith to arrest the above named C. D., and take him before E. F., a magistrate of the county of ———; or, in case of his absence or inability to act, before the nearest and most accessible magistrate in ——— county.

Given under my hand, with the seal of said court affixed, this ——— day of ——— A. D. 18—.

By order of the court.

[Seal.] A. F., Clerk.

§ 204. **Where served.** The bench warrant may be served in any county or part of the territory, and the officer serving it must proceed thereon as upon a warrant of arrest on an information, except that when served in another county or part of the territory it need not be indorsed by a magistrate of that county or part of the territory.

§ 205. **Proceedings by magistrate.** The magistrate, when the defendant is brought before him, must proceed upon the charges contained in the presentment, in the same manner as upon a warrant of arrest on an information.

TITLE VI.

OF THE INDICTMENT.

CHAPTER I.

FINDING AND PRESENTATION OF THE INDICTMENT.

§ 206. **Finding.** An indictment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be indorsed, "A true bill," and the indorsement must be signed by the foreman of the grand jury.

§ 207. **Dismissal.** If twelve grand jurors do not concur in finding an indictment against a defendant who has been held to answer the original information *of* [and] the certified record of the proceedings before the magistrate transmitted to them, must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed.

§ 208. **Resubmission of charge.** The dismissal of the charge does not, however, prevent its being again submitted to a grand jury as often as the court may so direct. But without such direction it cannot be again submitted.

§ 209. **Names of witnesses.** When an indictment is found the names of the witnesses examined before the grand jury must in all cases be inserted at the foot of the indictment or indorsed thereon before it is presented to the court.

§ 210. **Indictment—how presented.** An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court, and must be filed with the clerk, and remain in his office as a public record.

§ 211. **Proceedings to arrest.** When an indictment is found against a defendant who has not been previously arrested, and is not

under bail, the same proceedings must be had as are prescribed in sections two hundred and thirty-nine to two hundred and forty-six, inclusive, against the defendant who fails to appear for arraignment.

CHAPTER II.

RULES OF PLEADING AND FORM OF THE INDICTMENT.

§ 212. **Forms of pleading.** All the forms of pleading in criminal actions and rules by which the sufficiency of pleadings is to be determined are those prescribed by this Code.

§ 213. **First pleading.** The first pleading on the part of the territory is the indictment.

§ 214. **Requisites of indictment.** The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.

§ 215. **Certain and direct.** The indictment must be direct and certain, as it regards:

1. The party charged.

2. The offense charged.

3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

§ 216. **Fictitious name.** When a defendant is indicted or prosecuted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment.

§ 217. **Charge but one offense.** The indictment must charge but one offense, but the same offense may be set forth in different forms or degrees under different counts; and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count.

§ 218. **Time offense committed.** The precise time at which the offense was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the offense.

§ 219. **Certain errors not material.** When an offense involves the commission of or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material.

§ 220. **Words, how construed.** The words used in an indictment must be construed in their usual acceptance, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

§ 221. **Statute not strictly pursued.** Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used.

§ 222. **What is sufficient.** The indictment is sufficient if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated.
2. That it was found by a grand jury of the county or subdivision in which the court was held.
3. That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his true name is to the jury unknown.
4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county or subdivision, is triable therein.
5. That the offense was committed at some time prior to the time of finding the indictment.
6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.
7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.

§ 223. **Certain informalities disregarded.** No indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

§ 224. **Need not be stated.** Neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment.

§ 225. **Pleading judgment.** In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdic-

tion, but the judgment or determination may be stated to have been duly given or made. The facts constituting jurisdiction, however, must be established on the trial.

§ 226. **Pleading private statute.** In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

§ 227. **Requisites for libel.** An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter on which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on trial.

§ 228. **Indictment for forgery.** When an instrument, which is the subject of an indictment for forgery, has been destroyed or withheld by the act or procurement of the defendant, and the fact of the destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial.

§ 229. **For perjury.** In an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned, but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed.

§ 230. **Larceny or embezzlement.** In an indictment for the larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat and defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof.

§ 231. **Selling obscene books.** An indictment for exhibiting, publishing, passing, or offering to sell, or having in possession with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, paper, or writing, but it is sufficient to state generally the fact of the lewdness or obscenity thereof.

§ 232. **Several defendants.** Upon an indictment against several defendants, any one or more may be convicted or acquitted.

§ 233. **Accessories and principals.** The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, must hereafter be indicted, tried, and punished as principals, and no additional facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal.

§ 234. **Accessory tried, etc.** An accessory to the commission of a felony may be indicted, tried, and punished, though the principal felon be neither indicted nor tried, and though the principal may have been acquitted.

§ 235. **Compounding a felony.** A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another, or a gratuity, or reward, or an engagement, or promise therefor, upon the agreement or understanding, express or implied, to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offense have not been indicted or tried.

TITLE VII.

OF PLEADINGS AND PROCEEDINGS AFTER INDICTMENT AND BEFORE THE COMMENCEMENT OF THE TRIAL.

CHAPTER I.

OF THE ARRAIGNMENT OF THE DEFENDANT.

§ 236. **Defendant arraigned.** When the indictment is filed, the defendant must be arraigned thereon before the court in which it is found, if triable therein; if not, before the court to which it is removed or transmitted.

§ 237. **Must be present if felony.** If the indictment is for a felony, the defendant must be personally present; but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel.

§ 238. **Same—duty of court.** When his personal appearance is necessary, if he be in custody, the court may direct the officer in whose custody he is, to bring him before it to be arraigned, and the officer must do so accordingly.

§ 239. **Bench-warrant issued.** If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear to be arraigned when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the clerk to issue a bench-warrant for his arrest.

§ 240. **Same.** The clerk, on the application of the district attorney, may accordingly at any time after the order, whether the court be sitting or not, issue a bench-warrant into one or more counties.

§ 241. **Form of warrant.** The bench-warrant upon the indictment must, if the offense is a felony, be substantially in the following form:

County of ———.

The territory of Dakota to any sheriff, constable, policeman, or marshal in this territory:

An indictment having been found on the ——— day of ———, A. D. 18—, in the district court in and for the county (or subdivision) of ———, charging C. D. with the crime of ———, (designating it generally,) you are therefore commanded forthwith to arrest the above-named C. D. and bring him before that court (or before the court to which the indictment may have been removed, naming it) to answer said indictment; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of ———.

Given under my hand, with the seal of said court affixed, this ——— day of ———, A. D. 18—.

By order of the court.

[Seal.] E. F., Clerk.

§ 242. **Same.** If the offense is a misdemeanor or a bailable felony, the bench-warrant must be in a similar form, adding to the body thereof a direction to the following effect:

Or, if he requires it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer the indictment.

§ 243. **Court fix amount of bail.** If the offense charged is bailable, the court, upon directing the bench-warrant to issue, must fix the amount of bail; and an indorsement must be made on the bench-warrant and signed by the clerk, to the following effect:

The defendant is to be admitted to bail in the sum of ——— dollars.

§ 244. **Offense not bailable.** The defendant, when arrested under a warrant for an offense not bailable, must be held in custody by the sheriff of the county or subdivision in which the indictment is found.

§ 245. **Warrant served in any county.** The bench-warrant may be served in any county in the same manner as a warrant of arrest, except that, when served in another county, it need not be indorsed by a magistrate of that county.

§ 246. **Taking bail.** If the defendant is brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings may be had thereon.

§ 247. **Duty of court on indictment.** When the indictment is for a felony, and the defendant, before the finding thereof, has given bail for his appearance to answer the charge, the court to which the indictment is presented, or sent, or removed for trial, may order the defendant to be committed to actual custody, either without bail, or unless he give bail in an increased amount, to be specified in the order.

§ 248. **Defendant present.** If the defendant is present when the order is made, he must be forthwith committed accordingly. If he is not present, a bench-warrant must be issued and proceeded upon in the manner provided in this chapter.

§ 249. **Counsel before arraignment.** If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desire the aid of counsel. If he desires, and is unable to employ counsel, the court must assign counsel to defend him.

See Pol. Code Dak. Appendix, *c.* 18, *§ 4*a*.

§ 250. **How arraignment made.** The arraignment must be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment to the defendant, and asking him whether he pleads guilty or not guilty to the indictment.

§ 251. **True name.** When the defendant is arraigned he must be informed that if the name by which he is indicted be not his true name, he must then declare his true name or be proceeded against by the name in the indictment.

§ 252. **None given.** If he gives no other name, the court may proceed accordingly.

§ 253. **Another given—to be entered.** If he allege that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted.

§ 254. **Time to answer.** If, on the arraignment, the defendant require it, he must be allowed until the next day, or such further time may be allowed him as the court may deem reasonable, to answer the indictment.

§ 255. **Set aside, demur, or plead.** If the defendant do not require time, as provided in the last section, or if he do, then on the next day, or at such further day as the court may have allowed him, he may, in answer to the arraignment, either move the court to set aside the indictment, or may demur or plead thereto.

CHAPTER II.

SETTING ASIDE THE INDICTMENT.

§ 256. **Causes classified.** The indictment must be set aside by the court in which the defendant is arraigned, and upon his motion, in either of the following cases:

1. When it is not found, indorsed, and presented or filed as prescribed in this act.

2. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment, or indorsed thereon.

3. When a person is permitted to be present during the session of the grand jury, while the charge embraced in the indictment is under consideration, except as provided in section one hundred and ninty-five.

4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror.

§ 257. **Afterwards precluded.** If the motion to set aside the indictment be not made, the defendant is precluded from afterwards taking the objections mentioned in the last section.

§ 258. **When motion heard.** The motion must be heard at the time it is made, unless for good cause the court postpone the hearing to another time.

§ 259. **Answer immediately.** If the motion be denied, the defendant must immediately answer to the indictment either by demurring or pleading thereto.

§ 260. **When defendant discharged.** If the motion be granted, the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he have deposited money instead of bail, that the money be refunded to him, unless it direct that the case be resubmitted to the same or another grand jury.

§ 261. **Resubmission.** If the court direct that the case be resubmitted, the defendant, if already in custody, must so remain, unless he be admitted to bail; or if already admitted to bail, or money have been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment, and unless a new indictment is found before the next grand jury of the county is discharged; the court must, on the discharge of such grand jury, make the order prescribed by the preceding section.

§ 262. **Not a bar.** An order to set aside an indictment, as provided in this chapter, is no bar to a further prosecution for the same offense.

CHAPTER III.

DEMURRER.

§ 263. **Defendant's pleading.** The only pleading on the part of the defendant is either a demurrer or a plea.

§ 264. **Made in open court.** Both the demurrer and the plea must be put in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose.

§ 265. **When may demur.** The defendant may demur to the indictment when it appears upon the face thereof, either:

1. That the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county or subdivision.
2. That it does not substantially conform to the requirements of this act.
3. That more than one offense is charged in the indictment.
4. That the facts stated do not constitute a public offense.
5. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

§ 266. **Requisites of demurrer.** The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of the objection to the indictment, or it must be disregarded.

§ 267. **Objections heard.** Upon the demurrer being filed, the objections presented thereby must be heard, either immediately or at such time as the court may appoint.

§ 268. **Judgment of court.** Upon considering the demurrer the court must give judgment, either sustaining or overruling it, and an order to that effect must be entered upon the minutes.

§ 269. **Effect if sustained.** If the demurrer is sustained, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the court, being of opinion that the objection on which the demurrer is sustained may be avoided in a new indictment, direct the case to be resubmitted to the same or another grand jury.

§ 270. **Defendants discharged.** If the court do not direct the case to be resubmitted, the defendant, if in custody, must be discharged; or, if admitted to bail, his bail is exonerated; or, if he have deposited money instead of bail, the money must be refunded him.

§ 271. **Proceedings if resubmitted.** If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in this act, or in sections two hundred and fifty-nine and two hundred and sixty.

§ 272. **Plea where demurrer is overruled.** If the demurrer be overruled, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such a time as the court may allow. If he does not plead, judgment may be pronounced against him.

§ 273. **Certain objection—how taken.** When the objections mentioned in section two hundred and sixty-five appear upon the face of the indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, and in arrest of judgment.

CHAPTER IV.

PLEA.

§ 274. **Pleas classified.** There are three kinds of pleas to an indictment. A plea of:

1. Guilty.
2. Not guilty.
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty.

§ 275. **Plea to be oral.** Every plea must be oral, and must be entered upon the minutes of the court.

§ 276. **Form of plea.** The plea must be entered in substantially the following form:

1. If the defendant plead guilty:

The defendant pleads that he is guilty of the offense charged in this indictment.

2. If he plead not guilty:

The defendant pleads that he is not guilty of the offense charged in this indictment.

3. If he plead a former conviction or acquittal:

The defendant pleads that he has already been convicted (or acquitted, as the case may be) of the offense charged in this indictment, by the judgment of the court of ———, (naming it,) rendered at ———, (naming the place,) on the ——— day of ———.

§ 277. **Requisities in plea of guilty.** A plea of guilty can in no case be put in, except by the defendant himself, in open court, unless upon an indictment against a corporation, in which case it can be put in by counsel.

§ 278. **Plea may be withdrawn.** The court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted.

§ 279. **Issues on plea.** The plea of not guilty puts in issue every material allegation in the indictment.

§ 280. **Evidence under plea.** All matters of fact tending to establish a defense, other than that specified in the third subdivision of section 274, may be given in evidence under the plea of not guilty.

§ 281. **Former acquittal not of same offense.** If the defendant was formerly acquitted on the ground of variance between the indictment and the proof, or the indictment was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense.

§ 282. **Same on merits.** When, however, he was acquitted on the merits he is deemed acquitted of the same offense, notwithstanding a defect in form or substance in the indictment on which he was acquitted.

§ 283. **Former acquittal or conviction.** When the defendant shall have been convicted or acquitted upon an indictment, the conviction or acquittal is a bar to another indictment for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment.

§ 284. **Refusal to plead.** If the defendant refuse to answer the indictment by demurrer or plea, a plea of not guilty must be entered.

CHAPTER V.

THE REMOVAL OF THE ACTION BEFORE TRIAL.

§ 285. **Action removed—when—how.** A criminal action, prosecuted by indictment, may, at any time before trial is be-

gun, on the application of the defendant, be removed from the court in which it is pending, if the offense charged in the indictment be punishable with death, or imprisonment in the territorial prison, whenever it shall appear to the satisfaction of the court by affidavits, or if the court should so order by other testimony, that a fair and impartial trial cannot be had in such county or subdivision, in which case the court may order the person accused to be tried in some near or adjoining county, in any district where a fair and impartial trial can be had; but the party accused shall be entitled to a removal of the action but once, and no more; and if the accused shall make affidavit that he cannot have an impartial trial, by reason of the bias or prejudice of the presiding judge of the district court where the indictment is pending, the judge of such court may call any other judge of a district court to preside at such trial; and it shall be the duty of such other judge to so preside at said trial, and do any other act with reference thereto, as though he was presiding judge of said district court.

§ 286. **Duty of clerk.** The order of removal must be entered upon the minutes, and the clerk must thereupon make out and transmit to the court to which the action is removed, a certified copy of the order of removal, and of the records, pleadings, and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses.

§ 287. **Disposition of defendant.** If the defendant is in custody, the order must provide for the removal of the defendant, by the sheriff of the county or subdivision where he is imprisoned, to the custody of the proper officer of the county or subdivision to which the action is removed, and he must be removed according to the terms of such order.

§ 288. **Court may require bail.** When the court has ordered a removal of the action, it may require the accused, if the offense be then bailable, to enter into an undertaking with good and sufficient sureties, to be approved by the court, in such sum as the court may direct, conditioned for his appearance in the court to which the action has been removed, on the first day of the next term thereof, and to abide the order of such court; and, in default of such undertaking, a warrant shall be issued to the sheriff or other proper officer, commanding him safely to keep, and at the proper time to convey the prisoner to the jail of the county or subdivision where he is to be tried, there to be safely kept by the jailer thereof until discharged by due course of law.

§ 289. **Witness recognized.** When a removal of the action is allowed, the court may recognize the witnesses on the part of the territory to appear before the court in which the defendant is to be tried.

§ 290. **Trial, records, and papers.** The court to which the action is removed must proceed to trial and judgment therein the same in all respects as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must, at any time, upon application of the district attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained.

§ 291. **Removal by territory.** The district attorney, on behalf of the territory, may also apply in a similar manner for a removal of the action, and the court being satisfied that it will promote the ends of justice, may order such removal upon the same terms and to the same extent as are provided in this chapter, and the proceedings on such removal shall be in all respects as above provided.

CHAPTER VI.

THE MODE OF TRIAL.

§ 292. **Issue of fact.** An issue of fact arises:

1. Upon a plea of not guilty; or,
2. Upon a plea of a former conviction or acquittal of the same offense.

§ 293. **How tried.** Issues of fact must be tried by a jury.

§ 294. **Defendant to be present.** If the indictment is for a felony, the defendant must be personally present at the trial, but if for a misdemeanor or not punishable by imprisonment, the trial may be had in the absence of the defendant. If, however, his presence is necessary for the purpose of identification, the court may, upon application of the district attorney, by an order or warrant, require the personal attendance of the defendant at the trial.

CHAPTER VII.

FORMATION OF THE TRIAL JURY.

§ 295. **Who are jurors.** The jurors duly drawn and summoned for the trial of civil actions are also the jurors for the trial of criminal actions.

§ 296. **Trial juries formed.** Trial juries for criminal actions may also be formed in the same manner as trial juries in civil actions.

§ 297. **Clerk to prepare ballots.** At the opening of the court the clerk must prepare separate ballots containing the names of the persons returned as jurors, which must be folded as nearly alike as possible, and so that the names cannot be seen, and must deposit them in a sufficient box.

§ 298. **Names of all may be called.** When the case is called for trial, and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and the court, in its discretion, may order that an attachment issue against those who are absent, but the court may, in its discretion, wait or not for the return of the attachment.

§ 299. **Manner of drawing jury.** Before the name of any juror is drawn, the box must be closed and shaken, so as to intermingle the ballots therein. The clerk must then, without looking at the ballots, draw them from the box.

§ 300. **Disposition of ballots.** When the jury is completed, the ballots containing the names of the jurors sworn must be laid aside and kept apart from the ballots containing the names of the other jurors, until the jury so sworn is discharged.

§ 301. **Same.** After the jury are so discharged, the ballots containing their names must be again folded and returned to the box, and so on, as often as a trial is had.

§ 302. **When juror absent.** If a juror be absent when his name is drawn, or be set aside, or excused from serving on the trial, the ballot containing his name must be folded and returned to the box as soon as the jury is sworn.

§ 303. **If all do not appear.** When a jury has been duly summoned, if, upon calling the cause for trial, twenty-four of the jurors summoned do not appear, the court may, in its discretion, order the sheriff to summon from the body of the county or subdivision as many persons as it may think proper, at least sufficient to make twenty-four jurors, from whom a jury for the trial of the cause may be selected.

§ 304. **Names put in box.** The names of the persons summoned to complete the jury must be written on distinct pieces of paper, folded each as nearly alike as possible, and so that the name cannot be seen, and must be deposited in the box mentioned in section two hundred and ninety-seven.

§ 305. **Drawing the jury.** The clerk must thereupon, under the direction of the court, publicly draw out of the box so many of the ballots, one after another, as are sufficient to form the jury.

§ 306. **Number of jury—how sworn.** The jury consists of twelve men, chosen as prescribed by law, and sworn or affirmed well and truly to try and true deliverence to make between the territory of Dakota and the defendant whom they shall have in charge, and a true verdict to give according to the evidence, which verdict must be unanimous.

§ 307. **If number fails.** If a sufficient number cannot be obtained from the box to form a jury, the court may, as often as is necessary, order the sheriff to summon from the body of the county or subdivision so many persons qualified to serve as jurors as it deems sufficient to form a jury. The jurors so summoned may be called from the list returned by the sheriff, and so many of them not excused or discharged, as may be necessary to complete the jury, must be impaneled and sworn.

§ 308. **Affirmation.** Any juror who is conscientiously scrupulous of taking the oath above described, shall be allowed to make affirmation, substituting for the words "So help you God," at the end of the oath, the following: "This you do affirm under the pains and penalties of perjury."

CHAPTER VIII.

POSTPONEMENT OF THE TRIAL.

§ 309. **For cause by either.** When an indictment is called for trial, or at any time previous thereto, the court may, upon sufficient cause by either party, direct the trial to be postponed to another day in the same or next term.

TITLE VIII.

OF PROCEEDING AFTER THE COMMENCEMENT OF THE TRIAL AND BEFORE JUDGMENT.

CHAPTER I.

CHALLENGING THE JURY.

§ 310. **Challenges classed.** A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel.
2. To an individual juror.

§ 311. **Several defendants.** When several defendants are tried together they cannot sever their challenges, but must join therein.

§ 312. **Panel defined.** The panel is a list of jurors returned by a sheriff, to serve at a particular court, or for the trial of a particular action.

§ 313. **Challenge to panel.** A challenge to the panel is an objection made to all the trial jurors returned, and may be taken by either party.

§ 314. **Cause for.** A challenge to the panel can be founded only on a material departure from the forms prescribed by law in respect to the drawing and return of the jury, or on the intentional omission of the sheriff to summon one or more of the jurors drawn.

§ 315. **When taken.** A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying plainly and distinctly the facts constituting the ground of challenge.

§ 316. **Issue on the challenge.** If the sufficiency of the facts alleged as a ground of challenge be denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered upon the minutes of the court, and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

§ 317. **Proceedings on exception.** If, on the exception, the court deem the challenge sufficient, it may, if justice require it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge. If the exception be allowed, the court may, in like manner, permit an amendment of the challenge.

§ 318. **When challenge is denied.** If the challenge is denied, the denial may, in like manner, be oral, and must be entered upon the minutes of the court, and the court must proceed to try the question of fact.

§ 319. **Trial of challenge.** Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

§ 320. **Bias of officer.** When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner, as if made to a juror.

§ 321. **Discharge of jury.** If, upon an exception to the challenge, or a denial of the facts, the challenge be allowed, the court must discharge the jury, and another jury can be summoned for the same term forthwith, from the body of the county or subdivision; or the judge may order a jury to be drawn and summoned in the regular manner. If it be disallowed, the court must direct the jury to be impaneled.

§ 322. **Challenging individual jurors.** Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intend to challenge an individual juror, he must do so when the juror appears, and before he is sworn.

§ 323. **Nature of challenge.** A challenge to an individual juror is either:

1. Peremptory; or,
2. For cause.

§ 324. **Taken before sworn.** It must be taken when the juror appears, and before he is sworn, but the court may, for good cause, permit it to be taken after the juror is sworn, and before the jury is completed.

§ 325. **Peremptory challenge.** A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court must exclude him.

§ 326. **Defendant's challenge.** In all criminal cases the defendant is entitled to the following challenges:

1. For capital offenses the defendant may challenge peremptorily twenty jurors.
2. In prosecutions for offenses punishable by imprisonment in the territorial prison, ten jurors.
3. In other prosecutions, three jurors.

§ 327. **Prosecutor's challenges.** The prosecuting attorney in capital cases may challenge peremptorily six jurors; in other cases, three jurors.

§ 328. **Challenge for cause.** A challenge for cause may be taken either by the territory or the defendant.

§ 329. **For cause classed.** It is an objection to a particular juror, and is either:

1. General, that the juror is disqualified from serving in any case on trial; or,
2. Particular, that he is disqualified from serving in the case on trial.

§ 330. **Classes of general.** General causes of challenges are:

1. A conviction for felony.
2. A want of any of the qualifications prescribed by law to render a person a competent juror, including a want of knowledge of the English language as used in the courts.
3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror.

§ 331. **Particular cause.** Particular causes of challenges are of two kinds:

1. For such a bias, as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this Code as implied bias.
2. For the existence of a state of mind on the part of the juror in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this Code as actual bias.

§ 332. **For implied bias.** A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the sixth degree, inclusive, to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages.

3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment.

5. Having served on a trial jury which has tried another person for the offense charged in the indictment.

6. Having been one of a jury formerly sworn to try the indictment, and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it.

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror.

§ 333. **Not cause, but privilege.** An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

§ 334. **Causes stated on challenge — opinion.** In a challenge for implied bias, one or more of the causes stated in section three hundred and thirty-two must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section three hundred and thirty-one must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to said jury, founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered upon the minutes of the court.

§ 335. **Exception to challenge.** The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon as prescribed

in section three hundred and sixteen, except that if the exception be allowed the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

§ 336. **How tried.** All challenges, whether to the panel or to individual jurors, shall be tried by the court without the aid of triers.

§ 337. **Juror challenged a witness.** Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and is bound to answer every question pertinent to the inquiry therein.

§ 338. **Other witnesses.** Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues, govern the admission or exclusion of testimony, on the trial of the challenge.

§ 339. **Duty of court.** On the trial of a challenge, the court must either allow or disallow the challenge, and direct an entry accordingly upon the minutes.

§ 340. **Order of taking.** All challenges to an individual juror, except peremptory, must be taken, first by the defendant and then by the territory, and each party must exhaust all his challenges before the other begins.

§ 341. **Order of challenges for cause.** The challenges of either party for cause need not all be taken at once, but they must be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel.
2. To an individual juror for a general disqualification.
3. To an individual juror for implied bias.
4. To an individual juror for actual bias.

§ 342. **Peremptory challenges.** If all challenges on both sides are disallowed, either party, first the territory and then the defendant, may take a peremptory challenge, unless the party's peremptory challenges are exhausted.

CHAPTER II.

THE TRIAL.

§ 343. **Order of trial.** The jury having been impaneled and sworn, the trial must proceed in the following order:

1. If the indictment is for felony, the clerk or district attorney must read it, and state the plea of the defendant to the jury. In all other cases, this formality may be dispensed with.

2. The district attorney, or other counsel for the territory, must open the case and offer the evidence in support of the indictment.

3. The defendant or his counsel may then open his defense, and offer his evidence in support thereof.

4. The parties may then, respectively, offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, or to correct an evident oversight, permit them to offer evidence upon their original case.

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the counsel for the territory shall commence, and the defendant or his counsel shall follow, then the counsel for the territory shall conclude the argument to the jury.

6. The judge must then charge the jury. He may state the testimony, and must declare the law, but must not charge the jury in respect to matters of fact. Such charge must, if so requested, be reduced to writing before it is given, unless, by tacit or mutual consent, it is given orally, or unless it is fully taken down at the time it is given by a stenographic reporter, appointed by the court.

§ 344. **Order may be changed.** When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order of trial and argument prescribed in the last section may be departed from.

§ 345. **Court to decide law.** The court must decide all questions of law which arise in the course of the trial.

§ 346. **Jury determine law and fact.** On the trial of an indictment for libel, the jury have the right to determine the law and the fact.

§ 347. **When only fact.** On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court, and questions of fact are to be decided by the jury; and, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

§ 348. **Restriction of argument.** If the indictment is for an offense punishable with death, three counsel on each side may argue the case to the jury. If it is for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side.

§ 349. **Presumed innocent.** A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in

case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

§ 350. **Doubt as to degree.** When it appears that a defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only.

§ 351. **Defendants tried separately.** When two or more defendants are jointly indicted for a felony, any defendant requiring it must be tried separately. In other cases defendants jointly prosecuted may be tried separately or jointly in the discretion of the court.

§ 352. **Discharge of defendant as witness.** When two or more persons are included in the same indictment, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the territory.

Any person accused may testify in his own behalf. *§ 144*a*.

§ 353. **Same—duty of court.** When two or more persons are included in the same indictment, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must, before the evidence is closed, in order that he may be a witness for his co-defendant, submit its said opinion to the jury, who, if they so find, may acquit the particular defendant for the purpose aforesaid.

§ 354. **Rules of evidence.** The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this Code.

Party accused may testify in his own behalf. *§ 144*a*.

"An act concerning examination of husband and wife for and against each other." Code Civil Proc. Dak. § 446.

§ 355. **To convict of conspiracy.** Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but any other overt act, not alleged in the indictment, may be given in evidence.

§ 356. **Same—accomplice.** A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense, or the circumstances thereof.

§ 357. **Evidence of false pretense.** Upon a trial for having, with an intent to cheat or defraud another, designedly, by any false pretense, obtained the signature of any person to a written in-

strument, or having obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof, be in writing, either subscribed by or in the handwriting of the defendant, or unless the pretense be proven by the testimony of two witnesses, or that of one witness, and corroborating circumstances. But this section does not apply to a prosecution for falsely representing or personating another; and, in such assumed character, marrying, or receiving money or property.

§ 358. **Evidence of seduction.** Upon a trial for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution, or aiding or assisting therein, or for having, under promise of marriage, seduced and had illicit connection with an unmarried female of previous chaste character, the defendant cannot be convicted upon the testimony of the person injured unless she is corroborated by other evidence tending to connect the defendant with the commission of the offense.

§ 359. **Court may suspend proceedings.** If it appear by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on, or admitted to bail to answer any new indictment which may be found against him for the higher offense.

§ 360. **Same not former acquittal.** If an indictment for the higher offense is found by a grand jury impaneled within a year next thereafter, he must be tried thereon, and a plea of former acquittal to such last-found indictment is not sustained by the fact of the discharge of the jury on the first indictment.

§ 361. **Original indictment.** If a new indictment is not found for the higher offense within a year, as aforesaid, the court must again proceed to try the defendant on the original indictment.

§ 362. **Jury may be discharged.** The court may direct the jury to be discharged, where it appears that it has not jurisdiction of the offense, or that the facts as charged in the indictment do not constitute an offense punishable by law.

§ 363. **Disposition of prisoner.** If the jury is discharged because the court has not jurisdiction of the offense charged in the indictment, and it appears that it was committed out of the jurisdiction of this territory, the court may order the defendant to be discharged, or to be detained for a reasonable time specified in the order, until a communication can be sent by the district attorney to the

chief executive officer of the state, territory, or district where the offense was committed.

§ 364. **Same—bail and records.** If the offense was committed within the exclusive jurisdiction of another county of this territory, the court must direct the defendant to be committed for such time as it deems reasonable to await a warrant from the proper county for his arrest, or if the offense be a misdemeanor only, it may admit him to bail in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a time particularly specified in the undertaking, to surrender himself upon the warrant, if issued, or that his bail will forfeit such sum as the court may fix, and to be mentioned in the undertaking, and the clerk must forthwith transmit a certified copy of the indictment, and all the papers in the action, filed with him, to the district attorney of the proper county, the expense of which transmission is chargeable to that county.

§ 365. **When prisoner discharged.** If the defendant is not arrested on a warrant from the proper county, he must be discharged from custody, or his bail in the action be exonerated, or money deposited instead of bail refunded, as the case may be, and the sureties in the undertaking, as mentioned in the last section, must be discharged.

§ 366. **Proceedings if defendant arrested.** If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county, on a warrant of arrest issued by a magistrate.

§ 367. **Court must discharge prisoner.** If the jury be discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail that his bail be exonerated, or if he have deposited money instead of bail, that the money deposited be refunded to him, unless in its opinion a new indictment can be framed, upon which the defendant can be legally convicted, in which case it may direct that the case be resubmitted to the same or another grand jury.

§ 368. **May advise jury to acquit.** If, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction, it may advise the court to acquit the defendant. But the jury are not bound by the advice, nor can the court, for any cause, prevent the jury from giving a verdict.

§ 369. **Jury may view place.** When, in the opinion of the court, it is proper that the jury should view the place in which the offense was charged to have been committed, or in which any other

material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown to them by a person appointed by the court for that purpose, and the officers must be sworn to suffer no person to speak or communicate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

§ 370. **Must be declared in court.** If a juror have any personal knowledge respecting a fact in controversy in a cause, he must declare it in open court during the trial. If, during the retirement of a jury, a juror declare a fact, which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties.

§ 371. **Custody and conduct of jury.** The jurors sworn to try an indictment may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or to be kept in charge of proper officers. The officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak or communicate with them, nor to do so themselves, on any subject connected with the trial, and to return them into court at the next meeting thereof.

§ 372. **Jury admonished by court.** The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with any one else on any subject connected with the trial, or to form or express any opinion thereon, until the case is finally submitted to them.

§ 373. **When juror becomes sick.** If, before the conclusion of a trial a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled.

§ 374. **Murder—burden of proof.** Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

§ 375. **Bigamy—proof on trial.** Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases, and when the second marriage took place out of this territory, proof

of that fact, accompanied with proof of cohabitation thereafter in this territory, is sufficient to sustain the charge.

§ 376. **Forgery—same.** Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill or note, it is not necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited.

§ 377. **Requisites of court's charge.** In charging the jury, the court must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it must in addition inform the jury that they are the exclusive judges of all questions of fact. Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented, and given, or refused, the court must indorse or sign its decision. If part of any written charge be given and part refused, the court must distinguish, showing by the indorsement or answer what part of each charge was given, and what part refused.

§ 378. **Jury after charge.** After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn, to keep them together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

Sec. 382.

§ 379. **Defendant may be committed.** When a defendant, who has given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly.

§ 380. **Substitute for district attorney.** If the district attorney fails, or is unable to attend at the trial, the court must appoint some attorney at law to perform the duties of the district attorney on such trial.

CHAPTER III.

CONDUCT OF THE JURY AFTER THE CAUSE IS SUBMITTED TO THEM.

§ 381. **Jury-room.** A room must be provided by the board of commissioners of the county for the use of the jury, upon their retirement for deliberation, with suitable furniture, fuel, lights, and stationery. If the commissioners neglect, the court may order the sheriff to do so, and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge.

§ 382. **Food and lodging.** While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, upon the order of the court, at the expense of the county, with suitable and sufficient food and lodging.

Sec. 378.

§ 383. **Papers jury take.** Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, or copies of such parts of public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession.

§ 384. **Jury may be brought into court.** After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed on a point of law arising in the cause, the must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant, or his counsel, or after they have been called.

§ 385. **Juror sick.** If, after the retirement of the jury, one of them become so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept together for deliberation, the jury may be discharged.

§ 386. **Cannot be discharged until.** Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by the consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court deems proper, it satisfactorily appear that there is no reasonable probability that the jury can agree.

§ 387. **Cause retried.** In all cases where a jury are discharged, or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged from the

indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term, as the court may direct.

§ 388. **Adjournment while jury absent.** While the jury are absent the court may adjourn from time to time as to other business, but it is nevertheless deemed open, for every purpose connected with the cause submitted to them, until a verdict is rendered or the jury discharged.

§ 389. **Discharge of jury.** A final adjournment of the court discharges the jury.

CHAPTER IV.

THE VERDICT.

§ 390. **Return of verdict.** When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the cause must be again tried, at the same or another term.

§ 391. **Verdict in presence of defendant.** If the indictment is for a felony the defendant must, before the verdict is received, appear in person. If it is for a misdemeanor, the verdict may, in the discretion of the court, be rendered in his absence.

§ 392. **Proceedings when jury appear.** When the jury appear, they must be asked, by the court or the clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.

§ 393. **Verdict.** The jury may either render a general verdict, or, where they are in doubt as to the legal effect of the facts proved, they may, except upon an indictment for libel, find a special verdict.

*§ 393*a*. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor; and the judgment of the court shall be in accordance therewith. (*Sess. Laws* 1883, *c.* 9.)

§ 394. **Form of general verdict.** A general verdict upon a plea of not guilty is either "guilty," or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either "for the territory," or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty

by reason of insanity." When the defendant is acquitted on the ground of variance between the indictment and the proof, the verdict must be "not guilty by reason of variance between indictment and proof."

§ 395. **Special verdict.** A special verdict is that by which the jury find the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and the conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them.

§ 396. **Special verdict to be written.** The special verdict must be reduced to writing by the jury, or in their presence entered upon the minutes of the court, read to the jury, and agreed to by them, before they are discharged.

§ 397. **Form of special verdict.** The special verdict need not be in any particular form, but is sufficient if it presents intelligibly the facts found by the jury.

§ 398. **Argument of special verdict.** The special verdict may be brought to argument by either party, upon two days' notice to the other, at the same or another term of the court.

§ 399. **Judgment upon special verdict.** The court must give judgment upon the special verdict as follows:

1. If the plea is not guilty, and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted under the indictment, judgment must be given accordingly; but if otherwise, judgment of acquittal must be given.

2. If the plea is a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal, according as the facts prove or fail to prove the former conviction or acquittal.

§ 400. **New trial.** If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence, as established to their satisfaction, the court must order a new trial.

§ 401. **Degree must be found.** Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

§ 402. **May find any degree.** The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense.

§ 403. **Same — several defendants.** On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury.

§ 404. **Jury reconsider verdict.** When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider their verdict; and if, after the reconsideration, they return the same verdict, it must be entered. But when there is a verdict of acquittal, the court cannot require the jury to reconsider it.

§ 405. **Same.** If the jury render a verdict which is neither a general nor a special verdict, the court may, with proper instructions as to the law, direct them to reconsider it, and it cannot be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict, or to find the facts specially, and to leave the judgment to the court.

§ 406. **Judgment if jury persist.** If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment be given against him on a special verdict.

§ 407. **Jury may be polled.** When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.

§ 408. **Clerk to record verdict.** When the verdict is given, and is such as the court may receive, the clerk must immediately record it in full upon the minutes, and must read it to the jury and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes, and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury must be discharged from the case.

§ 409. **When defendant to be discharged.** If the judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as judgment is given, except that when the acquittal is for a variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention, to the end that a

new indictment may be preferred in the same manner and with like effect as provided in [section] three hundred and sixty-seven.

§ 410. **Committal of defendant.** If a general verdict is rendered against the defendant, or a special verdict is given, he must be remanded, if in custody, or if on bail, he may be committed to the proper officer of the county, to await the judgment of the court upon the verdict. When committed his bail is exonerated, or if money is deposited instead of bail, it must be refunded to the defendant.

§ 411. **Defense insanity, and jury acquits.** If the defense is the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court may thereupon, if the defendant is in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the care of the sheriff until he becomes sane.

CHAPTER V.

BILLS OF EXCEPTION.

§ 412. **Exceptions to matters of law.** On the trial of an indictment exceptions may be taken by the defendant to the decision of the court upon a matter of law by which his substantial rights are prejudiced, and not otherwise, in any of the following cases:

1. In disallowing a challenge to the panel of the jury, or to an individual juror for implied bias.

2. In admitting or rejecting witnesses or testimony, on the trial of a challenge to a juror for actual bias.

3. In admitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law, on the trial of the issue.

§ 413. **Bill signed and filed.** A bill containing the exceptions must be settled and signed by the presiding judge, and filed with the clerk.

§ 414. **Character of bill of exceptions.** The bill of exceptions must be settled at the trial, unless the court otherwise direct. If no such direction be given, the point of the exception must be particularly stated in writing, and delivered to the court, and must immediately be corrected or added, until it is made comformable to the truth.

§ 415. **When prepared if not settled at trial.** If the bill of exceptions be not settled at the trial, it must be prepared and served, within three days thereafter, on the district attorney, who

may, within three days thereafter, serve on the defendant, or his counsel, amendments thereto. The defendant may then, within three days, serve the district attorney with a notice to appear before the presiding judge of the court, at a specified time, not less than five nor more than ten days thereafter, to have the bill of exceptions settled.

§ 416. **Judge to settle and sign.** At the time appointed the judge must settle and sign the bill of exceptions.

§ 417. **Time—how enlarged.** The time for preparing the bill of exceptions or the amendments thereto, or for settling the same, may be enlarged by the consent of the parties, or by the presiding judge.

§ 418. **Exceptions deemed abandoned.** If the bill of exceptions be not served within the time prescribed in section four hundred and fifteen, or within the enlarged time therefor, as prescribed in the last section, the exceptions are deemed abandoned. If it be served and the parties omit, within the time limited by section four hundred and fifteen, the one to prepare amendments, and the other to give notice of appearance before the judge, they are respectively deemed, the one to have agreed to the bill of exceptions, the other to the amendments.

§ 419. **What exceptions to contain.** The bill of exceptions must contain so much of the evidence only as is necessary to present the questions of law upon which the exceptions were taken, and the judge must, upon the settlement of the bill, whether agreed to by the parties or not, strike out all other matters contained therein.

§ 420. **To be filed.** The bill of exceptions must be filed with the clerk of the court at the time of, or before, taking the writ of error.

§ 421. **Other exceptions.** Exceptions may be taken by either party to a decision of the court or judge upon a matter of law:

1. In granting or refusing a motion in arrest of judgment.
2. In granting or refusing a motion for a new trial.

CHAPTER VI.

NEW TRIALS.

§ 422. **New trials.** A new trial is a re-examination of the issue in the same court, before another jury, after a verdict has been given. The granting of a new trial places the parties in the same

position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment.

§ 423. **Court has power to grant a new trial.** The court in which a trial has been had upon an issue of fact, has power to grant a new trial, when a verdict has been rendered against the defendant by which his substantial rights have been prejudiced, upon his application, in the following cases only:

1. When the trial has been had in his absence, if the indictment is for felony.
2. When the jury has received any evidence out of court other than that resulting from a view of the premises.
3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.
4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors.
5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.
6. When the verdict is contrary to law or evidence.

§ 424. **Before judgment.** The application for a new trial must be made before judgment.

CHAPTER VII.

ARREST OF JUDGMENT.

§ 425. **Motion for, defined.** A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on plea or verdict of guilty, or on a verdict against the defendant on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment mentioned in section two hundred and sixty-five, unless the objection to the indictment has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment.

§ 426. **Arrest of judgment—no bar.** The court may also, on its own view of any of these defects, arrest the judgment, without motion. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the

indictment was found, and in no case of arrest of judgment is the verdict a bar to another prosecution or indictment.

§ 427. **Guilty, but indictment insufficient.** If, from the evidence on the trial, there is reasonable ground to believe the defendant guilty, and a new indictment can be framed, upon which he may be convicted, the court may order him to be recommitted to the officer of the proper county or subdivision, or admitted to bail anew to answer the new indictment. If the evidence shows him guilty of another offense, he must be committed or held thereon. But if no evidence appears sufficient to charge him with any offense, he must, if in custody, be discharged, or, if admitted to bail, his bail is exonerated, or if money has been deposited instead of bail, it must be refunded to the defendant, and the arrest of judgment operates as an acquittal of the charge upon which the indictment was founded.

TITLE IX.

OF JUDGMENT AND EXECUTION.

CHAPTER I.

THE JUDGMENT.

§ 428. **Court appoints time for.** After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, if the judgment is not arrested, or a new trial granted, the court must appoint a time for pronouncing judgment.

§ 429. **Time specified.** The time appointed must be at least two days after the verdict, if the court intend to remain in session so long, or, if not, at as remote a time as can reasonably be allowed.

§ 430. **Defendant's absence.** For the purpose of judgment, if the conviction is for a misdemeanor, judgment may be pronounced in his absence.

§ 431. **Officer to produce prisoner.** When the defendant is in custody the court may direct the officer, in whose custody he is, to bring him before it for judgment, and the officer must do so accordingly.

§ 432. **Bench-warrant.** If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of money deposited, may direct the clerk to issue a bench-warrant for his arrest.

§ 433. **Same—duty of clerk.** The clerk, on the application of the district attorney, may accordingly, at any time after the order, whether the court be sitting or not, issue a bench-warrant into one or more counties.

§ 434. **Form of warrant.** The bench-warrant must be substantially in the following form:

County of ———.

The territory of Dakota to any sheriff, constable, marshal, or policeman in this territory:

A. B. having been, on the ——— day of ———, A. D. 18—, duly convicted in the district court of the county of ——— of the crime of (designating it generally,) you are therefore commanded forthwith to arrest the above-named A. B. and bring him before that court for judgment; or, if the court has adjourned for the term, you are to deliver him into the custody of the sheriff of the county of ———, (as the case may be.)

Given under my hand, with the seal of said court affixed, this ——— day of ———, A. D. eighteen hundred and ———.

By order of the court.

[Seal.] E. F., Clerk.

§ 435. **How warrant served.** The bench-warrant may be served in any county in the same manner as a warrant of arrest, except that when served in another county it need not be indorsed by a magistrate of that county.

§ 436. **Disposal of defendant.** Whether the bench-warrant is served in the county in which it was issued, or in another county, the officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant, according to the command thereof.

§ 437. **Defendant informed by court.** When the defendant appears for judgment he must be informed by the court, or by the clerk under its direction, of the nature of the indictment, and of his plea and the verdict, if any, thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.

§ 438. **May show cause against judgment.** He may show for cause against the judgment:

1. That he is insane, and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of his insanity must be tried as hereinafter in this Code provided for. If upon the trial of that question the jury find that he is sane, judgment must be pronounced; but if they find him insane he may be committed to the territorial lunatic asylum, if there be one, until he becomes sane or be otherwise committed according to law, and when notice is given of that fact, as hereinafter provided for, he must be brought before the court for judgment.

2. That he has good cause to offer, either in arrest of judgment or for a new trial, in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.

§ 439. **Judgment rendered.** If no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it must thereupon be rendered.

§ 440. **Court hear further evidence.** After a plea or verdict of guilty, in a case where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily at a specified time, and upon such notice to the adverse party as it may direct.

§ 441. **How presented.** The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taxen by a magistrate of the county out of court, at a specified time and place, upon such notice to the adverse party as the court may direct.

§ 442. **Other evidence prohibited.** No affidavit, or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or member thereof, in aggravation or mitigation of the punishment, except as provided in the last two sections.

§ 443. **Judgment in two offenses.** If the defendant have been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses.

§ 444. **Fine and imprisonment.** A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine.

§ 445. **Fine constitutes a lien.** A judgment that the defendant pay a fine constitutes a lien, also, in like manner as a judgment for money rendered in a civil action.

§ 446. **Papers filed by clerk.** When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had, and must immediately annex together and file the following papers, which constitute a record of the action:

1. The indictment, and a copy of the minutes of the plea or demurrer;
2. A copy of the minutes of the trial;
3. The charges given or refused, and the indorsements, if any, thereon; and,
4. A copy of the judgment.

CHAPTER II.

THE EXECUTION.

§ 447. **Papers furnished officer.** When a judgment, except of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution.

§ 448. **When for fine.** If the judgment is for a fine alone, execution may issue thereon as on a judgment in a civil action.

§ 449. **For imprisonment.** If the judgment be imprisonment, or a fine and imprisonment, until such fine be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with.

§ 450. **Imprisonment or fine.** When the judgment is imprisonment in a county jail, or a fine, and that the defendant be imprisoned until it be paid, the judgment must be executed by the sheriff of the county or subdivision. In all other cases when the sentence is imprisonment, the sheriff of the county must deliver the defendant to the proper officer, in execution of the judgment.

§ 451. **Imprisonment in territorial prison.** If the judgment is for imprisonment in the territorial prison, the sheriff of the county or subdivision must, upon receipt of a certified copy thereof, take and deliver the defendant to the warden, superintendent, or keeper of the territorial prison. He must also deliver to the warden or other proper officer a certified copy of the judgment, and take from

the warden or other proper officer a receipt for the defendant, and make return thereof to the court.

§ 452. **Authority while conveying prisoner.** The sheriff or his deputy, while conveying the defendant to the proper prison, in execution of a judgment of imprisonment, has the same authority to require the assistance of any citizen of this territory, in securing the defendant, and in retaking him if he escape, as if the sheriff were in his own county, and every person who refuses or neglects to assist the sheriff, when so required, is punishable as if the sheriff were in his own county.

§ 453. **Proceedings on judgment of death.** When judgment of death is rendered, the judge must sign and deliver to the sheriff of the county a warrant, duly attested by the clerk, under the seal of the court, stating the conviction and judgment, and appointing a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of the judgment.

§ 454. **Duty of judge in such case.** The judge of a court at which a conviction requiring judgment of death is had, must, immediately after the conviction, transmit to the governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.

§ 455. **Governor may require opinion of judges.** The governor may thereupon require the opinion of the judges of the supreme court, or any of them, upon the statement so furnished.

§ 456. **Governor only can reprieve.** No judge, court, or officer, other than the governor, can reprieve or suspend the execution of a judgment of death, except the sheriff, in the cases provided in the next seven sections, unless a writ of error is allowed and taken.

§ 457. **If defendant become insane.** If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county or subdivision, with the concurrence of the judge of the court by which the judgment was rendered, may summon from the list of jurors selected, or to be selected forthwith by the county commissioners, a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the district attorney.

§ 458. **Inquisition to try insanity.** The district attorney must attend to the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.

§ 459. **Return of certificate.** A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerk of the court in which the conviction was had.

§ 460. **Duty of sheriff on the finding.** If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor, or from a majority of the judges of the supreme court, directing the execution of the judgment.

§ 461. **Same.** If the inquisition find that the defendant is insane, the sheriff must immediately transmit to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.

§ 462. **Female pregnant—inquisition.** When there is good reason to suppose that a female, against whom judgment of death is rendered, is pregnant, the sheriff of the county or subdivision, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury of three physicians of the territory to inquire into the supposed pregnancy. Immediate notice thereof must be given to the district attorney. The provisions of sections four hundred and sixty and four hundred and sixty-one apply to the proceedings upon the inquisition.

§ 463. **Duty of sheriff on finding.** If it is found by the inquisition that the female is not pregnant, the sheriff must execute the judgment. If, however, it is found that she is pregnant, the sheriff must suspend the execution of the judgment, and transmit the inquisition to the governor.

§ 464. **Governor to order execution.** When the governor is satisfied that the female is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment.

§ 465. **Duty of court when judgment not executed.** If, for any reason, a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the district attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued.

§ 466. **Same.** Upon the defendant being brought before the court, it must inquire into the facts, and, if no legal reason exists against the execution of the judgment, must make an order that the sheriff of the proper county execute the judgment at a specified time. The sheriff must execute the judgment accordingly.

§ 467. **How death produced.** The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

§ 468. **Death — where executed.** A judgment of death must be executed within the walls or yard of a jail of the county in which the conviction was had, or some convenient private place in the county. If there is no such jail or prison in the county in which the conviction was had, or if it becomes unfit or unsafe for the confinement of prisoners, or is destroyed by fire or otherwise, and the jail of another county has been legally designated for the confinement of the prisoners of the county in which the conviction was had, the judgment must be executed in manner as above.

§ 469. **Present at execution.** The sheriff or deputy-sheriff of the county must be present at the execution, and must invite the presence, by at least three days' notice, of the district attorney, together with one physician and twelve reputable citizens, to be selected by him. He must also, at the request of the defendant, permit any minister or ministers of the gospel whom the defendant may name, and any of his relatives or friends, not to exceed five, to attend the execution, and also such peace officers as the sheriff or under-sheriff may deem proper. But no persons other than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

§ 470. **Return of execution.** The sheriff or deputy-sheriff must prepare and sign, with their names of office, a certificate attached to the death-warrant, setting forth the time, manner, and place of the execution, and that the judgment was executed upon the defendant according to the provisions of the last three sections, and attested by at least twelve persons, not relatives of the defendant, who witnessed the execution.

§ 471. **Sheriff to file certificate.** The sheriff or deputy-sheriff must cause the certificate to be filed in the office of the clerk of the court.

TITLE X.

WRIT OF ERROR.

CHAPTER I.

WRITS OF ERROR, WHEN ALLOWED, AND HOW TAKEN, AND THE EFFECT THEREOF.

§ 472. **Writ of error.** Either party may sue out a writ of error to remove to the supreme court, and therein to re-examine and review the record and bills of exception in a criminal action, upon matters of law decided in the district courts, in manner as prescribed in this chapter.

§ 473. **Proceedings to obtain writ.** Writs of error shall be allowed in all cases from the final decisions of said district courts, to the supreme court, under such regulations as are herein or may be prescribed by law. The party seeking the writ must apply to the judge, or to a justice of the supreme court, by petition, verified by affidavit, setting forth clearly and succintly the chief matters of error complained of.

§ 474. **Title of parties to writ.** The party suing out the writ is known as the plaintiff in error, and the adverse party as the defendant in error, but the title of the action is not changed in consequence of the writ.

§ 475. **When by defendant.** The writ may be sued out by the defendant:

1. From a final judgment of conviction.
2. From an order refusing a motion in arrest of judgment.
3. From an order refusing a motion for a new trial.

4. Upon bills of exception for any of the causes mentioned in section four hundred and twelve of this Code.

§ 476. **By the territory.** The writ may be sued out by the territory:

1. From a judgment for the defendant on a demurrer to the indictment.
2. From an order arresting the judgment.
3. From an order granting a new trial.

§ 477. **Limit of time for writ.** The writ must be sued out within one year after the rendition of the judgment, and within sixty days after an order is made.

§ 478. **Effect of writ.** A writ sued out by the territory in no case stays or affects the operation of a judgment in favor of the defendant until judgment is reversed.

§ 479. **Supersedeas.** A writ of error from the supreme court to remove and re-examine or review a judgment of conviction, stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had, a certificate of the judges of such court, or of a justice of the supreme court, that, in his opinion, there is probable cause for the writ, but not otherwise.

§ 480. **Duty of sheriff.** If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment of the supreme court.

§ 481. **Execution suspended.** If, before the granting of the certificate, the judgment has commenced, the further execution thereof is suspended, and upon service of a copy of such certificate the defendant must be restored, by the officer in whose custody he is, to his original custody.

§ 482. **Clerk's return on writ.** Upon the writ of error being sued out, the clerk of the court upon whom it is served, must, within ten days thereafter, or within such reasonable time as may be allowed to him, transmit to the clerk of the supreme court the writ, with his return thereon, to which shall be annexed and returned an authenticated copy of the record of this action as mentioned in section four hundred and forty-eight, and of all bills of exception, together with an assignment of errors and prayer for reversal.

*§ 482*a*. **Writs of error—when returnable.** All writs of error heretofore issued from the supreme court to any of the district courts, returnable at the next June term, as provided in said chapter ten, shall be returnable to the next May term of the supreme court, as provided in this act, in the same manner and with the same effect as though such writs were so returnable on their faces. (*Sess. Laws* 1879, *c.* 54, § 2.)

§ 483. **Return to contain certificate of judge.** The return must also embrace a certificate of the judge or of a justice of the supreme court that the record contains in itself all the bills of exception and a true copy of all the evidence bearing upon, or necessarily relating to, any bill of exception.

§ 484. **Exceptions to charge.** The judges of the district courts shall not allow any bills of exception which shall contain the charge of the court at large to the jury, upon any general exception to the whole of such charge, but the party excepting shall be required to state distinctly the several and particular matters of law in such charge to which he excepts, and such matters of law, and those only, shall be inserted in the bills of exception, and allowed by the court.

§ 485. **Adverse party notified.** Immediately after the issuing of the writ, a citation to the adverse party to be and appear at the supreme court, to be issued by the clerk thereof, shall be served on him or his attorney, giving at least ten days' notice thereof.

§ 486. **Concerning certiorari.** No *certiorari* for diminution of the record shall be hereafter awarded in any action, unless a motion therefor shall be made in writing; and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit, and all motions for such *certiorari* shall be made at the first term of the entry of the action; otherwise, the same shall not be granted, unless upon special cause shown to the court accounting satisfactorily for the delay.

CHAPTER II.

DISMISSING THE WRIT FOR IRREGULARITY.

§ 487. **In substantial particulars.** If the writ is irregular in any substantial particular, but not otherwise, the court may, on any day in term, on motion of the defendant in error, upon two days' notice, with copies of the papers on which the motion was founded, order it to be dismissed.

§ 488. **For error in return.** The court may also, upon like motion, dismiss the writ, if the return is not made as provided in sections four hundred and eighty-four and four hundred and eighty-five, unless for good cause they enlarge the time for that purpose.

CHAPTER III.

ARGUMENT OF THE WRIT.

§ 489. **How brought on.** The writ of error may be brought to argument by either party on ten days' notice, on any day, at a general or adjourned term of the supreme court, but it must be heard and determined at the first term after the record is filed, unless for good cause shown.

§ 490. **What plaintiff to furnish.** When the writ is called for argument, the plaintiff in error must furnish each member of the court with a copy of the record of the action, bills of exception, and of the assignment of errors. If he fails to do so the writ must be dismissed, unless for cause shown the court otherwise direct.

§ 491. **Failure to appear.** The judgment may be affirmed if the plaintiff in error fails to appear, but can be reversed only after argument, though the defendant in error fails to appear.

§ 492. **Number of counsel heard.** Upon the argument of the writ, if the offense is punishable with death, three counsel on each side must be heard, if they require it. In any other case the court may, in its discretion, restrict the argument to one counsel on each side.

CHAPTER IV.

JUDGMENT IN SUPREME COURT.

§ 493. **When court must give judgment.** After hearing the writ the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.

§ 494. **Power of supreme court.** The supreme court may reverse, affirm, or modify the judgment or order of the district court, and may, if proper, order a new trial.

§ 495. **Duty of court if judgment is reversed.** If a judgment against the defendant is reversed, without ordering a new trial, the supreme court must direct, if he is in custody, that he be discharged therefrom, or if on bail, that his bail be exonerated, or if money was deposited instead of bail, that it be refunded to the defendant.

§ 496. **When original judgment must be enforced.** On a judgment of affirmance against the defendant, the original judgment must be enforced.

§ 497. **Disposition of judgment from supreme court.** When the judgment of the supreme court is given, it must be entered in the minutes, and a certified copy of the entry forthwith remitted to the clerk of the district court.

§ 498. **When supreme court has no further jurisdiction.** After the certificate of the judgment has been remitted to the court below, the supreme court has no further jurisdiction of the writ, or of the proceedings thereon, and all orders which may be necessary to carry the judgment into effect must be made by the court to which the certificate is remitted.

TITLE XI.

MISCELLANEOUS PROCEEDINGS.

CHAPTER I.

COMPELLING THE ATTENDANCE OF WITNESSES.

§ 499. **Subpœna defined.** The process by which the attendance of a witness before a court or magistrate is required is a subpœna.

§ 500. **Magistrates may issue.** A magistrate before whom an information is laid, or to whom a presentment of a grand jury is sent, may issue subpœnas, subscribed by him, for witnesses within the territory, either on behalf of the territory or the defendant.

§ 501. **District attorney for grand jury.** The district attorney may issue subpœnas, subscribed by him, for witnesses within the territory, in support of the prosecution, or for such other witnesses as the grand jury may direct, to appear before the grand jury upon an investigation before them.

§ 502. **Same for trial.** The district attorney may in like manner issue subpœnas for witnesses within the territory, in support of an indictment, to appear before the court at which it is to be tried.

§ 503. **Clerk issues blank for defendant.** The clerk of the court at which an indictment is to be tried, must, at all times, upon the application of the defendant, and without charge, issue as many blank subpœnas, under the seal of the court, and subscribed by him as clerk, for witnesses within the territory, as may be required by the defendant.

§ 504. **Form of.** A subpœna authorized by the last four sections must be substantially in the following form:

In the name of the territory of Dakota:

To A. B.:

You are commanded to appear before C. D., a justice of the peace at the town of ———, (or "the grand jury of the county of ———," or "the district court ———," or as the case may be,) on (stating the day and hour,) as a witness in a criminal action prosecuted by the territory of Dakota against E. F.

Dated at the town of ———, (as the case may be,) the ——— day of ———, 18—.

"G. H., justice of the peace," or "I. K., district attorney," or "by order of the court, L. M., clerk," (as the case may be.)

§ 505. **Subpœna duces tecum.** If the books, papers, or documents be required, a direction to the following effect must be contained in the subpœna:

And you are required also to bring with you the following: (Describe intelligibly the books, papers, or documents required.)

§ 506. **By whom served.** A peace officer must serve in his county, city, town, or village, as the case may be, any subpœna de-

livered to him for service, either on the part of the territory or of the defendant, and must make a written return of the service, subscribed by him, stating the time and place of service, without delay. A subpœna may, however, be served by any other person.

§ 507. **How served.** A subpœna is served by delivering it, or by showing it, and delivering a copy thereof to the witnesses personally.

§ 508. **Witness' expenses.** When a person attends before a magistrate, grand jury, or court, as a witness on behalf of the territory, upon a subpœna, or pursuant to an undertaking, and it appears that he has come from a place out of the county, or that he is poor, the court, if the attendance of a witness be upon a trial, by an order entered upon its minutes, or in any other case, the district judge, by a written order, may direct the county treasurer to pay the witness a reasonable sum, to be specified in the order, for his expenses.

§ 509. **Payment.** Upon the production of the order, or a certified copy thereof, the county treasurer must pay the witness the sum specified therein, out of the county treasury.

§ 510. **Witness residing out of county.** No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with the subpœna, unless the judge of the court in which the offense is triable, upon an affidavit of the prosecutor or district attorney, or of the defendant or his counsel, stating that he believes that the evidence of the witness [is] material, and his attendance at the examination or trial necessary, shall indorse on the subpœna an order for the attendance of the witness.

§ 511. **Disobedience to subpœna.** Disobedience to a subpœna, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt, in the manner provided in the Code of Civil Procedure.

§ 512. **Witness for defendant disobeying.** A witness disobeying a subpœna issued on the part of the defendant, also forfeits to the defendant the sum of fifty dollars, which may be recovered in a civil action.

CHAPTER II.

INQUIRING INTO THE INSANITY OF THE DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

§ 513. **Re-enactment.** Chapter five of article eight of title eleven of an act to establish a Code of Criminal Procedure for Dakota territory, approved January twelfth, eighteen hundred and sixty-nine, said chapter being headed, "Inquiry into the insanity of the defendant before trial or after conviction," so far as the same is not in conflict with the provisions of this present act, is hereby revived and re-enacted. The remainder of this chapter is the law referred to.

§ 514. **Insane cannot be tried.** An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense while he is insane.

§ 515. **When doubt arises.** When an indictment is called for trial, or upon conviction the defendant is brought up for judgment, if a doubt arise as to the sanity of the defendant, the court must order a jury to be impaneled, from the jurors summoned and returned for the term, or who may be summoned by the direction of the court as provided in sections three hundred and three to three hundred and eight, both inclusive, to inquire into the fact.

§ 516. **Trial to be suspended.** The trial of the indictment or the pronouncing of the judgment, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury.

§ 517. **Order of trial.** The trial of the question of insanity must proceed in the following order:

1. The counsel for the defendant must open the case and offer evidence in support of the allegation of insanity.
2. The counsel for the territory may then open their case and offer evidence in support thereof.
3. The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.
4. When the evidence is concluded, unless the case is submitted to the jury, on either side or on both sides, without argument, the counsel for the territory must commence, and the defendant or his counsel may conclude, the argument to the jury.
5. If the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately. If it be for any other offense, the court

may, in its discretion, restrict the argument to one counsel on each side.

6. The court must then charge the jury.

§ 518. **Charge of court.** The provisions of sections three hundred and forty-five and three hundred and forty-seven, in respect to the duty of the court upon questions of law, and of the jury upon questions of fact, and the provisions of section three hundred and seventy-seven, in respect to the charge of the court to the jury, upon the trial of an indictment or information, apply to the question of insanity.

§ 519. **If sane, trial proceeds.** If the jury find the defendant sane, the trial of the indictment must proceed, or judgment may be pronounced, as the case may be.

§ 520. **If found insane.** If the jury find the defendant is insane, the trial or judgment must be suspended until he becomes sane, and the court, if it deems his discharge dangerous to the public peace or safety, may order that he be in the mean time committed to the care of the sheriff until he becomes sane.

§ 521. **If committed, bail.** The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of money he may have deposited instead of bail.

§ 522. **Restored to sanity.** When he becomes sane, the sheriff must thereupon, without delay, place him in the proper custody until he be brought to trial or judgment, as the case may be, or be legally discharged.

§ 523. **Expenses.** The expenses of keeping the defendant are in the first instance chargeable to the county, but the county may recover them from the estate of the defendant, if he have any, or from a relative.

CHAPTER III.

COMPROMISING MISDEMEANOR BY LEAVE OF THE COURT.

§ 524. **Limitation.** When a defendant is held to answer on a charge of misdemeanor, for which the person, by the act constituting the offense, has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:

1. By or upon an officer of justice while in the execution of the duties of his office;

2. Riotously; or,
3. With an intent to commit a felony.

§ 525. **To be by permission.** If the party injured appear before the court to which the depositions and statement are required by section one hundred and sixty to be returned, at any time before trial, on an indictment for the offense, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein and entered upon the minutes.

§ 526. **Order a bar.** The order authorized by the last section is a bar to another prosecution for same offense.

§ 527. **No public offense compromised.** No public offense can be compromised, nor can any proceeding for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in sections five hundred and twenty-four and five hundred and twenty-five.

CHAPTER IV.

PROCEEDINGS AGAINST CORPORATIONS.

§ 528. **Summons.** Upon a presentment against a corporation the magistrate must issue a summons signed by him, with his name of office, requiring the corporation to appear before him at a specified time and place to answer the charge; the time to be not less than ten days after the issuing of the summons.

§ 529. **Form of summons.** The summons must be in substantially the following form:

County of ———.

In the name of the territory of Dakota.

To the (naming the corporation:)

You are hereby summoned to appear before me at (naming the place,) on (specifying the day and hour,) to answer to the charge made against you, upon the information of A. B., (or the presentment of the grand jury of the county of ———,) for (designating the offense generally.)

Dated at the city, or town, of ———, the ——— day of ———, 18—.

G. H., Justice of the Peace, (or as the case may be.)

§ 530. **When and how served.** The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president, or other head of the corporation, or to the secretary, cashier, or managing agent thereof.

§ 531. **Examination of charge.** At the time appointed in the summons the magistrate must investigate the charge in the same manner as in the case of a natural person brought before him, so far as those proceedings are applicable.

§ 532. **Certificate of magistrate.** After hearing the proofs the magistrate must certify upon the depositions, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the depositions and certificate in the same manner prescribed in section one hundred and sixty.

§ 533. **Grand jury may proceed.** If the magistrate return a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the grand jury may proceed thereon as in the case of a natural person held to answer.

§ 534. **Appearance and plea.** If an indictment be found, the corporation may appear by counsel to answer the same. If they do not thus appear, a plea of not guilty must be entered, and the same proceedings had thereon as in other cases.

§ 535. **Fine collected.** When a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it, by the sheriff of the county, out of their real and personal property, in the same manner as upon an execution.

CHAPTER V.

ENTITLING AFFIDAVITS.

§ 536. **Entitling unnecessary.** It is not necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment or upon a writ of error, but if made without a title, or with an erroneous title, it is as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment, or writ of error in which it is made.

CHAPTER VI.

ERRORS AND MISTAKES IN PLEADINGS OR OTHER PROCEEDINGS.

§ 537. **Informalities not fatal.** Neither a departure from the form or mode prescribed in this Code, in respect to any pleadings

or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

CHAPTER VII.

DISPOSAL OF PROPERTY STOLEN OF EMBEZZLED.

§ 538. **To be held by officer.** When property alleged to have been stolen or embezzled comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

§ 539. **Order for its delivery.** On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

§ 540. **Magistrate must deliver on proof.** If property stolen or embezzled come into the custody of a magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

§ 541. **Court may deliver by order.** If property stolen or embezzled have not been delivered to the owner, the court before which a trial is had for stealing or embezzling it, may, on proof of his title, order it to be restored to the owner.

§ 542. **If not claimed in six months.** If property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of a person stealing or embezzling it, the magistrate, or other officer having it in his custody, must, on payment of the necessary expenses incurred in its preservation, deliver it to the county commissioners, to be paid into the county treasury.

§ 543. **Receipt to defendant and clerk.** When money or other property is taken from a defendant, arrested upon a charge of public offense, the officer taking it must, at the time, give duplicate receipts therefor, specifying particularly the amount of money, or the kind of property taken; one of which receipts he must deliver to the defendant, and the other of which he must file with the clerk of

the court, to which the depositions and statement must be sent, as provided in section one hundred and sixty.

CHAPTER VIII.

REPRIEVES, COMMUTATIONS, AND PARDONS.

§ 544. **Re-enactment.** Chapter twelve of article eight of title eleven of the aforesaid act of January twelfth, eighteen hundred and sixty-nine, said chapter being entitled "Reprieves, Commutations, and Pardons," so far as the said chapter is in accordance with the organic act, and consistent with the provisions of this Code, is hereby revived and re-enacted. The remainder of this chapter is the law referred to.

§ 545. **Governor may grant.** The governor has power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to the regulations provided in this chapter.

§ 551, *§§ 551*a*–551*d*.

§ 546. **Treason—duty of legislature.** He may also suspend the execution of the sentence upon a conviction for treason, until the case can be reported to the legislature, at the next meeting, when the legislature must either pardon or commute the sentence, direct the execution thereof, or grant a further reprieve.

*§§ 551*a*–551*d*.

§ 547. **Reports to legislature.** He must annually communicate to the legislature each case of reprieve, commutation, or pardon, stating the name of the convict, the crime of which he was convicted, the sentence, and its date, and the date of the commutation, pardon, or reprieve.

§ 548. **Report of cases required.** When an application is made to the governor for a pardon, he may require the presiding judge of the court before which the conviction was had, or the district attorney by whom the action was prosecuted, to furnish him, without delay, with the statement of the facts proved on the trial, and of any other facts having reference to the propriety of granting the pardon.

*§§ 551*a*–551*d*.

§ 549. **Notice to district attorney.** At least ten days before the governor acts upon an application for a pardon, written notice of the intention to apply therefor, signed by the person applying, must be served upon the district attorney of the county where the conviction was had, and proof by affidavit of the service must be

presented by the governor: *provided*, such application is not signed by such district attorney.

*§§ 551*a*–551*d*.

§ 550. **Publication of notice.** Unless dispensed with by the governor, a copy of the notice must also be published, for thirty days from the first publication, in the territorial paper, and a paper in the county in which the conviction was had, nearest the place of conviction.

*§§ 551*a*–551*d*.

§ 551. **Papers filed with secretary.** When the governor grants a reprieve, commutation, or pardon, he must, within ten days thereafter, file all the papers presented to him in relation thereto in the office of the secretary of the territory, by whom they must be kept as records, open to public inspection.

*§ 551*a*. **Applications for pardons.** All applications for pardons on behalf of any person or persons convicted in any court in this territory of any crime punishable under the laws thereof by imprisonment in the territorial prison, and sentenced to such imprisonment, shall be made and conducted in the manner hereinafter prescribed. (*Sess. Laws* 1883, *c.* 88, § 1.)

*§ 551*b*. **Method of making application.** Notice of the application for such pardon shall be given to the judge who presided at the trial, or his successor in office, and to the district attorney, or his successor in office, of the district, who prosecuted the indictment against such person or persons so convicted and sentenced, at least thirty days before such application shall be filed with the governor. The service of such notice upon the judge and district attorney, aforesaid, shall be made and the return thereof certified in the same manner as now provided for the service of summons in the district court, and such certificate of service shall accompany every such application to the governor. A notice of such application, setting forth the name of the person or persons on whose behalf it is made, the crime of which he shall have been convicted, the time of such conviction, and the term of imprisonment, shall also be published at least once each week for four successive weeks in some newspaper of general circulation in the county where the offense, for which pardon is sought, was committed, or if there be no newspaper published therein then such notice shall be posted in a conspicuous place, on the door of the court-house of such county, for four successive weeks prior to the application. The affidavit of the publisher of such paper, or the person posting such notice, shall also accompany such application, showing that such notice has been published or posted as herein provided. (*Id.* § 2.)

*§ 551*c*. **Contest of application.** Any person or persons feeling aggrieved by the application for any pardon may contest the same, and for that purpose may appear in person before the governor during the consideration of said application, and show cause, by written or oral testimony, why such pardon should not be granted. (*Id.* § 3.)

*§ 551*d*. **Governor may make rules.** The governor may in his discretion make such additional rules and regulations governing applications for pardons as may from time to time seem to him best, not in conflict with the provisions of this act; but the provisions of this act shall not apply to the applications for pardon to be granted within thirty days before the time when the convict would otherwise be legally entitled to discharge. (*Id.* § 4.)

CHAPTER IX.

OF BAIL.

§ 552. **Must be admitted, when.** Bail, by sufficient sureties, shall be admitted upon all arrests in criminal cases where the offense is not punishable by death, and in such cases it may be taken by any of the persons or courts authorized by law to arrest and imprison offenders.

§ 553. **May, when.** Bail, by sufficient sureties, may be admitted upon all arrests in criminal cases where the punishment may be death, unless the proof is evident or the presumption great; but in such cases it shall be taken only by the supreme court or a district court, or by a justice or judge thereof, who shall exercise their discretion therein, having regard to the nature and circumstances of the offense, and of the evidence, and to the usages of law.

§ 554. **After conviction—classed.** After conviction of an offense not punishable with death, a defendant who sues out a writ of error for the revision of a judgment may be admitted to bail:

1. As a matter of right when the writ of error is from a judgment imposing a fine only.
2. As a matter of discretion in all other cases.

§ 555. **Qualification and justification.** The qualifications of bail are the same as those in civil cases, and the sureties must in all cases justify by affidavits, taken before the magistrate, court, or judge, that they each possess those qualifications.

§ 556. **Discharge of defendant.** Upon the allowance of bail, and the execution of the requisite recognizance, bond, or undertaking to the territory, the magistrate, judge, or court must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged.

§ 557. **Deposit for bail.** A deposit of the sum of money mentioned in the order admitting to bail, is equivalent to bail, and upon such deposit the defendant must be discharged from custody.

§ 558. **Arrest by bail.** Any party charged with a criminal offense and admitted to bail, may be arrested by his bail at any time before they are finally discharged, and at any place within the territory; or by a written authority indorsed on a certified copy of the recognizance, bond, or undertaking, may empower any officer or person of suitable age and discretion to do so, and he may be surrendered and delivered to the proper sheriff or other officer, before any court, judge, or magistrate having the proper jurisdiction in the case, and

at the request of such bail, the court, judge, or magistrate shall recommit the party so arrested to the custody of the sheriff or other officer, and indorse on the recognizance, bond, or undertaking, or certified copy thereof, after notice to the district attorney, and if no cause to the contrary appear, the discharge and exoneration of such bail, and the party so committed shall therefrom be held in custody until discharged by due course of law.

§ 559. **Forfeit—excuse.** If, without sufficient excuse, the defendant neglects to appear according to the terms or conditions of the recognizance, bond, or undertaking, either for hearing, arraignment, trial, or judgment, or upon any other occasion when his presence in court, or before the magistrate, may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the recognizance, bond, or undertaking of bail, or the money deposited instead of bail, as the case may be, is and shall be thereupon declared forfeited. But if, at any time before the final adjournment of the court, the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture to be discharged upon such terms as may be just. After the forfeiture the district attorney must proceed with all due diligence, by action against the bail upon the instrument so forfeited. If money deposited instead of bail be so forfeited, the clerk of the court or other officer, with whom it is deposited, must, immediately after the final adjournment of the court, pay over the money deposited to the county treasurer.

§ 560. **Additional security.** When proof is made to any court, judge, or other magistrate, having authority to commit on criminal charges, that a person previously admitted to bail on any such charge is about to abscond, or that his bail is insufficient, or has removed from the territory, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison, and an order for his arrest may be indorsed on the former committment, or a new warrant therefor may be issued by such judge or magistrate, setting forth the cause thereof.

CHAPTER X.

OF SEARCH-WARRANTS.

§ 561. **Search-warrant defined.** A search warrant is an order in writing, in the name of the territory, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

§ 562. **Grounds for its issue.** It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be.

2. When it was used as the means of committing a felony, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or of any other person in whose possession it may be.

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, or from a house or other place occupied by him, or under his control, or from the possession of the person to whom he may have so delivered it.

§ 563. **Probable cause.** A search-warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

§ 564. **Issued on sworn complaint.** The magistrate must, before issuing the warrant, take, on oath, the complaint of the prosecuting witness in writing, which must set forth the facts tending to establish the grounds of *whereof is punishment by imprisonment in the territorial prison, shall be* the application, or probable cause for believing that they exist.

§ 565. **Requisites of warrant.** If the magistrate be thereupon satisfied of the existence of grounds of the application, or that there is probable cause to believe their existence, he must issue a search-warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate, and also to arrest the person in whose possession the same may be found, to be dealt with according to law.

§ 566. **Form of warrant.** The warrant must be in substantially the following form:

County of ———.

In the name of the territory of Dakota. To any sheriff, constable, marshal, or policeman in the county of ———:

Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken,) the (stating the particular grounds of the application according to section five hundred and sixty-two, or if the affidavit be not positive,) that there is probable cause for believing that (stating the grounds of the application in the same manner.)

You are therefore commanded, in the day-time, (or "at any time of the day or night," as the case may be, according to section five hundred and seventy,) to make immediate search on the person of C. D., (or "in the house situated," describing it, or any other place to be searched, with reasonable particularity, as the case may be,) for the following property, (describing it with reasonable particularity,) and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place.)

Dated at ———, the ——— day of ———, 18—.

E. F., Justice of the Peace of the city (or town) of (or as the case may be.)

§ 567. **By whom served.** A search-warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer, on his requiring it, he being present and acting in its execution.

§ 568. **Officer may break door.** The officer may break open an outer or inner door, or window of a house, or any part of the house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

§ 569. **Same.** He may break open any outer or inner door, or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

§ 570. **Served in night, when.** The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavits be positive that the property is on the person or in the place to be searched; in which case he may insert a direction that it be served at any time of the day or night.

§ 571. **Void after ten days.** A search-warrant must be executed and returned to the magistrate by whom it was issued within ten days. After the expiration of these times respectively, the warrant, unless executed, is void.

§ 572. **Property, how disposed of.** When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in sections five hundred and forty to five hundred and forty-three, both inclusive. If it were taken on a warrant issued on the grounds stated in the second and third subdivisions of section five hundred and sixty-two, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense, in respect to which the property was taken, is triable.

§ 573. **Return of warrant.** The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly, or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they be present, verified by the affidavit of the officer, and taken before the magistrate, to the following effect:

I, A. B., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

§ 574. **Copy of inventory.** The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

§ 575. **Complaint controverted.** If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto.

§ 576. **Testimony—how taken.** The testimony given by each witness must be reduced to writing, and authenticated in the manner prescribed in sections one hundred and forty-three and one hundred and forty-five.

§ 577. **Property to be restored.** If it appear that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

§ 578. **Depositions returned.** The magistrate must annex together the depositions, the search-warrant, and return, and the inventory, and then return them to the next district court of the county having power to inquire into the offense in respect to which the search-warrant was issued, by the intervention of a grand jury, at or before its opening on the first day.

§ 579. **Without cause.** A person who maliciously, and without probable cause, procures a search-warrant to be issued and executed, is guilty of a misdemeanor.

§ 580. **Officer exceeding authority.** A peace officer, in executing a search-warrant, who willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

§ 581. **Searching defendant by magistrate.** When a person charged with a felony is supposed by the magistrate before whom he is brought to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or the order of the court in which the defendant may be tried.

CHAPTER XI.

PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

§ 582. **Governor may offer reward.** The governor may offer a reward not exceeding one thousand dollars, payable out of the territorial treasury, for the apprehension:

1. Of any convict who has escaped from the territorial prison; or,
2. Of any person who has committed, or is charged with the commission of, an offense punishable with death.

§ 583. **Delivery on requisition.** A person charged in any state or territory of the United States with treason, felony, or other crime, who shall flee from justice, and be found in this territory, must, on demand of the executive authority of the state or territory from which he fled, be delivered up by the governor of this territory, to be removed to the state or territory having jurisdiction of the crime.

§ 584. **Magistrate to issue warrant.** A magistrate may issue a warrant for the apprehension of a person so charged, who shall flee from justice, and be found within this territory.

§ 585. **Proceedings.** The proceedings for the arrest and commitment of a person charged, are in all respects similar to those provided in this Code for the arrest and commitment of a person charged with a public offense committed in this territory. Except that an exemplified copy of an indictment found, or other judicial proceedings had, against him in the state or territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

§ 586. **Committed for reasonable time.** If, from the examination, it appear the person charged has committed the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody for a time specified in the warrant, which the magistrate deems reasonable, to enable the arrest of the fugitive under the warrant of the executive of this territory, on the requisition of the executive authority of the state or territory in which he committed the offense, unless he give bail, as provided in the next section, or until he be legally discharged.

§ 587. **Admission to bail.** The magistrate may admit the person arrested to bail by an undertaking, with sufficient sureties, and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to be arrested upon the warrant of the governor of this territory.

§ 588. **Notice to district attorney.** Immediately upon the arrest of the person charged, the magistrate must give notice to the district attorney.

§ 589. **Duty of district attorney.** The district attorney must immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney or presiding judge of the criminal court of the city or county therein, having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

§ 590. **Discharged, unless.** The person arrested must be discharged from custody or bail, unless, before the expiration of the time designated in the warrant or undertaking, he be arrested under the warrant of the governor of this territory.

§ 591. **Magistrate to return proceedings.** The magistrate must return his proceedings to the next district court of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged, and if he be in custody, or the time for his arrest have not elapsed, it may discharge him from detention, or may order his undertaking of bail to be canceled, or continue his detention for a longer time, or readmit him to bail, to appear and surrender himself within a time specified in the undertaking.

§ 592. **Accounts for foreign arrests.** When the governor shall demand from the executive authority of a state or territory of the United States, or of a foreign government, the surrender to the authorities of this territory of a fugitive from justice, the accounts of the person employed by him for that purpose must be paid out of the territorial treasury.

§ 593. **No compensation allowed.** No compensation, fee, or reward of any kind can be paid to or received by a public officer of this territory for a service rendered or expense incurred in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this territory, or detaining him herein, except as provided in section 592.

Penal Code Dak. § 106.

§ 594. **Misdemeanor.** A violation of the last section is a misdemeanor.

CHAPTER XII.

DISMISSAL OF THE ACTION BEFORE OR AFTER INDICTMENT FOR WANT OF PROSECUTION OR OTHERWISE.

§ 595. **No indictment.** When a person has been held to answer for a public offense, if an indictment is not found against him at the next term of the court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown.

§ 596. **When not brought to trial.** If a defendant, prosecuted for a public offense, whose trial has not been postponed upon his application, is not brought to trial at the next term of court in which the indictment is triable after it is found, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown.

§ 597. **Court may order continuance.** If the defendant is not prosecuted or tried, as provided in the last two sections, and sufficient reason therefor is shown, the court may order the action to be continued from term to term, and in the mean time may discharge the defendant from custody, on his own undertaking, or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

§ 598. **Action dismissed.** If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him.

§ 599. **Reasons for dismissal in order.** The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed; but in that case the reasons of the dismissal must be set forth in the order, which must be entered upon the minutes.

§ 600. **Nolle prosequi abolished.** The entry of a *nolle prosequi* is abolished, and the district attorney cannot discontinue or abandon a prosecution for a public offense, except as provided in the last section.

§ 601. **Dismissal not a bar.** An order for the dismissal of the action, as provided in this chapter, is not a bar to any other prosecution for the same offense.

CHAPTER XIII.

GENERAL PROVISIONS AND DEFINITIONS APPLICABLE TO THIS CODE.

§ 602. **Rule of construction.** The rule of common law that penal statutes are to be strictly construed, has no application to this Code. This Code establishes the law of this territory respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to promote its objects, and in furtherance of justice.

§ 603. **Code not retroactive.** No part of this Code is retroactive unless expressly so declared.

§ 604. **Construction of words.** Unless when otherwise provided, words used in this Code in the present tense include the future as well as the present. Words used in the masculine comprehend as well the feminine and neuter. The singular number includes the plural, and the plural the singular. And the word "person" includes a corporation as well as a natural person.

§ 605. **Writing.** The term "writing" includes printing.

§ 606. **Oath.** The term "oath" includes an affirmation.

§ 607. **What signature includes.** The term "signature" includes a mark when the person cannot write, his name being written near it, and the mark being witnessed by a person who writes his own name as a witness, except to an affidavit or deposition, or a paper executed before a judicial officer, in which case the attestation of the officer is sufficient.

§ 608. **To what Code applies.** This Code applies to criminal actions, and to all other proceedings in criminal cases which are herein provided for, from the time when it takes effect.

§ 609. **Effect upon actions commenced.** All modes of procedure in criminal actions heretofore enacted in this territory, having relation to any matters herein provided for, shall, upon the taking effect of this Code, be entirely abrogated, and from thence abolished: *provided, however*, that all proceedings of every kind or character whatsoever, commenced before the taking effect of this Code, shall not, by reason of anything in this Code contained, be deemed to have abated: *provided*, that this Code shall not be construed as repealing the procedure in justices' courts in cases in which they have lawful original jurisdiction: *and provided further*, that this Code shall not be construed as repealing an act entitled "An act respecting grand and petit jurors of the district courts," approved December 24, 1867.

§ 610. **Common law when Code silent.** That from and after the taking effect of this act, the procedure, practice, and pleadings in the district courts of this territory, in criminal actions, or in matters of a criminal nature, not specifically provided for in this Code, shall be in accordance with the procedure, practice, and pleadings of the common law, and assimilated, as near as may be, with the procedure, practice, and pleadings of the United States or federal side of said courts.

§ 611. **When to take effect.** This act shall take effect at noon on the tenth day of March, A. D. one thousand eight hundred and seventy-five.

Approved January 15, 1875.

NOTE. The foregoing Code is printed as amended by the act approved February 16, 1877, in sections 9, 19, 402, 422, 426, and 552 to 560, both inclusive; also by inserting the words "Territory of Dakota" in place of the "people of this territory," or the like corresponding phrases.

CHAPTER XIV.

JAILS.

An Act for the Regulation of County Jails. [Chapter XLVIII. Laws of 1862.]

§ 612. **Judges prescribe rules for jails.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* The judges of the district courts of the several judical districts of this territory, shall from time to time, as they may deem necessary, prescribe, in writing, rules for the regulation and government of the jails in the several counties within their respective districts, upon the following subjects:

1. The cleanliness of the prisoners.
2. The classification of prisoners in regard to sex, age, and crime, and also persons insane, idiots, and lunatics.
3. Beds and clothing.
4. Warming, lighting, and ventilation of the prison.
5. The employment of medical and surgical aid when necessary.
6. Employment, temperance, and instruction of the prisoners.
7. The supplying of each prisoner with a Bible.
8. The intercourse between prisoners and their counsel and other persons.
9. The punishment of prisoners for violation of the rules of the prison.

10. Such other regulations as said judges may deem necessary to promote the welfare of said prisoners: *provided*, that such rules shall not be contrary to the laws of this territory.

§ 613. **How promulgated and preserved.** The said judges shall, as soon as necessary, cause a copy of said rules to be delivered to the county commissioners in the several counties in their respective judicial districts; and it shall be the duty of said commissioner forthwith to cause the same to be printed, and to furnish the sheriff of their county with a copy of said rules, for each and every room or cell of said jail, and also to forward a copy of said rules to the secretary of the territory, who may file away and preserve the same.

§ 614. **Duty of sheriff.** The sheriff shall, on the receipt of said rules, cause a copy thereof to be posted up and continued in some conspicuous place in each and every room or cell of said jail.

§ 615. **Judges may amend rules.** The judges aforesaid may, from time to time, as they may deem necessary, revise, alter, or amend said rules, and such revised rules as shall be printed and disposed of by said commissioners and sheriff, in the same manner as is directed by sections six hundred and thirteen and six hundred and fourteen of this act.

§ 616. **Sheriff has charge of jail.** The sheriff, or, in case of his death, removal, or disability, the person by law appointed to supply his place, shall have charge of the county jail of his proper county, and of all persons by law confined therein, and such sheriff or other officer is hereby required to conform, in all respects, to the rules and directions of said district judge above specified, or which may from time to time, by said judge, be made and communicated to him by said commissioners.

§ 617. **Sheriff to keep jail register.** The sheriff or other officers performing the duties of sheriff of each county in this territory, shall, as soon as necessary after the passage of this act, procure, at the expense of the proper county, a suitable book, to be called the jail register, in which the said sheriff, by himself or his jailer, shall enter:

1. The name of each prisoner, with the date and cause of his or her commitment.
2. The date or manner of his or her discharge.
3. What sickness, if any, has prevailed in the jail during the year, and, if known, what were the causes of such disease.
4. Whether any or what labor has been performed by the prisoners, and the value thereof.
5. The practice observed during the year of whitewashing and cleaning the occupied cells or apartments, and the times and seasons of so doing.

6. The habits of the prisoners as to personal cleanliness, diet, and order.

7. The means furnished prisoners of literary, moral, and religious instruction, and of labor.

8. All other matters required by said rules, or in the discretion of such sheriff deemed proper; that the said sheriff or other officers performing the duties of sheriff shall carefully keep and preserve the said jail register, in the office of the jailer of his proper county, and at the expiration of said office shall deliver the same to his successor in office.

§ 618. **Sheriff to make jail report.** The sheriff, or other officer performing the duties of sheriff, shall, on or before the first Monday of November in each year, make out in writing, from said jail register, a jail report, one copy of which said report he shall forwith file in the office of the clerk of the district court of the proper district, one copy with the county clerk of his county, for the use of the commissioners thereof, and one copy of said report he shall transmit to the secretary of the territory, and it shall be the duty of the secretary of the territory to communicate the reports of the several sheriffs of this territory to the legislative assembly, on or before the tenth day of its session annually.

§ 619. **Charge to grand jury.** It shall be the duty of the district court to give this act in charge of the grand jury once each term of said court, and lay before them any and all rules, plans, and regulations, established by the district judge, relating to county jails and prison discipline, which shall then be in force.

§ 620. **Grand jury visit jail and report.** That the grand jury of each county in this territory shall, once at each term of the district court, while in attendance, visit the jail, examine its state and condition; examine and inquire into the discipline and treatment of prisoners, their habits, diet, and accommodations; and it shall be their duty to report to said court, in writing, whether the rules of the said district judge have been faithfully kept and observed, or whether any of the provisions of this act have been violated. It shall also be the duty of the county commissioners of each county of this territory to visit the jail of their county once during each of their regular meetings of each year.

§ 621. **Duty of county board in relation to jails.** It shall be the duty of the county commissioners, at the expense of their respective counties, to provide suitable means for warming the jail, and its cells or apartments, beds and bedding, night buckets, and such other permanent fixtures and repairs as may be prescribed by the said district judge; said commissioners shall also have power to appoint a physician to the jail when they may deem it necessary, and pay him such annual or other salary as they may think reason-

able and proper, which salary shall be drawn out of the county treasury; and said medical officer, or any physician or surgeon, who may be employed in the jail, shall make a report in writing whenever required by said commissioner, district judge, or grand jury.

§ 622. **Sheriff provides board and necessaries.** It shall be the duty of the sheriff of each county to provide—*First*, [fuel,] bed-clothing, washing, nursing, when required, and board generally, and all necessaries for the comfort and welfare of said prisoners, as the said judge by his said rules shall designate, for all persons confined by law, and he shall be allowed such compensation for services required by the provisions of this act as may be prescribed by the county commissioners of their respective counties.

§ 623. **Sheriff to visit jail, when.** The sheriff shall visit the jail in person, and examine into the condition of each prisoner, at least once each month, and once during each term of the district court; and it is hereby made his duty to cause all the cells and rooms used for the confinement of prisoners to be thoroughly whitewashed at least three times in each year.

§ 624. **Jailer to be deputy sheriff.** The jailer or keeper of the jail shall, unless the sheriff elect to act as jailer in person, be a deputy appointed by the sheriff, and such jailer shall take the necessary oaths before entering upon the duties of his office: *provided*, the sheriff shall, in all cases, be liable for the negligence and misconduct of the jailer as of other deputies.

§ 625. **If sheriff or jailer refuse—penalty.** If the sheriff or jailer having in charge any county jail shall neglect or refuse to conform to all or either of the rules and regulations established by said judge, or to any other duty or duties required of him by this act, he shall, on conviction thereof by indictment, for each case of such failure or neglect of duty as aforesaid, pay into the county treasury of the proper county, for the use of such county, a fine not less than ten dollars, nor more than one hundred dollars, to be assessed by the district court of the proper district.

§ 626. **Effect.** This act shall take effect and be in force from and after its passage.

Approved May 8, 1862.

CHAPTER XV.

PRISONS AND IMPRISONMENT FOR OFFENSES.

[Chapter XXXIII. Laws of 1862-63.]

§ 627. **Common jails used as prisons.** The common jails now erected, or which shall hereafter be erected, in the several counties in the charge of the respective sheriffs, shall be used as prisons:

1. For the detention of persons charged with offenses, and duly committed for trial.

2. For the detention of persons who may be duly committed to secure their attendance as witnesses on the trial of any criminal cause.

3. For the confinement of persons pursuant to a sentence, upon a conviction for an offense, and of all other persons duly committed for any cause authorized by law.

4. For the confinement of persons who may be sentenced to imprisonment in the territorial prison, until a suitable prison shall be provided.

§ 628. **When no jail in county.** Whenever there is no jail erected in any county, every judicial or executive officer of such county who shall have power to order, sentence, or deliver any person to the county jail may order, sentence, or deliver such person to the jail of any adjoining county; and if there is no jail erected in any adjoining county, then to either of the forts or garrisons in the territory, with the consent of the commanding officer of the same; and the jailer of any such adjoining county shall receive and keep such prisoner in the same manner as if he had been ordered, sentenced, or delivered to him by any officer or court of his own county. The county from which such prisoner was taken, shall pay all the expenses of keeping and maintaining him in said jail.

§ 629. **Expenses of—how paid—limitation.** All charges and expenses for safe-keeping and maintaining convicts who have been sentenced to confinement in the territorial prison shall be paid out of the treasury of the territory yearly, the accounts of the keeper being first allowed by the board of county commissioners of the county where the convict shall be confined; and the expenses of safe-keeping and maintaining persons charged with offenses, and duly committed for trial, and of those who are sentenced to confinement in the county jail, or who may be committed for the non-payment of any fine, shall be paid out of the treasury of the county; the account of the keeper being in like manner allowed by the board of county commissioners: *Provided*, that the territory, nor any county, shall ever pay more than

two and a half dollars a week for the support of any person as aforesaid.

§ 630. **Commissioners inspectors of prisons.** The county commissioners in the several counties shall be inspectors of the prisons in their respective counties, and shall visit them at least once in each year, and shall examine fully into the condition of such prison, as to health, cleanliness, and discipline; and the keeper thereof shall lay before them a calendar setting forth the name, age, and cause of committal of each prisoner; and if it shall appear to the said inspectors that any of the provisions of law have been violated or neglected, they shall forthwith give notice to the district attorney of the county.

§ 631. **No liquor to prisoners.** No sheriff, jailer, or keeper of any prison, shall, under any pretense, give, sell, or deliver to any person committed to any prison, for any cause whatever, any spirituous liquor, or any mixed liquor, part of which is spirituous, or any wine, cider, or strong beer, unless a physician shall certify in writing that the health of such prisoner requires it, in which case he may be allowed the quantity prescribed, and no more. And no sheriff, jailer, or keeper, as aforesaid, shall put up, or keep in the same room, male and female prisoners together.

§ 632. **Penalty—sexes separate.** If any sheriff, jailer, or keeper of any prison, shall sell or deliver to any prisoner in his custody, or shall willingly or negligently suffer any such prisoner to have any liquor, prohibited in section six hundred and thirty-one of this chapter, or shall place or keep together prisoners of different sexes, contrary to the provisions of said section six hundred and thirty-one, he shall in each case forfeit and pay for the first offense the sum of twenty-five dollars, and such officer shall, on a second conviction, be further sentenced to be incapable of holding the office of sheriff, deputy-sheriff, jailer, or keeper of any prison, for the term of five years.

§ 633. **Liquor by other persons.** If any person, other than is mentioned in the preceding section, shall sell or deliver to any person committed for any cause whatever, any liquor, prohibited in this chapter, or shall have in his possession, in the precincts of any prison, any such liquor, with intent to carry or deliver the same to any prisoner confined therein, he shall be punished by fine not exceeding fifteen dollars.

§ 634. **Prison kept cleanly.** The keeper of such prison shall see that the same is constantly kept in a cleanly and healthful condition, and shall see that strict attention is constantly paid in the personal cleanliness of all the prisoners in his custody, as far as may be, and shall cause the shirt of each prisoner to be washed at least once in each week. Each prisoner shall be furnished daily with as much clean water as he shall have occasion for, either for drink or

for the purpose of personal cleanliness, and with a clean towel once a week, and shall be served three times each day with wholesome food, which shall be well cooked and in sufficient quantity.

§ 635. **Bible furnished each prisoner.** The keeper of each prison shall provide, at the expense of the county, for each prisoner under his charge, who may be able and desirous to read, a copy of the Bible, or New Testament, to be used by such prisoner at proper seasons during his confinement, and any minister of the gospel, disposed to aid in reforming the prisoners, and instructing them in their moral and religious duties, shall have access to them at seasonable and proper times.

§ 636. **Calendar of all persons committed—contents.** The sheriffs of the respective counties shall keep a true and exact calendar or register of all persons committed to any prison under their care, and the same shall be kept in a book, to be provided by the county for that purpose. Said calendar shall contain the names of all persons who shall be committed to prison, the places of abode, the time of their commitment; shall state the cause of their commitment, and the authority that committed them, and if they are committed for criminal offenses, shall contain a description of their persons; and when any prisoner shall be liberated, said calendar shall state the time when and the authority by which such liberation took place; and if any prisoner escapes shall also state particularly the time and manner of said escape.

§ 637. **Sheriff to furnish court with copy of calendar.** At the opening of each session of the district court, within his county, the sheriff shall return a copy of said calendar, under his hand, to the judge holding said court; and if any sheriff shall neglect or refuse so to do, he shall be punished by fine not exceeding three hunred dollars.

§ 638. **Jails—how constructed.** In the jails erected, or which shall be hereafter erected, in this territory, there shall be provided sufficient and convenient apartments for confining prisoners not criminal separate from felons and other criminals, and also for confining persons of different sexes separate and apart from each other.

§ 639. **Solitary imprisonment.** Whenever any person shall be duly sentenced to solitary imprisonment and confinement at hard labor in the territorial prison, or either of them, the sheriff of the proper county is required to execute such sentence of solitary imprisonment until a suitable territorial prison shall be provided, by confining such convict in one of the cells of the jail, or if there be no such cell, then in the most retired and solitary part of the jail, and during the time of such solitary imprisonment the convict shall be fed with bread and water only, unless other food shall be necessary for the preservation of his health; and no intercourse shall be allowed

with such convict during such confinement, except for the conveyance of food and other necessary purposes.

§ 640. **Imprisonment at hard labor.** Whenever any person shall be confined in any jail pursuant to the sentence of any court, if such sentence or any part thereof shall be that he be confined at hard labor, the sheriff of the county in which such person shall be confined, shall furnish such convict with suitable tools and materials to work with, if, in the opinion of the said sheriff, the said convict can be profitably employed, either in the jail or yard thereof, and the expense of said tools and materials shall be defrayed by the county in which said convict shall be confined, and said county shall be entitled to his earnings. And the said sheriff, if in his opinion the said convict can be more profitably employed outside of said jail or yard, either for the county or for any municipality in said county, it shall be his duty to so employ said convict either in work on public streets, or highways, or otherwise, and in so doing he shall take all necessary precaution to prevent said convict's escape, by ball and chain, or otherwise, and fifty per cent. of the profits of such employment, after paying all expenses incident thereto, may be retained by said sheriff as his fees therefor, the balance to be paid into the treasury of the proper county, to the credit of the general fund; and when a convict is imprisoned in the county jail for non-payment of a fine, he may be employed by said sheriff as provided in this act, or as provided in said section six hundred and forty; and in case any convict employed outside of the jail-yard shall escape, he shall be deemed as having escaped from the jail proper. (*Sess. Laws 1879, c. 36, § 1.*)

Court may sentence to hard labor. *§ 19*a*.

*§ 640*a*. **When marshal shall superintend labor.** When the imprisonment is pursuant to the judgment of any court, police court, police magistrate of an incorporated city or town, for the violation of any ordinance, by-law, or other regulation, the marshal shall superintend the performance of the labor herein contemplated, and shall furnish the tools and materials, if necessary, at the expense of the city or town requiring the labor, and such city or town shal be entitled to the earnings of its convicts. (*Id.* § 3.)

*§ 640*b*. **Officer may punish convict for cause.** The officer having charge of any convict for the purpose specified in this chapter may use such means as, and no more than, are necessary to prevent escape; and if any convict attempt to escape, either while going from or returning to the jail, or while at labor, or at any time, or if he refuse to labor, the officer having him in charge, after due inquiry, may, to secure such person or to cause him to labor, use the means authorized by section eight of this act: *provided*, such punishment shall all be inflicted within the jail or jail inclosure for refusal to work, and shall not be considered as any part of the time for which the prisoner is sentenced. (*Id.* § 4.)

*§ 640*c*. **Convict's credit for labor.** For every day's labor performed by any convict under the provisions thereof, there shall be credited on any judgment for fine and costs against him the sum of two dollars. (*Id.* § 5.)

Abuse of convict. Penal Code Dak. § 765*a*.

*§ 640*d*. **Punishment of convict for disorderly conduct.** If any person, confined in any jail upon a conviction or charge of any offense, is refractory or disorderly, or if he willfully destroy or injure any article of bedding or other furniture, door or window, or any other part of such prison, the sheriff of the county, after due inquiry, may chain and secure such person, or cause him to be kept in solitary confinement not more than three days for any one offense; and during such solitary confinement he may be fed with bread and water only, unless other food is necessary for the preservation of his health. (*Sess. Laws* 1879, *c.* 36, § 8.)

§ 641. **Keeper order solitary confinement.** Whenever any person committed to prison for any cause whatever shall be unruly, or shall disobey any of the regulations established for the management of prisons, the sheriff or keeper may order such prisoner to ke kept in solitary confinement and fed on bread and water only, as is provided in section six hundred and thirty-nine of this chapter, for a period not exceeding twenty days for each offense.

§ 642. **Bedding, fuel, etc.** The keeper of each prison shall furnish necessary bedding, clothing, and fuel, and medical aid for all prisoners who shall be in his custody, and shall be paid therefor according to the provisions of section six hundred and twenty-nine of this chapter, and such payment shall be deducted from the sum he is entitled to receive for the weekly support of the prisoner, according to the provisions of section six hundred and twenty-nine.

§ 643. **Penalty for breaking prison.** If any person who may be in any prison, under sentence of imprisonment in the territorial prison, shall break the prison and escape, he shall be punished by imprisonment in the territorial prison for the term of one year, in addition to the unexpired term for which he was originally sentenced.

See Penal Code Dak. *§ 139*a*, § 141.

§ 644. **Same for person not convicted.** If any person who may be imprisoned pursuant to a sentence of imprisonment in the county jail, or any person who shall be committed for the purpose of detaining him for trial, for any offense not capital, shall break prison and escape, he shall be imprisoned in the county jail for the term of six months.

§ 645. **Same committed for capital offense.** If any person who shall be committed to prison, for the purpose of detaining him for trial for a capital offense, shall break prison and escape, he shall be imprisoned in the territorial prison for the term of two years.

§ 646. **Prisoners in case of fire.** If any prison, or any building thereto, shall be on fire, and the prisoners shall be exposed to danger by such fire, the keeper may remove such prisoners to a place of safety, and there confine them so long as may be necessary to avoid such danger, and such removal and confinement shall not be deemed an escape of such prisoners.

§ 647. **Held for fines and costs.** When any poor convict shall have been confined in any prison for the space of six months, for the non-payment of fines and costs only, or either of them, the sheriff of the county in which such person shall be imprisoned, shall make a report thereof to any two justices of the peace for such county. If required by such justices, the said keeper shall bring such convict before them, either at the prison or at such other convenient place thereto as they shall direct. The said justices shall proceed to inquire into the truth of said report, and if they shall be satisfied that such report is true, and the convict has not had, since his conviction, any estate, real or personal, with which he could have paid the sum for the non-payment of which he was committed, they shall make a certificate thereof to the sheriff of the county, and direct him to discharge such convict from prison, and the sheriff shall forthwith discharge him.

§ 648. **Sheriff to receive prisoners.** All sheriffs, jailers, prison-keepers, and their, and each and every of all their, deputies, within this territory, to whom any person or persons shall be sent or committed, by virtue of legal process, issued by or under the authority of the United States, shall be and they are hereby enjoined and required to receive such persons into custody, and to keep them safely until they be discharged by due course of the laws of the United States; and all such sheriffs, jailers, prison-keepers, and their deputies, offending in the premises, shall be liable to the same pains and penalties, and the parties aggrieved shall be entitled to the same remedies against them, or any of them, as if such prisoners had been committed to their custody by virtue of legal process issued under the authority of this territory.

§ 649. **Pay for keeping same.** The United States shall be liable to pay, for the support and keeping of said prisoners, the same charges and allowances as are allowed for the support and keeping of prisoners committed under authority of this territory.

§ 650. **Calendar of same.** Before every stated term of the United States court to be held within this territory, the said sheriffs, jailers, and prison-keepers shall make out, under oath, a calendar of prisoners in their custody, under the authority of the United States, with the date of their commitment, by whom committed, and for what offense, and transmit the same to the judge of the district court of the United States for this district, and at the end of every six months they shall transmit to the United States marshal of this territory for allowance and payment of their account, if any, against the United States, for the support and keeping of such prisoners aforesaid.

§ 651. **Prisons required in every county.** That there shall be established and kept in every county, by authority of the

board of county commissioners, and at the expense of the county, a prison for the safe-keeping of prisoners lawfully committed.

§ 652. **Grand juries to examine prisons.** That the grand jury, at each term of the district court, shall make personal inspection of the condition of the county prison, as to the sufficiency of the same for the safe-keeping of prisoners, their convenient accommodation and health, and shall inquire into the manner in which the same has been kept since the last term; and the court shall give this duty in special charge to such grand jury, and it shall be imperative upon the board of county commissioners to issue the necessary orders, or cause to be made the necessary repairs, in accordance with the complaint or recommendation of the grand jury.

§ 653. **Sheriffs or deputies keep jail.** The sheriff of the county, by himself or deputy, shall keep the jail, and shall be responsible for the manner in which the same is kept. He shall keep separate rooms for the sexes, except where they are lawfully married; he shall provide proper meat, drink, and fuel for prisoners.

§ 654. **Keeping paid by county.** Whenever a prisoner is committed for crime, or in any suit in behalf of the territory, the county board shall allow the sheriff his reasonable charge for supplying such prisoner.

§ 655. **Sheriff's authority.** When a prisoner is confined by virtue of any process directed to the sheriff, and which shall require to be returned to the court whence it issued, such sheriff shall keep a copy of the same, together with his returns made thereon, which copy, duly certified by such sheriff, shall be *prima facie* evidence of his right to retain such prisoner in custody.

§ 656. **Commitments filed by sheriff.** All instruments of every kind, or attested copies thereof, by which a prisoner is committed or liberated, shall be regularly indorsed and filed, and safely kept in a suitable box by such sheriff, or by his deputy, acting as a jailer.

§ 657. **Deliver to successor.** Such box, with its contents, shall be delivered to the successor of the officer having charge of the prison.

§ 658. **Jail of another county.** When there is no sufficient prison in any county wherein any criminal offense shall have been committed, any judge of the district court of such county, upon application of the sheriff, may order any person charged with a criminal offense, and ordered to be committed to prison, to be sent to the jail of the county nearest having a sufficient jail, and the sheriff of such nearest county shall, on exhibit of such judge's order, receive and keep in custody, in the jail of his county, the prisoner ordered to be committed as aforesaid, at the expense of the county from which said prisoner was sent, and the said sheriff shall, upon the order of

the district court, or a judge thereof, redeliver such prisoner when demanded.

§ 659. **Fugitive in any county jail.** Any county jail may be used for the safe-keeping of any fugitive from justice or labor in this territory, in accordance with the provisions of any act of congress, and the jailer shall, in this case, be entitled to reasonable compensation for the support and custody of such fugitive from the officer having him in custody.

§ 660. **Juvenile prisoners.** Juvenile prisoners shall be treated with humanity, and in a manner calculated to promote their reformation. They shall be kept, if the jail will admit of it, in apartments separate from those containing more experienced and hardened criminals. The visits of parents, guardians, and friends who desire to exert a moral influence over them, shall at all reasonable times be permitted.

§ 661. **Conflicting acts repealed.** All acts or part of acts inconsistent with this act are hereby repealed.

§ 662. **Effect.** This act shall take effect from and after its passage and approval.

Approved January 9, 1863.

CHAPTER XVI.

CONVICTS.

An Act to Provide for the Custody of Convicts. [Chapter IX. Laws of 1870–71.]

§ 663. **Governor authorized to contract.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* That the governor is authorized, and it is hereby made his duty, to enter into a contract with the proper authorities of the state of Iowa to keep and maintain any convict or convicts now under conviction, or that may hereafter be convicted and sentenced by any of the district courts of this territory, for violation of the laws thereof, during the time for which said convict or convicts may have been sentenced by courts, or either of them, upon the terms most advantageous to the territory that he can obtain.

Territorial penitentiary. See Pol. Code Dak. Appendix, *c.* 53.

§ 664. **Prison for territory designated.** That the state prison or penitentiary located at Fort Madison, in the state of Iowa, shall be regarded and recognized as the territorial prison of the terri-

tory of Dakota, and all persons who are now or who may be hereafter under conviction for any offense against the laws of the territory of Dakota, the penalty whereof is punishment by imprisonment in the territorial prison, shall be sentenced to the state prison of the said state of Iowa, and such sentence shall be as legal in all respects as if such person or persons had been sentenced to a territorial prison within the limits of the territory of Dakota: *provided, however*, that the governor may, whenever the interests of the territory require it, annul and cancel the contract with the said state of Iowa, and enter into a new contract with the authorities of any other neighboring state to keep and maintain the convicts of this territory: *and provided further*, that should the said state of Iowa annul or cancel the said contract or agreement entered into with this territory, then in that case the governor is authorized, and it is hereby made his duty, to enter into a contract upon the most favorable terms possible with the authorities of some other neighboring state to keep and maintain the convicts from this territory; and in either case, when the governor shall contract with any other neighboring state to keep and maintain the convicts of this territory, it shall be his duty to immediately notify the auditor and the several judges of the district courts of this territory, of the nature of said contract, and the location of the prison of said state, and after receiving such notification it shall be lawful for the said district judges to sentence persons convicted in their several courts, when the punishment to be inflicted is imprisonment in the territorial prison, to the prison designated by the governor as the one located in the state with whom he has made such contract, and all the provisions of this act shall in such case apply as fully and completely to the sentence and transportation of convicts to such prison as it does by virtue of this act to the state prison of Iowa.

§ 665. **Sheriffs to convey convicts.** That the sheriff of each county within this territory shall, at the close of each term of the district court in such county, convey all persons who may have been convicted of offenses punishable by imprisonment in the territorial prison, and sentenced in accordance with the provisions of this act to the said state prison of the state of Iowa, and he shall receive from the territorial treasury for services in going to and returning from such prison, including all expenses by him incurred, at the rate of ten cents per mile for each and every mile actually and necessarily traveled in going to and returning from said prison: *provided, however*, that when more than one convict is taken at the same time, the sheriff shall receive, in addition to ten cents per mile, all necessary expenses incurred in the way of fare and hiring help for the safe conveyance of said extra convicts.

§ 666. **Penalty for violation.** Should any sheriff fail to take all convicts at the same time to the said prison which may have been

convicted at any one term of court as herein provided, or shall he knowingly demand or receive greater compensation than is expressly given herein by the preceding section, he shall be guilty of a misdemeanor, and upon conviction by any court having competent jurisdiction, shall be fined in any sum not less than twenty-five nor more than five hundred dollars for each offense.

§ 667. **Sheriff's report to auditor.** It shall be the duty of every sheriff who shall have conveyed any convict or convicts to the said prison at Fort Madison, or other prison designated by the governor in accordance with the provisions of section six hundred and sixty-four of this act, to immediately notify the auditor of the territory, in writing, of the exact date that said convict or convicts were received by the authorities of said prison, and a neglect of this duty by any sheriff of this territory shall render him liable, upon conviction before the district court wherein said sheriff shall reside, to a fine of not less than twenty-five nor more than two hundred dollars for each and every offense.

§ 668. **Accounts of sheriff to be audited.** It shall be the duty of the auditor to audit all accounts presented by the sheriffs of the different counties of this territory, for services rendered under the provisions of this act in conveying convicts to the state prison at Fort Madison, Iowa, or other prison designated by the governor as aforesaid, when verified by the affidavit of such sheriff that he actually and necessarily traveled the distance and rendered the services stated in his said account, and to draw a warrant on the territorial treasurer for the amount found due such sheriff for such services rendered.

§ 669. **Same for maintenance of convicts.** It shall be the duty of the auditor to audit all accounts presented by the authorities of the said state of Iowa, or other state designated by the governor as the one with whom he has contracted for keeping and maintaining the convicts of this territory, under such regulations as he may prescribe, and to draw his warrant or warrants on the territorial treasurer for the amount or amounts found due said state.

§ 670. **Effect.** This act shall take effect and be in force from and after its passage and approval.

Approved December 14, 1870.

Territorial penitentiary. See Pol. Code Dak. Appendix, *c.* 53.

CHAPTER XVII.

HABEAS CORPUS.

An Act Regulating the Proceedings on Habeas Corpus. [Chapter XLIV. Laws of 1862-63.]

§ 671. **Application for — issue and service of writ.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* If any person shall be committed or detained for any criminal or supposed criminal matter, it shall and may be lawful for him to apply to the supreme or district court, in term time, or any judge thereof in vacation, for a writ of *habeas corpus*, which application shall be in writing, and signed by the prisoner or some person on his behalf, setting forth the facts concerning his imprisonment, and in whose custody he is detained, and shall be accompanied by a copy of the warrant or warrants of commitment, or an affidavit that the said copy has been demanded of the person in whose custody the prisoner is detained, and by him refused or neglected to be given. The said court or judge to whom the said application shall be made shall forthwith award the said writ of *habeas corpus*, unless it shall appear from the petition itself, or from the document annexed, that the party can neither be discharged nor admitted to bail, nor in any other manner relieved, which said writ, if issued by the court, shall be under the seal of the court; if by a judge, under the hand of the judge, and shall be directed to the person in whose custody the prisoner is detained, and made returnable forthwith, to the intent that no officer, sheriff, jailer, keeper, or other person to whom such writ shall be directed, may pretend ignorance thereof. Every such writ shall be indorsed with these words, "by the *habeas corpus* act," and whenever the said writ shall by any person be served upon the sheriff, jailer, or keeper, or other person whatsoever, to whom the same shall be directed, or being brought to him, or being left with any of his under officers or deputies, at the jail or place where the prisoner is detained, he, or some of his under officers or deputies, shall, upon payment or tender of the charges of bringing said prisoner, to be ascertained by the court or judge awarding the said writ, and indorsed thereon, not exceeding fifteen cents per mile, and upon sufficient security given to pay the charges [for] carrying him back, if he shall be remanded, make return of such writ, and bring, or cause to be brought, the body of the prisoner before the court or judge who granted the writ, or in case of the adjournment of the said court, or absence of the judge, then before any of the judges aforesaid, and certify the true cause of his imprisonment, within three days thereafter, unless the commitment of such person be in a place beyond the distance of twenty miles from the place where the writ is returnable; if beyond the distance

of twenty miles, and not above one hundred miles, then within ten days, and if beyond the distance of one hundred miles, then within twenty days after the delivery of the writ as aforesaid, and not longer.

§ 672. **Person not criminally committed.** When any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his or her liberty, under any color or pretense whatever, he or she may apply for a writ of *habeas corpus* as aforesaid. Application shall be in writing, signed by the party or some person on his behalf, setting forth the facts concerning his or her imprisonment, and wherein the illegality of such imprisonment consists, and in whose custody he or she is detained; which application or petition shall be verified by the oath or affirmation of the party applying, or some other person on his or her behalf. If the confinement or restraint is by virtue of any judicial writ, or process or order, a copy thereof shall be annexed thereto, or an affidavit made that the same has been demanded and refused. The same proceedings shall thereupon be had in all respects as are directed in the preceding section.

§ 673. **Return of writ—hearing—causes for discharge.** Upon the return of the writ of *habeas corpus*, a day shall be set for the hearing of the cause of imprisonment or detainer, not exceeding five days thereafter, unless the prisoner shall request a longer time. The said prisoner may deny any of the material facts set forth in the return, or may allege any fact to show, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby material facts may be ascertained. The said court or judge shall proceed in a summary way to settle the said facts by hearing the testimony and arguments as well of all parties interested civilly, if any there be, as of the prisoner and the person who holds him in custody, and shall dispose of the prisoner as the case may require. If it appears that the prisoner is in custody by virtue of process from any court, legally constituted, he can be discharged only for some of the following causes:

1. When the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum, or person.

2. Where, though the original imprisonment was lawful, yet by some act, omission, or event, which has subsequently taken place, the party has become entitled to his discharge.

3. Where the process is defective in some substantial form required by law.

4. Where the process, though in proper form, has been issued in a case, or under circumstances where the laws do not allow process, or orders for imprisonment or arrest, to issue.

5. When, although in proper form, the process has been issued or executed by a person, either unauthorized to issue or execute the same, or where the person having the custody of the prisoner, under such process, is not the person empowered by law to detain him.

6. Where the process appears to have obtained by false pretense or bribery.

7. Where there is no general law, nor any judgment, order, or decree of a court, to authorize the process, if in a civil suit, nor any conviction, if in a criminal proceeding.

No court or judge, on the return of a *habeas corpus*, shall, in any other manner, inquire into the legality or justice of a judgment or decree of a court legally constituted. In all cases where the imprisonment is a criminal or supposed criminal matter, if it shall appear to the said court or judge that there is sufficient legal cause for the commitment of the prisoner, although such commitment may have been informally made, or without due authority, or the process may have been informally made, or without due authority, or the process may have been executed by a person not authorized, the court or judge shall make a new commitment in proper form, and directed to the proper officer, or admit the party to bail if the case be bailable.

§ 674. **Recognizance with security.** When any person shall be admitted to bail on *habeas corpus*, he shall enter into recognizance, with one or more securities, in such sum as the court or judge shall direct, having regard to the circumstances of the prisoner, and the nature of the offense, conditioned for his or her appearance at the next district court, to be holden in and for the county where the offense was committed, or where the same is to be tried. Where any court or judge shall admit to bail, or remand any prisoner brought before him or them on any writ of *habeas corpus*, it shall be the duty of the said court or judge to bind all such persons as do declare anything material to prove the offense with which the prisoner is charged, by recognizance, to appear at the proper court having cognizance of the offense, on the first day of the next term thereof, to give evidence touching the said offense, and not to depart the said court without leave, which recognizance, so taken, together with the recognizance entered into by the prisoner when he is admitted to bail, shall be certified and returned to the proper court, on the first day of the next succeeding term thereof. If any such witness shall neglect or refuse to enter into a recognizance, as aforesaid, when thereunto required, it shall be lawful for the court or judge to commit him to jail until he shall enter into such recognizance, or he be otherwise discharged by due course of law. If any judge shall refuse or neglect to bind any such witness or prisoner by recognizance, when taken as aforesaid, he shall be deemed guilty of a misdemeanor in office, and be proceeded against accordingly.

§ 675. **Remanding prisoner—second writ.** When any

prisoner, brought up on a writ of *habeas corpus*, shall be remanded to prison, it shall be the duty of the court or judge remanding him [to make out and deliver to the sheriff, or other person to whose custody he shall be remanded, an order, in writing, stating the cause or causes of remanding him.] If such prisoner shall obtain a second writ of *habeas corpus*, it shall be the duty of such sheriff or other person to whom the same shall be directed, to return therewith the order aforesaid, and if it shall appear that said prisoner was remanded for any offense adjudged not bailable, it shall be taken and received as conclusive, and the prisoner shall be remanded without further proceedings.

§ 676. **Power of judge under second writ.** It shall not be lawful for any court or judge, on a second writ of *habeas corpus* obtained by such prisoner, to discharge the said prisoner, if he is clearly and specifically charged in the warrant of commitment with a criminal offense, but the said court or judge shall, on the return of such second writ, have power only to admit such prisoner to bail, where the offense is bailable by law, or remand him to prison, where the offense is not bailable, or where such prisoner shall fail to give the bail required.

§ 677. **Not again committed unless indicted.** No person who has been discharged by order of a court or judge on a *habeas corpus*, shall be again imprisoned, restrained, or kept in custody for the same cause, unless he be afterwards indicted for the same offense; nor unless by the legal order or process of the court wherein he is bound by recognizance to appear. The following shall not be deemed to be the same cause:

1. If after a discharge for a defect of proof, or on any material defect in the commitment, in a criminal case, the prisoner should be again arrested on sufficient proof, and committed by legal process for the same offense.

2. If in a civil suit the party has been discharged for any illegality in the judgment or process, and is afterwards imprisoned by legal process for the same cause of action.

3. Generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned, if the cause be legal, and the forms required by law observed.

§ 678. **Want of prosecution — witnesses cannot be had.** If any person shall be committed for a criminal or supposed criminal matter, and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offense, the prisoner shall be let at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court at the second term shall be satisfied that the due exertions have been made to procure the evidence for and on behalf of the territory, and that

there are reasonable grounds to believe that such evidence may be procured at the third term, they shall have power to continue such case till the third term. If any such prisoner shall have been admittted to bail for a crime other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the territory are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material.

§ 679. **Writ not to delay trial.** To prevent any person from avoiding or delaying his trial, it shall not be lawful to remove any prisoner on *habeas corpus*, under this act, out of the county in which he or she is confined, within fifteen days next preceding the term of the court at which such person ought to be tried, except it be to convey him or her into the county where the offense with which he or she stands charged is properly cognizable.

§ 680. **Removal from one place or jail to another.** Any person, being committed to any prison, or in custody of any officer, sheriff, jailer, keeper, or other person, or his under officer or deputy, for any criminal or supposed criminal matter, shall not be removed from the said prison or custody into other prison or custody, unless it be by *habeas corpus*, or some other any legal writ; or where the prisoner shall be delivered to the constable, or other inferior officer, to be carried to some common jail; or shall be removed from one place to another, within the county, in order to his discharge or trial in due course of law; or in case of sudden fire, infection, or other necessity; or where the sheriff shall commit such prisoner to the jail of an adjoining county for the want of a sufficient jail in his own county, as is provided in the act concerning jails or jailers; or where the prisoner, in pursuance of a law of the United States, may be claimed or demanded by the executive of the United States or territories. If any person shall, after such commitment as aforesaid, make out, sign, or countersign any warrant or warrants for such removal, except as before excepted, then he or they shall forfeit to the prisoner or aggrieved party a sum not exceeding three hundred dollars, to be received by the prisoner, or party aggrieved, in the manner hereinafter mentioned.

§ 681. **Penalty if judge fail or delay writ.** Any judge empowered by this act to issue writs of *habeas corpus*, who shall corruptly refuse to issue such writ, when legally applied to, in a case where such writ may lawfully issue, or who shall, for the purpose of oppression, unreasonably delay the issuing of such writ, shall, for every such offense, forfeit to the prisoner or party aggrieved a sum not exceeding five hundred dollars.

§ 682. **Officer refusing to execute and return.** If any officer, sheriff, jailer, keeper, or other person to whom any such writ

shall be directed, shall neglect or refuse to make the returns, as aforesaid, or to bring the body of the prisoner according to the command of said writ within the time required by this act, all and every such officer, sheriff, jailer, keeper, or other person, shall be deemed guilty of contempt of the court or judge who issued said writ; whereupon, the said court or judge may and shall issue an attachment against such officer, sheriff, jailer, keeper, or other person, and cause him or them to be committed to the jail of the county, there to remain, without bail or mainprise, until he or they shall obey the said writ. Such officer, sheriff, jailer, keeper, or other person, shall also forfeit to the prisoner or aggrieved party a sum not exceeding five hundred dollars, and shall be incapable of holding or executing his said office.

§ 683. **Removing or concealing.** Any one having a person in his custody or under his restraint, power, or control, for whose relief a writ of *habeas corpus* is issued, who, with intent to avoid the effect of such writ, shall transfer such person to the custody, or place him or her under the control, of another, or shall conceal him or her, or change the place of his or her confinement, with intent to avoid the operation of such writ, or with intent to remove him or her out of this territory, shall forfeit for every such offense one thousand dollars, and be imprisoned not less than one year, nor more than five years. In any prosecution for the penalty incurred under this section, it shall not be necessary to show that the writ of *habeas corpus* had issued at the time of the removal, transfer, or concealment therein mentioned, if it be proven that the acts therein forbidden were done with the intent to avoid the operation of such writ.

§ 684. **Copy of commitment to prisoner.** Any sheriff or his deputy, any jailer or coroner, having custody of any prisoner committed on a civil or criminal process of any court or magistrate, who shall neglect to give such prisoner a copy of the process, order, or commitment by virtue of which he is imprisoned, within six hours after the demand made by said prisoner, or any one on his behalf, shall forfeit five hundred dollars.

§ 685. **Rearresting for same cause.** Any person who, knowing that another has been discharged by order of a competent judge or tribunal on a *habeas corpus*, shall, contrary to the provisions of this act, arrest or detain him again for the same cause which was shown on the return of such writ, shall forfeit five hundred dollars for the first offense, and one thousand dollars for every subsequent offense.

§ 686. **Penalties go to person.** All the pecuniary forfeitures under this act shall inure to the use of the party for whose benefit the writ of *habeas corpus* issued, and shall be sued for and recovered, with costs, in the name of the territory, by every person aggrieved.

§ 687. **General issue may be pleaded.** In any action or suit for any offense against the provisions of this act, the defendant or defendants may plead the general issue, and give the special matter in evidence.

§ 688. **No bar.** The recovery of the said penalties shall be no bar to a civil suit for damages.

§ 689. **Who may issue writ, etc.** The supreme and district courts within this territory, or the judges thereof, in vacation, shall have power to issue writs of *habeas corpus*, for the purpose of bringing the body of any person confined in any jail within the same before them, to testify or be surrendered in discharge of bail. When a writ of *habeas corpus* shall be issued for the purpose of bringing into court any person to testify, or the principal, to be surrendered in discharge of bail, and such principal or witness shall be confined in any jail in this territory out of the county in which such principal or witness is required to be surrendered, or to any county in this territory, and there be executed and returned by any officer to whom it shall be directed, and the principal, after being surrendered, or his bail discharged, or a person testifying as aforesaid, shall, by the officer executing such writ, be returned by virtue of an order of the court, for the purpose aforesaid, an attested copy of which, lodged with the jailer, shall exonerate such jailer from being liable for an escape. The party praying out such writ of *habeas corpus* shall pay to the officer executing the same such reasonable sum for his services as shall be adjudged by the courts respectively.

§ 690. **Effect.** This act shall take effect and be in force from and after its passage.

Approved January 9, 1863.