CODE OF CRIMINAL PROCEDURE

CHAPTER 1.

PRELIMINARY PROVISIONS.

§ **9548. Title.** This act shall be known as the code of criminal procedure of the state of North Dakota. [C. Cr. P. 1877, § 1; R. C. 1895, § 7740.]

§ **9549. Crime defined. Punishments.** A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, 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 state; or,
6. Other penal discipline. [C. Cr. P. 1877, § 2; R. C. 1895, § 7741.]

§ **9550. Division of crimes.** Crimes or public offenses are divided into:

1. Felonies.
2. Misdemeanors. [C. Cr. P. 1877, § 3; R. C. 1899, § 7742.]

§ **9551. Felonies defined. Misdemeanor defined.** A felony is a crime which is or may be punishable with death or imprisonment in the penitentiary; every other crime is a misdemeanor. When a crime punishable by imprisonment in the penitentiary is also punishable by fine or imprisonment in a county jail, in the discretion of the court or jury, it is, except when otherwise specifically declared by law to be a felony, a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary. [C. Cr. P. 1877, §§ 4, 5; R. C. 1895, § 7743.]

§ **9552. Punishment only on conviction.** No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof. [C. Cr. P. 1877, § 6; R. C. 1899, § 7744.]

§ **9553. How crimes prosecuted. Exceptions.** Every public offense must be prosecuted by information or indictment, except:

1. When proceedings are had for the removal of a civil officer of the state, or an officer of some political subdivision thereof.
2. Breaches of military discipline arising in the militia, when in actual service, and in the land and naval forces in time of war or public danger, or which this state may keep, with the consent of congress, in time of peace.
3. Offenses tried in justices', police and county courts in cases concerning which lawful jurisdiction is or may be conferred upon such courts. [C. Cr. P. 1877, § 7; R. C. 1895, § 7745.]

§ **9554. Criminal action defined.** The proceedings by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action. [C. Cr. P. 1877, § 8; R. C. 1899, § 7746.]

§ **9555. How prosecution entitled.** A criminal action is prosecuted in the name of the state of North Dakota as a party against the party charged with the offense. [C. Cr. P. 1877, § 9; R. C. 1895, § 7747.]

§ **9556. Party defendant.** The party prosecuted in a criminal action is designated in this code as the accused or as the defendant. [C. Cr. P. 1877, § 10; R. C. 1895, § 7748.]

§ **9557. Rights of defendant.** In all criminal prosecutions the party accused shall have the right:

1. To appear and defend in person and with counsel.
2. To demand and be informed of the nature and cause of the accusation.
3. To meet the witnesses against him face to face.
4. To have the process of the court to compel the attendance of witnesses in his behalf.
5. To a speedy and public trial, and by an impartial jury of the county in which the offense is alleged to have been committed or is triable, but subject to the right of the state to have a change of the place of trial for any of the causes for which the party accused may obtain the same. [C. Cr. P. 1877, § 11; R. C. 1895, § 7749.]

§ **9558. Only once prosecuted.** No person can be twice put in jeopardy for the same offense; nor can any person be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted or put in jeopardy, except as provided by law for new trials. [C. Cr. P. 1877, § 12; R. C. 1895, § 7750.]

§ **9559. Witness against self. Restraint, extent of.** No person can be compelled in a criminal action to be a 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. [C. Cr. P. 1877, § 13; R. C. 1899, § 7751.]

§ **9560. How conviction can be had.** No person can be convicted of a crime or public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon a judgment against him, his demurrer having been overruled, or upon a judgment of a justice's court, or such other courts as are or may be created by law for cities, incorporated towns and villages, or county courts exercising increased jurisdiction as provided in section 111 of the constitution, in cases in which such judgment may be lawfully given without the intervention of a jury, or by the judgment of a court, a jury having been waived, upon a criminal charge not amounting to a felony. [C. Cr. P. 1877, § 14; R. C. 1895, § 7752.]

CHAPTER 2.

COURTS HAVING JURISDICTION IN CRIMINAL ACTIONS.

§ **9561. Jurisdiction of district court.** There is in each of the judicial districts of this state a court denominated the district court, with jurisdiction conferred by the constitution of this state and the laws passed in pursuance thereof, and having, among other things, common law jurisdiction and authority within their respective judicial districts for the redress of all wrongs committed against the laws of this state, affecting persons or property. [C. Cr. P. 1877, § 15; R. C. 1895, § 7753.]

District court has jurisdiction to try misdemeanors cognizable in justice's court. State v. Finder, 10 S. D. 103, 72 N. W. 97.

§ **9562. Where district courts held.** Each of the said district courts may be held, for the trial of criminal actions, in any organized county or in any judicial subdivision in the same district, as is or may be provided by law. [C. Cr. P. 1877, § 16; R. C. 1895, § 7754.]

§ **9563. Always open. Questions of fact. Terms.** The said district courts are always open for the purpose of hearing and determining all questions. motions and applications of every kind and character in criminal actions or

proceedings of which they have original or appellate jurisdiction, except issues of fact; and said questions, motions and applications may be heard and determined at any place within the judicial district in which is situated the county or judicial subdivision wherein the action or proceeding is brought or is pending. But issues of fact in all criminal actions or proceedings must be tried at a regular term of the court in the county or judicial subdivision in which the same is legally brought or to which the place of trial is changed as provided by law. [R. C. 1895, § 7755.]

§ **9564. Jurisdiction of district courts specified.** Each of the said district courts has and must exercise jurisdiction and authority:

1. To inquire, by the intervention of a grand jury when required by law, of all public offenses committed or triable in the county or judicial 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 judicial subdivision, or otherwise detained, and to make an order for their recommitment or discharge, or other disposition, according to law.

3. To hear, try and determine as limited by law, all accusations in writing presented by a grand jury, or otherwise as provided and for the causes specified in section 9632 of this code, against any district, county, township, city or municipal officer or state officer not liable to impeachment, for misconduct, malfeasance, crime or misdemeanor in office or for habitual drunkenness or gross incompetency and upon conviction to enter judgment as prescribed by law.

4. To hear, try and determine, upon information or indictment or otherwise as provided by law, prosecutions for crimes or public offenses committed against the laws of this state, and to issue writs and process and do all other acts therein according to law as may be necessary in the exercise of said jurisdiction and authority, whether original or appellate, and upon conviction of any such crime or public offense, to impose the punishment prescribed by law therefor. [C. Cr. P. 1877, § 17; R. C. 1895, § 7756.]

§ **9565. Decisions of district courts reviewable.** The final decisions of the district courts in criminal actions, are reviewable and determinable by the supreme court, according to law, on appeals bringing up for review the record and proceedings therein. [C. Cr. P. 1877, § 18; R. C. 1895, § 7757.]

§ **9566. Jurisdiction. Justices. Magistrates. County courts.** As limited by law directing the place of exercising their jurisdiction and authority, county, city, township and other justices of the peace, police magistrates and, when authorized by law, the judges of the county courts, and the county courts shall have jurisdiction and authority throughout the counties or the judicial subdivisions in which the county, city, township or municipality for which they are respectively elected, are located:

1. To act as committing magistrates under the provisions of this code or other laws of this state conferring the same.

2. To hear, try and determine such petit misdemeanors as, by the constitution of this state and the justices' code or this code or other laws, jurisdiction is now or may hereafter be conferred upon them to punish.

3. To adjudge and impose the punishment prescribed by law, upon conviction, in all cases within their jurisdiction to hear, try and determine. [C. Cr. P. 1877, § 19; R. C. 1895, § 7758.]

CHAPTER 3.

PREVENTION OF PUBLIC OFFENSES.

ARTICLE 1.—LAWFUL RESISTANCE.

§ **9567. 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. [C. Cr. P. 1877, § 20; R. C. 1899, § 7759.]

§ **9568. By party about 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. [C. Cr. P. 1877, § 21; R. C. 1899, § 7760.]

§ **9569. By other persons.** Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense. [C. Cr. P. 1877, § 22; R. C. 1899, § 7761.]

ARTICLE 2.—INTERVENTION OF THE OFFICERS OF JUSTICE.

§ **9570. Public offenses prevented.** Public offenses may be prevented by the intervention of the officers of justice:

1. By requiring a 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. [C. Cr. P. 1877, § 23; R. C. 1899, § 7762.]

§ **9571. Persons aiding 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. [C. Cr. P. 1877, § 24; R. C. 1899, § 7763.]

ARTICLE 3.—SECURITY TO KEEP THE PEACE.

§ **9572. Complaint for threatening, before whom.** A complaint may be laid before any of the magistrates mentioned in section 9693, authorized by law to act within the county or judicial subdivision, that a person has threatened to commit an offense against the person or property of another. [C. Cr. P. 1877, § 25; R. C. 1895, § 7764.]

§ **9573. Complaint defined.** A complaint within the meaning of this article, is a statement in writing, made to a magistrate, that a person has threatened to commit an offense against the person or property of another, and subscribed and sworn to by the complaint. [R. C. 1895, § 7765.]

§ **9574. Magistrate must issue warrant.** If it appears from such complaint 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 complaint, and commanding the officer forthwith to arrest the person complained of, and bring him before such magistrate. [C. Cr. P. 1877, § 26; R. C. 1895, § 7766.]

§ **9575. Procedure when charge controverted.** When the person complained of is brought before the magistrate, if the charge is 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. [C. Cr. P. 1877, § 27; R. C. 1899, § 7767.]

§ **9576. When accused must be discharged.** If it appears 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. [C. Cr. P. 1877, § 28; R. C. 1899, § 7768.]

§ 9577. **When accused must give undertaking.** If, however, there is 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 meantime to keep the peace toward the people of this state, and particularly toward the complainant. [C. Cr. P. 1877, § 29; R. C. 1899, § 7769.]

§ 9578. **When undertaking is or is not given.** If the undertaking required by the last section is given the party complained of must be discharged. If he does 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. [C. Cr. P. 1877, § 30; R. C. 1899, § 7770.]

§ 9579. **Accused committed. How discharged.** If the person complained of is committed for not giving security, he may upon giving the same, be discharged by any justice of the peace of the county or of the city or township, or by any police magistrate of the county, or by the judge of the county court of the county when authorized to act as a committing magistrate or by the judge of the district court of the county. [C. Cr. P. 1877, § 31; R. C. 1895, § 7771.]

§ 9580. **Undertaking transmitted to district court.** The undertaking must be transmitted by the magistrate to the next district court of the county. [C. Cr. P. 1877, § 32; R. C. 1899, § 7772.]

§ 9581. **Assault in presence of court.** 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 9577, or if he refuses to do so he may be committed as provided in section 9578. [C. Cr. P. 1877, § 33; R. C. 1899, § 7773.]

§ 9582. **Accused 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 does not the court may forfeit his undertaking and order it to be prosecuted unless his default is excused. [C. Cr. P. 1877, § 34; R. C. 1899, § 7774.]

§ 9583. **Complainant not appearing, accused discharged.** If the complainant does not appear the person complained of may be discharged, unless good cause to the contrary is shown. [C. Cr. P. 1877, § 35; R. C. 1899, § 7775.]

§ 9584. **Procedure 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. [C. Cr. P. 1877, § 36; R. C. 1899, § 7776.]

§ 9585. **When undertaking 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 9582 or upon his being convicted of a breach of the peace. [C. Cr. P. 1877, § 37; R. C. 1899, § 7777.]

§ 9586. **Action upon undertaking.** Upon the state's 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 state's attorney must thereupon commence an action upon it in the name of this state. [C. Cr. P. 1877, § 38; R. C. 1899, § 7778.]

§ 9587. **What alleged in 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. [C. Cr. P. 1877, § 39; R. C. 1899, § 7779.]

§ **9588. Limitation.** Security to keep the peace or to be of good behavior cannot be required, except as prescribed in this article. [C. Cr. P. 1877, § 40; R. C. 1899, § 7780.]

§ **9589. Costs to be taxed.** In all cases of security to keep the peace under this article, the court in addition to the orders mentioned in said article 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 in criminal cases, and execution may issue therefor. [1881, ch. 38, § 1; R. C. 1899, § 7781.]

Article 4.—Police in Cities and Villages, and their Attendance at Public Meetings.

§ **9590. Organization of police.** The organization and regulation of the police in the cities and villages of this state are governed by special statutes. [C. Cr. P. 1877, § 41; R. C. 1899, § 7782.]

§ **9591. 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. [C. Cr. P. 1877, § 42; R. C. 1899, § 7783.]

Article 5.—Suppression of Riots.

§ **9592. 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. [C. Cr. P. 1877, § 43; R. C. 1899, § 7784.]

§ **9593. 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. [C. Cr. P. 1877, § 44; R. C. 1899, § 7785.]

§ **9594. Person commanded refusing, punished.** Every person commanded by a public officer to assist him in the execution of process, as provided in section 9592, who without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor. [C. Cr. P. 1877, § 45; R. C. 1899, § 7786.]

§ **9595. Governor may 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. [C. Cr. P. 1877, § 46; R. C. 1899, § 7787.]

§ **9596. Governor may ask aid of the United States.** 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. [C. Cr. P. 1877, § 47; R. C. 1899, § 7788.]

§ **9597. Unlawful assemblage.** When any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county 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 state immediately to disperse. [C. Cr. P. 1877, § 48; R. C. 1899, § 7789.]

§ **9598. Procedure if rioters 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 law, and for that purpose may command the aid of all persons present or within the county. [C. Cr. P. 1877, § 49; R. C. 1899, § 7790.]

§ **9599. Who deemed rioters.** If a person so commanded to aid the magistrates and officers neglects to do so, he is deemed one of the rioters, and is punishable accordingly. [C. Cr. P. 1877, § 50; R. C. 1899, § 7791.]

§ **9600. Negligence of officers is a misdemeanor.** If a magistrate or officer having notice of an unlawful or riotous assembly mentioned in section 9597, neglects 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. [C. Cr. P. 1877, § 51; R. C. 1899, § 7792.]

§ **9601. When officers may disperse assembly.** If the persons assembled and commanded to disperse do not immediately disperse, any two of the magistrates or officers mentioned in section 9597, 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. [C. Cr. P. 1877, § 52; R. C. 1899, § 7793.]

§ **9602. Endeavors before endangering life.** Every endeavor must be used, both by the magistrate 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 rioters to disperse before an attack is made upon them by which their lives may be endangered. [C. Cr. P. 1877, § 53; R. C. 1899, § 7794.]

§ **9603. 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 penitentiary for not less than two years. [C. Cr. P. 1877, § 54; R. C. 1899, § 7795.]

CHAPTER 4.

PROCEEDINGS FOR THE REMOVAL OF PUBLIC OFFICERS.

Article 1.—Removal by Impeachment.

§ **9604. Impeachments. What officers liable to and for what.** The governor and other state and judicial officers of the state, except county judges, justices of the peace and police magistrates, shall be liable to and may be impeached for habitual drunkenness, crimes, corrupt conduct or malfeasance or misdemeanor in office. The articles of impeachment may contain charges and specifications, or either, predicated upon or on account of any crime, corrupt conduct, malfeasance or misdemeanor in office committed by the accused during any previous term of the same office. [R. C. 1895, § 7796.]

§ **9605. Commencement. Trial. Presiding officer.** The sole power of impeachment is vested in the house of representatives and a concurrence of

a majority of all the members is necessary to the exercise thereof. All impeachments shall be tried by the senate sitting for that purpose, and the senators shall be upon oath or affirmation, to do justice according to law and the evidence. When the governor or lieutenant governor is on trial, the chief justice of the supreme court shall preside, or in case he is disqualified or unable to preside, then some other judge of said court to be selected by the senate. No person shall be convicted without the concurrence of two-thirds of the senators elected. [R. C. 1895, § 7797.]

§ 9606. **How originated. Prosecution. Articles.** Every impeachment must be originated by resolution adopted by the house of representatives, and the prosecution thereof conducted by at least five managers selected therefor by the house. Said managers, or a committee of the house, must prepare the articles of impeachment in accordance with the resolution of the house and submit them to the house for approval, and when approved the managers must present the same at the bar of the senate and immediately deliver them to the presiding officer thereof. The house may authorize the managers to employ counsel to assist them in the preparation and prosecution of the articles of impeachment. [R. C. 1895, § 7798.]

§ 9607. **Form of articles and specifications.** The articles of impeachment shall be divided into separate charges and specifications thereunder. The charges shall be numbered consecutively by themselves and each shall set forth in a general way the facts claimed to constitute one of the offenses named in section 9604. The specifications under each charge shall immediately follow it and be consecutively numbered, and each shall set forth the facts claimed to constitute an offense of the kind named in the charge under which it is placed. There may be as many charges and as many specifications under each as the circumstances may require. No objection shall be made on account of the form of the articles of impeachment, and the same shall be deemed sufficient in substance if their allegations enable the accused to understand the nature of the accusations against him, and to make his defense. [R. C. 1895, § 7799.]

§ 9608. **Day for hearing. Notice to accused.** The senate must whenever articles of impeachment are presented to it by or on behalf of the house of representatives, assign a day for the hearing of the impeachment and inform such house thereof. The day so assigned shall not be earlier in the session than that at which the completion of the business of the legislative assembly may be effected. But all steps and preparations necessary may be taken and made from time to time during the session to enable the trial to begin immediately upon the completion of the business of the legislative assembly. The president of the senate or other person presiding therein, must cause a copy of the articles of impeachment with a notice to answer the same, at the time and place appointed, to be served upon the accused not less than twenty days before the day set for the trial. [R. C. 1895, § 7800.]

§ 9609. **Service of notice.** The service must be made upon the accused personally, or if he cannot upon diligent inquiry be found within the state, the senate upon proof of that fact may order the notice to be served by publication or otherwise in such manner as it may deem proper; and the notice as published must require the accused to appear at the specified time and place to answer the articles of impeachment. When the notice to the accused is served by publication or otherwise than personally within the state, the articles of impeachment may be served upon the accused by mail or otherwise as the senate may deem proper. [R. C. 1895, § 7801.]

§ 9610. **Procedure after notice.** If the accused does not appear the senate upon proof of service of the notice and articles of impeachment in any manner provided in the last two sections, as the circumstances may require, may, of its own motion or for cause shown, assign another day for the hearing

of the accused, or may proceed in the absence of the accused to trial and judgment. [R. C. 1895, § 7802.]

§ **9611. Impeachment suspends officer.** No officer shall exercise the duties of his office after he shall have been impeached and before his acquittal. Whenever upon the impeachment of an officer there is no one authorized by law to perform the duties of the office, and the senate shall by resolution declare that the public service may suffer by reason thereof, the governor shall designate some suitable person to perform the duties of the office until the end of the trial upon the articles of impeachment, and the person so designated shall receive the same salary, fees and emoluments as such officer during his incumbency. If the accused is acquitted, he shall thereby, be immediately restored to the office, but if he is convicted, the office shall be deemed vacant and be immediately filled as provided by law. [R. C. 1895, § 7803.]

§ **9612. Organization of court. Powers.** It shall be the duty of the senate and each member thereof, unless excused for cause, to meet at the senate chamber on the day assigned to hear the impeachment and organize as a court for the trial of the same, and such organization shall be held and deemed to be perfected when the presiding officer of the senate and all members thereof, not excused, shall have taken the oath or affirmation prescribed. No member shall sit in the trial, or give his vote upon such trial, until he shall have taken such oath or affirmation. The oath or affirmation shall be administered by the secretary of the senate to the presiding officer thereof, and by the presiding officer to each of the members of the senate. The senate sitting as a court upon the trial of an impeachment shall have the same power to compel the attendance of its members as when engaged in the ordinary business of legislation. [R. C. 1895, § 7804.]

§ **9613. Counsel for accused.** If the accused appears and is unable to procure the assistance of counsel, it is the duty of the president of the senate, or other person presiding, to appoint some suitable person to assist him in his defense. If he is served by publication and fails to appear, it is the duty of the president of the senate, or other person presiding, to appoint some person as counsel to appear in his behalf and make defense for him. [R. C. 1895, § 7805.]

§ **9614. How accused may answer.** When the defendant appears he may in writing object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty. Such plea must be entered upon the journal, and puts in issue every material allegation of the articles of impeachment and the specifications thereunder; or the accused may answer the articles in writing. [R. C. 1895, § 7806.]

§ **9615. Objections to the articles. Procedure.** If the accused makes objections to the sufficiency of the articles of impeachment and such objections are sustained by a majority of the members of the senate, the decision shall be entered on the journal and no further proceedings be had upon the articles, but if such objections are not sustained by a majority of the members of the senate, the accused must be ordered forthwith to answer the articles. [R. C. 1895, § 7807.]

§ **9616. Objections overruled. Further proceedings.** If the accused upon the overruling of his objections as provided in the last section, then pleads guilty to any or all of the charges or specifications, the senate must render judgment of conviction against him, but if he pleads not guilty or refuses to plead, the senate must at such time as it may appoint proceed to try the impeachment. [R. C. 1895, § 7808.]

§ **9617. Duty of secretary of senate.** It shall be the duty of the secretary of the senate in all cases of impeachment to keep a full and correct record of all proceedings and said record shall be held and become a public record.

The secretary of the senate shall also have power to administer all requisite oaths and affirmations. [R. C. 1895, § 7809.]

§ **9618. Subordinate officers of the court.** The senate sitting as a court of impeachment shall have power, from time to time, to appoint such subordinate officers, clerks and reporters as may be necessary for the convenient transaction and dispatch of business, and may at any time remove such officers or any of them. [R. C. 1895, § 7810.]

§ **9619. Process for witnesses.** The managers selected by the house of representatives and the person impeached and his counsel, shall, severally, be entitled to process for compelling the attendance of persons and witnesses, or the production of papers or records required for the trial of the impeachment. [R. C. 1895, § 7811.]

§ **9620. Senate may make rules. Subpenas.** The senate sitting as a court of impeachment shall have full power and authority to establish such rules and regulations for the trial of the accused as may be necessary, and shall have power to adjourn from time to time and dissolve when its work is concluded, and to compel obedience to its process and orders. Its process, including subpenas, shall run into every part of the state and may be served by the same officers as other process, or by any person authorized by the presiding officer of the court to serve the same, and shall have the same force and effect as subpenas from district courts in criminal actions. [R. C. 1895, § 7812.]

§ **9621. Privileges of court. Imprisonment.** The senate, while sitting as a court of impeachment, shall have all the powers and privileges conferred upon it by the constitution as a house of the legislative assembly or the laws passed in pursuance thereto, provided imprisonment shall not extend beyond the dissolution of the court of impeachment. [R. C. 1895, § 7813.]

§ **9622. Vote on charge. Conviction.** The vote upon the charges and specifications shall be taken by yeas and nays, beginning with the first specification under the first charge, and continuing until all the specifications under the first charge have been disposed of. A vote shall be taken in the same way upon each specification and all specifications and other charges in the articles of impeachment until they are all disposed of. If two-thirds of the members elected concur in favor of a conviction upon any of the charges or specifications the accused must be convicted, otherwise he shall be acquitted. [R. C. 1895, § 7814.]

§ **9623. Upon conviction, judgment entered by resolution.** If the accused is convicted the senate must, at such time as it may appoint, pronounce judgment in the form of a resolution entered upon the journal of the senate. [R. C. 1895, § 7815.]

§ **9624. Adoption of resolution.** On the adoption of the resolution by a majority of the members present who voted on the question of acquittal or conviction, it becomes the judgment of the senate. [R. C. 1895, § 7816.]

§ **9625. Extent of judgment of conviction.** The judgment may be that the defendant be removed from office, or that he be removed from office and disqualified to hold any office of trust or profit in the state. [R. C. 1895, § 7817.]

§ **9626. Effect of such judgment.** If a judgment of conviction is given, the defendant shall be disqualified from exercising any of the functions of the office, and from receiving the salary, fees or emoluments thereof, and the office shall be filled for the remainder of the term as upon a vacancy. [R. C. 1895, § 7818.]

§ **9627. Lieutenant governor impeached.** If the lieutenant governor is impeached, notice of the impeachment must be immediately given to the senate by the house of representatives, that another president may be chosen. [R. C. 1895, § 7819.]

§ **9628. Impeachment does not bar prosecution.** If the offense for which the defendant is impeached or convicted is also the subject of an information or indictment, the information or indictment is not barred thereby. [R. C. 1895, § 7820.]

§ **9629. Compensation. Members. Counsel. Payment.** The presiding officer, except the chief justice when presiding, and members of the senate while sitting as a court of impeachment, and of the house of representatives, shall each receive their regular per diem and mileage while attending the court of impeachment, and the compensation of the secretary of the senate, sergeant-at-arms and all subordinate officers, clerks and reporters of the court and counsel employed to assist the managers, shall be such amount as shall be determined upon by a vote of the members of such court. The state auditor upon presentation of a certificate or certificates signed by the presiding officer and secretary of the senate, shall draw his warrants upon the state treasurer to pay the expense of the senate, and the compensation of the officers, clerks and reporters and counsel under the provisions of this article. [R. C. 1895, § 7821.]

§ **9630. Compensation. Officers. Witnesses. Payment.** The same fees shall be allowed to witnesses, officers and other persons serving process or orders as are allowed for like services in criminal actions, but no fees can be demanded in advance. Such fees shall be certified and paid as provided in the preceding section for the payment of the senate, officers, clerks, reporters and counsel, but subject to the right of the senate to disallow all fees and charges which it shall deem unreasonable or unnecessary. [R. C. 1895, § 7822.]

Article 2.—Removal by Judicial Proceedings.

§ **9631. Additional proceedings. Removal from office.** In addition to the proceedings mentioned in chapter 25 of the code of civil procedure and article 2, chapter 6, 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. [C. Cr. P. 1877, § 55; R. C. 1899, § 7823.]

Action to remove from office cannot be brought in name of county or private person. Wishek v. Becker, 10 N. D. 63, 84 N. W. 590.

For removal of regent of education by governor, see State ex rel Holmes v. Shannon, 7 S. D. 319, 64 N. W. 175.

§ **9632. Accusation. Causes for removal.** An accusation in writing against any district, county, township, city or municipal officer, or state officer not liable to impeachment, except representatives in congress and members of the legislative assembly, for misconduct, malfeasance, crime or misdemeanor in office, or for habitual drunkenness or gross incompetency, 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; provided, that when such proceedings are against a state officer not liable to impeachment, the accusation may be presented by the grand jury of the county or judicial subdivision in which such officer resides or in which he has his place of office for the transaction of his official business. [C. Cr. P. 1877, §§ 56, 67; R. C. 1895, § 7824.]

§ **9633. Form 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. [C. Cr. P. 1877, § 57; R. C. 1899, § 7825.]

§ **9634. Duty of judge. State's attorney.** After receiving the accusation the judge to whom it is delivered must forthwith cause it to be transmitted to the state's 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 accusa-

tion at a specified time. The original accusation must then be filed with the clerk of the court. [C. Cr. P. 1877, § 58; R. C. 1899, § 7826.]

§ **9635. Defendant must 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 does not appear, the court may proceed to hear and determine the accusation in his absence. [C. Cr. P. 1877, § 59; R. C. 1899, § 7827.]

§ **9636. 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. [C. Cr. P. 1877, § 60; R. C. 1899, § 7828.]

§ **9637. Objections for insufficiency.** If he objects 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 presents intelligibly the ground of the objection. [C. Cr. P. 1877, § 61; R. C. 1899, § 7829.]

§ **9638. Denial may be oral.** If he denies the truth of the accusation, the denial may be oral and without oath and must be entered upon the minutes. [C. Cr. P. 1877, § 62; R. C. 1899, § 7830.]

§ **9639. Objections overruled. Answer.** If an objection to the sufficiency of the accusation is not sustained, the defendant must answer the accusation forthwith. [C. Cr. P. 1877, § 63; R. C. 1899, § 7831.]

§ **9640. Conviction on plea or trial.** If the defendant pleads guilty the court must render judgment of conviction against him. If he denies the matters charged or refuses to answer the accusation, the court must immediately or at such time as it may appoint proceed to try the accusation. [C. Cr. P. 1877, § 64; R. C. 1895, § 7832.]

§ **9641. Trial by jury.** The trial must be by a jury and conducted in all respects in the same manner as the trial of an information or indictment for a misdemeanor. [C. Cr. P. 1877, § 65; R. C. 1899, § 7833.]

§ **9642. Judgment on conviction.** 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. [C. Cr. P. 1877, § 66; R. C. 1899, § 7834.]

§ **9643. Process for witnesses.** The state's attorney or other person appointed to prosecute, and the defendant, are respectively entitled to such process as may be necessary to enforce the attendance of witnesses, as upon a trial of an information or indictment. [R. C. 1895, § 7835.]

§ **9644. Appeal from judgment of removal.** From a judgment of removal an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but until such judgment is reversed the defendant is suspended from his office, and pending the appeal the office must be filled as in case of vacancy. [R. C. 1895, § 7836.]

§ **9645. Proceedings to remove state's attorney.** The same proceedings may be had on like grounds for the removal of a state's 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. [C. Cr. P. 1877, § 69; R. C. 1895, § 7837.]

§ **9646. Other accusation and proceedings thereon.** When an accusation in writing and verified by the oath of any person is presented to the district court, alleging that an officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, or has rendered himself incompetent to perform his said duties by reason of habitual drunkenness or other cause, the judge of the court to whom it is delivered must forthwith cause it to be transmitted to the state's attorney of the county, or in case it is against the state's attorney

of the county, the accusation must be delivered by the judge to the clerk of the court and by him to such person as may be appointed by the judge to act as prosecuting officer in the matter, and the state's attorney of the county or person appointed to prosecute, must cause a copy of said accusation to be served upon the accused and, by written notice, require him to appear before the court at a time specified, not more than twenty days nor less days from the time the accusation was presented, and answer said accusation. On the day named in said notice, or on some subsequent day not more than thirty days from that on which the accusation was presented, to be fixed by the judge, the court must proceed to hear the accusation and evidence offered in support of the same and the answer, if any is made, and the evidence offered by the party accused. The court may try and determine the issues unless the accused requires that they be submitted to a jury. If a jury is required the court must forthwith in a summary manner cause a jury to be impaneled and the matter submitted to them. Challenges shall be allowed and the trial conducted in the same manner as a trial by jury in a civil action. If the charge is tried by the court it shall proceed as a civil action tried by the court. The decision of the court or the verdict of the jury shall be "guilty," or "not guilty." Costs shall be awarded as in a civil action. If the accused is found guilty either by the decision of the court or by the verdict of the jury, the court shall render judgment that the accused be removed from his office, and for the costs of the action. A statement of the case may be settled and an appeal taken as provided by law in a civil action. The court may, in its discretion, if the accused is found guilty, award treble costs against him. If the court finds that the accusation was made without probable cause, it must tax the costs of the prosecution and trial against the complainant. [C. Cr. P. 1877, § 70; R. C. 1895, § 7838.]

Proceeding is summary in its nature and of a character peculiar in itself. Myrick v. McCabe, 5 N. D. 422, 67 N. W. 143.

Officer may be removed from office for misconduct. In re Simpson, 9 N. D. 379, 83 N. W. 541.

Attorney who is officer and attorney may be disbarred and removed from office for misconduct. Idem.

CHAPTER 5.

BASTARDY PROCEEDINGS.

§ **9647. Complaint for bastardy. Form.** Any unmarried woman who is delivered of a bastard child, or is pregnant with a child, which, if born alive, may be a bastard, may make a complaint in writing under oath before a justice of the peace or police magistrate against the person who is the father of such child. Such proceedings must be entitled in the name of the state as plaintiff and against the accused as defendant. The complaint shall be substantially in the following form:

State of North Dakota, } ss.
County of ..... }

Before.....J. P.
(or Police Magistrate.)

The State of North Dakota, Plaintiff,
against
.....Defendant.

.....being first duly sworn on oath, says: That she is an unmarried woman and was on the.....day of.....19..., delivered of a bastard child (or is pregnant with a child which, if born alive,

may be a bastard), begotten by the defendant..... on or about the.....day of.....19..., at.....

Wherefore she asks that a warrant may be issued for the arrest of the defendant.....that he may answer to such charge.

.....

Subscribed and sworn to, etc.

[R. C. 1895, § 7839.]

A woman has cause of action against the father of her bastard child. Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772.

Probable cause; what is, to justify issuing warrant. State v. McKnight, 7 N. D. 444, 75 N. W. 790.

Evidence examined and held sufficient to prove charge. See State v. Peoples, 9 N. D. 146, 82 N. W. 749.

Bastardy proceedings are properly instituted in name of state. State v. Bunker, 7 S. D. 639, 65 N. W. 33.

The proceeding is a civil action. State v. Knowles, 10 S. D. 471, 74 N. W. 201.

§ **9648. Warrant issued. Form. Service.** Upon the filing of the complaint the magistrate shall issue a warrant which, exclusive of the venue and title, shall be in substantially the following form:

The state of North Dakota to any sheriff, constable, marshal or policeman in the county of .....:

Complaint on oath having been made to me by ..... that she is an unmarried woman and has been delivered of a bastard child (or is pregnant with a child which, if born alive, may be a bastard), and accusing the defendant.....with being the father of such child.

You are therefore commanded forthwith to arrest the above named .....and, unless he gives an undertaking in the sum of.....dollars, to be approved by the clerk of the district court of the county where arrested, to bring him before me at .....or in case of my absence or inability to act before the nearest or most accessible magistrate authorized to act in this county.

Dated at..... this ..... day of .....19...

.....

Justice of the Peace (or Police Magistrate).

The officer to whom such warrant is delivered may execute the same in any part of this state by arresting the defendant and taking him before a magistrate as in such warrant directed. The undertaking required by the warrant shall be conditioned for the defendant's appearance as prescribed in section 9650. [R. C. 1895, § 7840.]

§ **9649. How defendant released.** If the defendant shall at any time after his arrest pay or secure to be paid to the complainant such sum of money as she may agree in writing to receive in full satisfaction and as shall be approved by the board of county commissioners of the county in which she resides and shall execute and give an undertaking with sufficient sureties to be approved by such board to the county in which she resides, conditioned to secure and indemnify such county from all charges for the maintenance of such child and shall also pay all expenses incurred by such county for the support of the mother during her lying in or of the child and the costs of prosecution, he shall be discharged. [R. C. 1895, § 7841.]

§ **9650. Undertaking. Amount. Commitment.** Upon the arrest of the defendant, unless he complies with the provisions of the last section or gives an undertaking as provided in section 9648, the magistrate before whom the defendant is taken shall require him to execute and give an undertaking in a sum not less than five hundred and not exceeding one thousand dollars, with sufficient sureties, payable to the state of North Dakota and conditioned

that he will appear at the next term of the district court of such county and from term to term until the final disposition of the proceeding to answer the complaint and abide the judgment and orders of the court therein; if the defendant fails to execute and give such undertaking the magistrate shall make an order committing him as in criminal actions. [R. C. 1895, § 7842.]

§ **9651. How warrant returned. Undertaking.** The warrant when executed together with any undertaking given by the defendant shall be returned by the officer making the arrest to the magistrate who issued the warrant or his successor in office, and the magistrate shall transmit any undertaking given by the defendant together with a transcript of his proceedings and all other papers in the case, without delay, to the clerk of the district court of the proper county. [R. C. 1895, § 7843.]

§ **9652. Undertaking after commitment.** Any person imprisoned for failure to give such undertaking may be discharged by giving the same with sufficient sureties at any time after his commitment; such undertaking may be taken and approved by the magistrate before whom such proceeding was had or by the judge of the district court before whom the same is pending. [R. C. 1895, § 7844.]

§ **9653. Proceedings for trial.** The trial of such proceeding shall, except as herein otherwise provided, be governed by the law regulating civil actions. The clerk shall place such proceedings upon the calendar for trial at the first term of the district court after the papers therein are received by him. No notice of trial and note of issue need be served or filed. [R. C. 1895, § 7845.]

§ **9654. Answer. Trial. By court. By jury.** If the defendant answers, denying the charge, the issue shall be tried by the court, unless a jury is demanded by either party, in which case the issue shall be tried by jury. [R. C. 1895, § 7846.]

§ **9655. Defendant adjudged father. Judgment.** If the court or jury finds that the defendant is the father of such child, or if the defendant fails to answer the charge, he shall be adjudged the father of such child and the court shall render such judgment as may seem necessary to secure, with the assistance of the mother, the maintenance and education of such child, until such time as the child is likely to be able to support itself, which judgment shall be docketed by the clerk as judgments in civil actions. Such judgment shall direct the person to whom and the times at which any parts of the same shall be paid and shall also require the defendant to secure the payment thereof by an undertaking executed by him with sufficient sureties and in default thereof the defendant shall be committed to jail until discharged according to law. The court may at any time upon the motion of either party, upon ten days' notice to the other party, vacate or modify such judgment as justice may require. [R. C. 1895, § 7847.]

§ **9656. Imprisoned ninety days. Discharge.** Any person who shall have been so imprisoned ninety days may apply for his discharge from imprisonment in the manner provided in the code of civil procedure for the discharge from imprisonment of persons confined in jail upon executions against the person. [R. C. 1895, § 7848.

§ **9657. Execution may issue. Exemptions.** Executions may issue on such judgment whenever any amount is due on the same and shall be executed as an execution on a judgment in a civil action, and no property, except absolute exemptions, shall be exempt from such execution. [R. C. 1895, § 7849.]

§ **9658. Woman failing to prosecute. County commissioners.** If any woman mentioned in section 9647 fails to prosecute the father of her child and such child is likely to become a public charge, any member of the board of county commissioners of the county where she resides may apply to a justice of the peace or police magistrate of such county, who shall thereupon examine

her under oath as to who is the father of such child, the time when and place where such child was begotten and as to such other circumstances as are deemed necessary; the magistrate shall thereupon issue a warrant for the arrest of the person charged with being the father of the child and the same proceedings shall be had thereon and with like effect as in cases of complaint made by the woman. [R. C. 1895, § 7850.]

§ **9659. Prosecution limited.** No proceedings under this chapter shall be instituted unless commenced within one year after the birth of such child, but no time during which the defendant is not an inhabitant of or usually residing within this state is a part of the time limited for the commencement of such proceeding. [R. C. 1895, § 7851.]

§ **9660. Other provisions applicable.** The provisions of articles 8 and 9 of chapter 11 of the code of civil procedure relating to exceptions and new trials, and the provisions of chapter 15 of such code relating to appeals are applicable to proceedings under this chapter. [R. C. 1895, § 7852.]

§ **9661. State's attorney must prosecute.** The several state's attorneys within their respective counties shall prosecute all proceedings under this chapter. [R. C. 1895, § 7853.]

§ **9662. Action on undertaking.** If the defendant fails to appear in accordance with the terms of the undertaking provided for in section 9650 the state's attorney of the county shall commence an action thereon in the name of the state for the recovery of the full amount specified in such undertaking, which amount is declared to be liquidated damages. The judgment in such action shall direct the payment of such money as provided in section 9655, so far as the same is applicable and the court may also direct the clerk to issue a bench warrant for the arrest of the defendant and the provisions of sections 9875 and 9876 of this code, so far as the same are applicable, shall govern the proceedings under such warrant. [R. C. 1895, § 7854.]

§ **9663. Proceedings on undertaking.** If at any time after having given the undertaking provided for in section 9655, the defendant shall be in default in the payment of any sum provided for in the judgment, the court may upon motion of the state's attorney, upon ten days' notice to the defendant and his sureties enter up judgment on such undertaking and award execution for the amount of money due upon such judgment at the time such motion is heard. [R. C. 1895, § 7855.]

§ **9664. Deposit instead of undertaking.** The defendant instead of giving any undertaking required under the provisions of this chapter may deposit with the clerk of the district court of the county in which such proceeding is commenced, a sum of money equal to the amount for which such undertaking is required to be given. Such deposit shall be held to answer the event of such proceeding to the same extent and upon the same conditions as the undertaking in lieu of which such deposit is made. [R. C. 1895, § 7856.]

CHAPTER 6.

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

Article 1.—Local Jurisdiction of Public Offenses.

§ **9665. Who punishable in this state.** Every person is liable to punishment under the laws of this state, for a crime or public offense committed by him therein, or as otherwise prescribed by the penal code, except when it

s by law cognizable exclusively in the courts of the United States. [C. Cr. P. 1877, § 71; R. C. 1895, § 7857.]

§ **9666. Commenced without, consummated within.** When the commission of a public offense commenced without this state is consummated within its boundaries, the defendant is liable to punishment therefor in this state, though he was out of the state at the time of the commission of the offense charged, if he consummated it in this state 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 or judicial subdivision in which the offense is consummated. [C. Civ. P. 1877, § 72; R. C. 1899, § 7858.]

§ **9667. Duel without, death within state.** When an inhabitant or resident of this state, by previous appointment or engagement fights a duel, or is concerned as a second or surgeon therein, out of the jurisdiction of this state, and in the duel a wound is inflicted upon a person, whereof he dies in this state, the jurisdiction of the offense is in the county or judicial subdivision where the death happens. [C. Cr. P. 1877, § 73; R. C. 1895, § 7859.]

§ **9668. Inhabitant leaving to evade law.** When an inhabitant or resident of this state leaves 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 or judicial subdivision of which the offender was an inhabitant or resident when the offense was committed. [C. Cr. P. 1877, § 74; R. C. 1895, § 7860.]

§ **9669. Part committed in different counties.** When a crime or public offense is committed in part in one county or judicial subdivision and in part in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense occur in two or more counties or judicial subdivisions, the jurisdiction is in either or any of said counties or judicial subdivisions. [C. Cr. P. 1877, § 75; R. C. 1895, § 7861.]

§ **9670. Committed near boundary.** When a public offense is committed on the boundary of two or more counties or judicial subdivisions, or within five hundred yards thereof, the jurisdiction is in either county or judicial subdivision. [C. Cr. P. 1877, § 76; R. C. 1895, § 7862.]

§ **9671. On board vessel.** When an offense is committed in this state 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 or judicial subdivision through which the vessel is navigated in the course of her voyage, or in the county or judicial subdivision where the voyage terminates. [C. Cr. P. 1877, § 77; R. C. 1895, § 7863.]

§ **9672. Certain enumerated cases.** The jurisdiction of a criminal action:

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

2. For maliciously, forcibly or fraudulently taking or enticing away a child under the age of twelve years, with intent to detain and conceal such child from its parents, guardian or other person having lawful charge of the child; or,

3. For inveigling, enticing or taking away any unmarried female of previous chaste character, under the age of twenty years, for the purpose of prostitution, or for aiding or assisting in such abduction, for such purpose; or,

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

Is in any county or judicial subdivision 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 accused in instigating, procuring, promoting, aiding or assisting or in being an accessory to the commission of the offense or in abetting the parties concerned therein. [C. Cr. P. 1877, § 78; R. C. 1895, § 7864.]

§ **9673. Proceedings in certain cases.** When property taken in one county or judicial subdivision, by burglary, robbery, larceny or embezzlement, has been brought into another, the jurisdiction of the offense is in either. But if before the conviction of the defendant in the latter, he is indicted in the former county or judicial subdivision, the sheriff of the latter must, upon demand, deliver him to the sheriff of the county or judicial subdivision where the indictment was found, upon being served with a certified copy of the indictment and a receipt indorsed thereon, 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. The sheriff having the custody of the accused shall not surrender him except upon an indictment by a grand jury. [C. Cr. P. 1877, § 80; R. C. 1895, § 7865.]

§ **9674. Treason. Overt act without state.** The jurisdiction of a criminal action for treason, when the overt act is committed out of this state, is in any county or judicial subdivision of the state. [R. C. 1895, § 7866.]

§ **9675. Jurisdiction of accessory.** In the case of an accessory in the commission of a public offense, the jurisdiction is in the county or judicial subdivision where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county or judicial subdivision. [C. Cr. P. 1877, § 81; R. C. 1895, § 7867.]

§ **9676. Conviction or acquittal in another state.** When an act charged as a public offense is within the jurisdiction of another state, country or territory as well as in this state, a conviction or acquittal thereof in the former is a bar to a prosecution or indictment therefor in this state. [C. Cr. P. 1877, § 82; R. C. 1895, § 7868.]

§ **9677. Conviction or acquittal in another county.** 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. [C. Cr. P. 1877, § 83; R. C. 1899, § 7869.]

§ **9678. Escaping from penitentiary.** The jurisdiction of a criminal action for escaping from or breaking the penitentiary, with intent to escape therefrom, or for attempting by force or violence or in any other manner to escape from said prison, is in the county where the same is located. [C. Cr. P. 1877, § 84; R. C. 1895, § 7870.]

§ **9679. Escaping from jail.** The jurisdiction of a criminal action for breaking or escaping from the jail of any county is in the county where said jail is located. [C. Cr. P. 1877, § 84; R. C. 1895, § 7871.]

§ **9680. Bringing stolen property into state.** The jurisdiction of a criminal action for stealing in any state, country or territory, the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this state, is in any county or judicial subdivision into which such stolen property has been brought. [C. Cr. P. 1877, § 85; R. C. 1895, § 7872.]

§ **9681. Murder or manslaughter.** The jurisdiction of a criminal action for murder or manslaughter, when the injury which caused the death was inflicted in one county or judicial subdivision and the party injured dies in another or out of the state, is in the county or judicial subdivision where the injury was inflicted. [C. Cr. P. 1877, § 86; R. C. 1895, § 7873.]

§ **9682. Against a principal not present.** The jurisdiction of a criminal action against a principal in the commission of a public offense, when such principal is not present at the commission thereof, is in the same county or judicial subdivision in which it would be under this code, if he was so present and aiding and abetting therein. [C. Cr. P. 1877, § 87; R. C. 1895, § 7874.]

§ **9683. Violating enumerated sections.** The jurisdiction of a criminal action for the violation of any of the provisions of sections 9089, 9090 and 9091 of the penal code is in any county or judicial subdivision, either:

1. In which any act is done toward the commission of the offense; or,
2. Into, out of or through which the offender passed to commit the offense; or,
3. Where the offender is arrested. [R. C. 1895, § 7875.]

ARTICLE 2.—TIME OF COMMENCING CRIMINAL ACTIONS.

§ **9684. For murder not limited.** 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. [C. Cr. P. 1877, § 88; R. C. 1895, § 7876.]

§ **9685. For felony other than murder.** An information for any other felony than murder must be filed, or an indictment found, within three years after its commission; provided, that nothing in this section contained shall be construed to bar or prevent a person prosecuted for murder from being found guilty of manslaughter and punished accordingly. [C. Cr. P. 1877, § 89; R. C. 1895, § 7877.]

§ **9686. For misdemeanor.** An information, or a complaint for a misdemeanor, except as otherwise specially limited by law, must be filed, or an indictment found, within two years after its commission. [R. C. 1895, § 7878.]

§ **9687. Time of defendant's absence.** If when the crime or public offense is committed, the defendant is out of the state, the information may be filed, or the indictment found, within the time herein limited, after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within this state, is part of the limitation. [C. Cr. P. 1877, § 90; R. C. 1895, § 7879.]

Not necessary to allege absence from state in information; defendant must plead limitation or it will be waived. Smith v. Jones, 16 S. D. 337, 92 N. W. 1084.

§ **9688. When action is commenced.** An information is filed or an indictment found within the meaning of this article when it is presented, if an information by the state's attorney or person appointed to prosecute, or if an indictment, by the grand jury, in open court, and there received and filed; or if a complaint, when filed by a magistrate having jurisdiction to hear, try and determine the action. [C. Cr. P. 1877, § 91; R. C. 1895, § 7880.]

ARTICLE 3.—THE COMPLAINT, INFORMATION OR INDICTMENT AND MAGISTRATES.

§ **9689. Complaint defined.** A complaint is a statement in writing made to a magistrate that a person has been guilty of some designated crime or public offense, and subscribed and sworn to by the complainant. [R. C. 1895, § 7881.]

§ **9690. Indictment defined.** An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a crime or public offense. [C. Cr. P. 1877, § 186; R. C. 1895, § 7882.]

§ **9691. Information defined.** An information is an accusation in writing, in form and substance like an indictment for the same offense, charging a person with a crime or public offense, signed and verified by some person and presented to a police magistrate, or to the district court, and filed by said police magistrate, if presented to him, or if presented to the district court, then in the office of the clerk of said court. [R. C. 1895, § 7883.]

Form of complaint; what sufficient. State ex rel Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541; State v. Severine, 2 S. D. 238, 49 N. W. 1056; State v. Rozum, 8 N. D. 548, 80 N. W. 477.

§ **9692. Magistrates defined.** A magistrate is an officer authorized by law, to issue a warrant for the arrest of a person charged with a crime or public offense. [C. Cr. P. 1877, § 93; R. C. 1895, § 7884.]

§ **9693. Who are magistrates.** The following officers are magistrates:

1. The judges of the supreme court, with authority to act as such throughout the state.

2. The judges of the district courts, with authority to act as such throughout the judicial districts for which they are respectively elected.

3. As limited by law directing the place of exercising their jurisdiction and authority, county, city, township and other justices of the peace, police magistrates and, when authorized by law, the judges of the county courts, with authority to act as such throughout the counties or the judicial subdivisions in which the county, city, township or municipality for which they are respectively elected are located. [C. Cr. P. 1877, § 94; R. C. 1895, § 7885.]

Police magistrates are ex officio justices of the peace. State v. Wright, 15 S. D. 628, 91 N. W. 311.

Article 4.—The Complaint.

§ **9694. What complaint must state.** The complaint must state:

1. The name of the person accused, if known, or if not known and it is so stated, he may be designated by any other name.

2. The county or judicial subdivision in which the offense was committed.

3. The general name of the crime or public offense.

4. The acts or omissions complained of as constituting the crime or public offense named.

5. The person against whom, or against whose property the offense was committed, if known, and,

6. If the offense is against the property of any person, a general description of such property. The complaint must be subscribed and sworn to by the complainant. [R. C. 1895, § 7886.]

Need not be framed with same degree of care and technical accuracy as required for information. State ex rel Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541.

§ **9695. Who may make complaint.** Every person who has reason to believe that a crime or public offense has been committed, must make complaint against such person before some magistrate having authority to make inquiry of the same. [R. C. 1895, § 7887.]

§ **9696. Magistrate may examine complainant.** When a complaint is made before a magistrate, charging a person with the commission of a crime or public offense, such magistrate may examine the complainant, under oath, as to his knowledge of the commission of the offense charged, and he may also examine any other persons. [R. C. 1895, § 7888.]

§ **9697. Accused arrested without warrant.** When any officer or other person shall bring any person he has arrested without a warrant, before a magistrate, it is the duty of such officer or person to specify the charge upon which he has made the arrest. It is then the duty of the magistrate or state's attorney to make a complaint of the offense charged, and cause the officer or person, or some other person, to subscribe and make oath to such complaint and file it. [R. C. 1895, § 7889.]

§ **9698. Witnesses other than complainant.** Every person making complaint charging the commission of a crime or public offense, must inform the magistrate of all persons whom he believes to have any knowledge of its commission, and the magistrate, at the time of issuing the warrant, may issue subpenas for such persons, requiring them to attend at a specified time and place as witnesses. [R. C. 1895, § 7890.]

Article 5.—The Warrant of Arrest.

§ **9699. Issuance of warrant. Justices of the peace.** When a complaint, verified by oath or affirmation, is laid before a magistrate, charging the commission of a crime or 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 accused committed it, issue a warrant for his arrest; but when the magistrate before whom the complaint is made is a justice of the peace, before issuing the warrant, the complaint, if made by any person other than the state's attorney of the county, and other evidence taken by such magistrate relating to the offense charged, must be submitted to such state's attorney and he must examine into the charge and enter either his approval or disapproval of the issuance of a warrant upon such complaint. If the state's attorney disapproves, no warrant shall be issued, but if he approves the issuance of a warrant such magistrate shall proceed accordingly; provided, however, that in cases when it appears from statements of the complaint or other written evidence submitted to the magistrate that the accused is liable to escape from the county before the approval of the state's attorney can be had as hereinbefore prescribed and such magistrate so certifies on the complaint, and in all cases mentioned in section 9697 of this code, a warrant may issue without the approval of the state's attorney. No justice of the peace shall receive any fees or allowances whatever for any act done or services rendered in a criminal action or proceeding commenced or prosecuted in disregard of the provisions of this section. [C. Cr. P. 1877, § 95; R. C. 1895, § 7891.]

§ 9700. **Warrant defined. Form.** A warrant of arrest is an order in writing, in the name of the state, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

State of North Dakota, } ss.
County of ..... }

The state of North Dakota to any sheriff, constable, marshal or policeman in this state (or in the county of....., or as the case may be):

Complaint 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....., 19...

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

[C. Cr. P. 1877, § 96; R. C. 1895, § 7892.]

§ 9701. **Requisites of warrant.** The warrant must specify the name of the defendant, or if it is 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. [C. Cr. P. 1877, § 97; R. C. 1899, § 7893.]

§ 9702. **Directed to peace officer. Execution.** The warrant must be directed to and executed by a peace officer. [C. Cr. P. 1877, § 98; R. C. 1899, § 7894.]

§ 9703. **Peace officer defined.** A peace officer is a sheriff of a county or his deputy, or a constable, marshal or policeman of a township, city, village or town. [C. Cr. P. 1877, § 99; R. C. 1895, § 7895.]

§ 9704. **To whom judge may direct warrant.** If the warrant is issued by a judge of the supreme court or by a judge of the district court it may be directed generally to any sheriff, constable, marshal or policeman in the state, and may be executed by any of such officers to whom it may be delivered in any part of the state. [C. Cr. P. 1877, § 100; R. C. 1895, § 7896.]

§ 9705. **To whom, other magistrate.** If it is issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal or policeman

in the county or judicial subdivision in which it is issued, and may be executed by such officer in any part of the state. [C. Cr. P. 1877, § 101; R. C. 1895, § 7897.]

§ 9706. **Officer executing may command assistance.** An officer arresting a person for whom he has a warrant, in a county or judicial subdivision other than the one in which he holds office, may, in the county or judicial subdivision where he finds such person, call for assistance and command aid, and exercise authority as if in his own county. [R. C. 1895, § 7898.]

§ 9707. **Duty of officer if felony.** If the offense charged in the warrant is a felony, the officer making the arrest must take the accused before the magistrate who issued the warrant, or some other magistrate in the same county as provided in the warrant of arrest. [C. Cr. P. 1877, § 103; R. C. 1895, § 7899.]

§ 9708. **If a misdemeanor. Bail.** If the offense charged in the warrant is a misdemeanor not within the jurisdiction of the magistrate who issued it to punish, and the accused is arrested in another county or judicial subdivision, the officer must, upon being required by the accused, take him before a magistrate in that county or judicial subdivision, who must admit him to bail and take bail from him accordingly. But if there is no magistrate residing within the county or judicial subdivision wherein the accused is arrested and the accused requires it, the officer must take him before a magistrate of any other county nearer or more accessible than the magistrate issuing the warrant and said magistrate must admit him to bail and take bail from him accordingly. [C. Cr. P. 1877, § 104; R. C. 1895, § 7900.]

§ 9709. **Procedure when 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 accused. The officer must then discharge the accused from arrest, and must without delay deliver the warrant and undertaking to the clerk of the court at which the accused is required to appear. [C. Cr. P. 1877, § 105; R. C. 1895, § 7901.]

§ 9710. **When bail is not given.** If, on the admission of the accused to bail, the bail is not forthwith given, the officer must take the accused before the magistrate who issued the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county and must at the same time deliver to the magistrate the warrant with his return thereon indorsed and subscribed by him. [C. Cr. P. 1877, § 106; R. C. 1895, § 7902.]

§ 9711. **Misdemeanor within magistrate's jurisdiction.** If the offense charged is within the jurisdiction of the magistrate to try and punish upon conviction, the accused, if arrested in another county or judicial subdivision must be taken before the magistrate who issued the warrant, or, if he is absent, then before some other magistrate, as provided in the last preceding section. [R. C. 1895, § 7903.]

§ 9712. **Delay prohibited. Attorney.** The accused must in all cases be taken before the magistrate without unnecessary delay, and any attorney at law entitled to practice in the courts of record of North Dakota, may, at his request, visit such person after his arrest. [C. Cr. P. 1877, § 108; R. C. 1895, § 7904.]

On being arrested, a request to be taken before some other than nearest magistrate, a compliance would not make party making arrest liable for false imprisonment. Richardson v. Dybedahl, 14 S. D. 126, 84 N. W. 486.

§ 9713. **Magistrate not issuing the warrant.** If the accused is taken before a magistrate other than the one who issued the warrant, the complaint on which the warrant was granted must be sent to that magistrate, or if it cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew. [C. Cr. P. 1877, § 109; R. C. 1895, § 7905.]

§ 9714. **Accused from other county.** When a complaint is laid before a magistrate of the commission of a crime or public offense, triable in another county of this state, but showing that the accused is in the county or judicial subdivision where the complaint is laid, the same proceedings must be had as prescribed in this article, except that the warrant must require the accused to be taken before the nearest and most accessible magistrate of the county in which the offense is triable, and the complaint of the complainant, with the depositions, if any, of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered. [C. Cr. P. 1877, § 110; R. C. 1895, § 7906.]

§ 9715. **Taken to proper county.** The officer who executes the warrant must take the accused before the nearest or most accessible magistrate of the county or judicial subdivision in which the offense is triable, and must deliver to him the complaint and the depositions, if any, and the warrant with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself. [C. Cr. P. 1877, § 111; R. C. 1895, § 7907.]

§ 9716. **If offense a misdemeanor.** If the offense charged in the warrant issued pursuant to section 9714 is a misdemeanor not within the jurisdiction of the magistrate to try and punish, the officer must, upon being required by the accused, take him before a magistrate of the county in which the warrant was issued, who must admit the accused to bail and immediately transmit the warrant and complaint and depositions, if any, and undertaking, to the clerk of the court in which the accused is required to appear.. [C. Cr. P. 1877, § 112; R. C. 1895, § 7908.]

§ 9717. **Privilege of officer.** An officer who has arrested a person charged with a crime or public offense in any county or judicial subdivision, may take and convey such person through such parts of this state as shall be in the ordinary route of travel from the place where he shall have been arrested to the place where he is to be conveyed and delivered under the process by which the arrest shall have been made, and such conveyance shall not be deemed an escape. [R. C. 1895, § 7909.]

§ 9718. **Officer not liable to arrest.** While having in charge any person arrested in a criminal action or proceeding, neither the officer, nor any of his assistants, shall be liable to arrest on civil process; and such officer is authorized to require any citizen to aid in securing the accused, and to retake him, if he escapes, in any part of the state, as if he was within his own county; and a refusal or neglect to render such aid shall be an offense in the same manner as if he was an officer of the county or judicial subdivision where such aid is required. [R. C. 1895, § 7910.]

§ 9719. **Giving bail deemed waiver of examination.** Any person arrested for a misdemeanor not within the jurisdiction of a magistrate to hear, try and punish, in any county or judicial subdivision other than the county or judicial subdivision wherein the offense is triable, shall, if admitted to bail and released thereon, be deemed to have waived all and every right to a preliminary examination upon said charge before any magistrate and such person may be informed against, tried and punished, upon conviction of such offense, in all respects as if such preliminary examination had been had. [R. C. 1895, § 7911.]

Article 6.—Arrest, By Whom and How Made.

§ 9720. **Arrest defined.** An arrest is the taking of a person into custody in the manner authorized by law. [C. Cr. P. 1877, § 113; R. C. 1895, § 7912.]

§ 9721. **Who may take.** An arrest may be made, either:

1. By a peace officer, under a warrant.
2. By a peace officer, without a warrant; or,
3. By a private person. [C. Cr. P. 1877, § 114; R. C. 1899, § 7913.]

§ **9722. Officer may summon aid.** Any officer making an arrest may orally summon as many persons as he deems necessary to aid him therein. [C. Cr. P. 1877, § 115; R. C. 1899, § 7914.]

§ **9723. Persons must aid.** Every person when required must aid an officer in the making of an arrest. [R. C. 1895, § 7915.]

§ **9724. When made for felony. 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. [C. Cr. P. 1877, § 116; R. C. 1899, § 7916.]

§ **9725. How arrest 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. [C. Cr. P. 1877, § 117; R. C. 1899, § 7917.]

§ **9726. Restraint limited.** The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention. [C. Cr. P. 1877, § 118; R. C. 1899, § 7918.]

§ **9727. Warrant must be shown.** If the person making the arrest is acting under the authority of a warrant, he must so inform the defendant, and he must show the warrant, if required. [C. Cr. P. 1877, § 119; R. C. 1899, § 7919.]

§ **9728. Officers must obey warrant.** An officer making an arrest in obedience to a warrant, must proceed with the person arrested as commanded in the warrant or otherwise as provided by law. [R. C. 1895, § 7920.]

§ **9729. When defendant resists.** If, after notice of intention to arrest the defendant, he either flees or forcibly resists, the officer may use all necessary means to effect the arrest. [C. Cr. P. 1877, § 120; R. C. 1899, § 7921.]

§ **9730. 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 is refused admittance. [C. Cr. P. 1877, § 121; R. C. 1899, § 7922.]

§ **9731. 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 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. [C. Cr. P. 1877, § 123; R. C. 1899, § 7923.]

To justify arrest without warrant, fact must be such as to lead a person of ordinary caution to believe offense has been committed. Richardson v. Dybedahl, 14 S. D. 126, 84 N. W. 486.

§ **9732. 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 is refused admittance. [C. Cr. P. 1877, § 124; R. C. 1899, § 7924.]

§ **9733. Arrest at night. Reasonable cause.** 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 afterward appears that the felony had not been committed. [C. Cr. P. 1877, § 125; R. C. 1899, § 7925.]

§ **9734. Must state authority.** 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. [C. Cr. P. 1877, § 126; R. C. 1899, § 7926.]

§ **9735. 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. [C. Cr. P. 1877, § 127; R. C. 1899, § 7927.]

§ 9736. **Offense in presence of magistrate.** When a public offense is committed in the 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. [C. Cr. P. 1877, § 128; R. C. 1899, § 7928.]

§ 9737. **When private person may 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. [C. Cr. P. 1877, § 129; R. C. 1899, § 7929.]

§ 9738. **Must inform person of cause of arrest.** A private person making an arrest must, upon making the arrest, inform the person to be arrested of his intention to arrest him, and of the cause of the arrest, 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. [C. Cr. P. 1877, § 130; R. C. 1895, § 7930.]

§ 9739. **When private person may break door.** If the person to be arrested has committed a felony, and a private person, after notice of his intention to make the arrest, is refused admittance, he may break open an outer or inner door or window of a dwelling house, for the purpose of making the arrest. [C. Cr. P. 1877, § 131; R. C. 1899, § 7931.]

§ 9740. **Private person arresting. Duty.** 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. [C. Cr. P. 1877, § 132; R. C. 1899, § 7932.]

§ 9741. **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. [C. Cr. P. 1877, § 133; R. C. 1899, § 7933.]

§ 9742. **Procedure against person arrested without warrant.** When an arrest is made without a warrant by a peace officer or by a private person, the person arrested must without unnecessary delay be taken:

1. Before the nearest or most accessible magistrate in the county or judicial subdivision where the arrest is made; or,
2. If there is no magistrate in said county or judicial subdivision qualified to act, then before the nearest or most accessible magistrate authorized to act for the county or judicial subdivision where the arrest is made. A complaint stating the charge against the person arrested, must be made before such magistrate, as provided by section 9697 of this code. [R. C. 1895, § 7934.]

§ 9743. **Who may break door. When.** Any person who has lawfully entered a house for the purpose of making an arrest, or, being therein, makes an arrest, may break open the door or window thereof, if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same when necessary for the purpose of liberating a person who, acting in his aid, lawfully enters for the purpose of making an arrest, and is detained therein. [C. Cr. P. 1877, § 122; R. C. 1895, § 7935.]

Article 7.—Warrants and Service Thereof by Telegraph.

§ 9744. **Warrant transmitted by telegraph.** Whenever a warrant for the arrest of a person accused of a crime or public offense is issued by a judge of the supreme or district court or by a magistrate of the county wherein such offense is triable, the delivery of such warrant by telegraph may be authorized by a judge of the supreme or district court, by an indorsement,

authorizing such delivery, at any place within this state, upon the warrant of arrest under the hand of such judge, directed generally to any sheriff, constable, marshal or policeman in the state. After such indorsement, a telegraphic copy of such warrant may be sent by telegraph to one or more of such officers within the state, and such copy is as effectual in the hands of any such officer, and he must serve the same and in all regards proceed thereunder in the same manner as though he held an original warrant issued by the magistrate making the indorsement thereon. [R. C. 1895, § 7936.]

§ 9745. Duty of officer transmitting. Every officer causing telegraphic copies of a warrant to be sent must certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder and signed by him. [R. C. 1895, § 7937.]

§ 9746. Warrant returnable in county where issued. Misdemeanor. Every person arrested by warrant for any offense, when no other provision is made for his examination, must be taken before some magistrate of the county in which the warrant was issued, and the warrant with the proper return thereon, signed by the person who made the arrest, must be delivered to such magistrate. Any telegraphic copy of a warrant under which an officer has acted in making an arrest shall be deemed the original warrant. If the offense charged in the warrant is a misdemeanor within the jurisdiction of a magistrate to try and upon conviction to punish, a trial must be had as provided by law. [R. C. 1895, § 7938.]

§ 9747. Arrest directed by telegraph. In all cases when by law a peace officer of this state may arrest a person without a warrant, or having a warrant for the arrest of a person accused of a crime or public offense and such person may otherwise escape from this state, such officer may, by telegraph, direct any sheriff, constable, marshal or policeman in this state to arrest such person, and designate the accused in said order by name or description, or both. [R. C. 1895, § 7939.]

§ 9748. How executed. Procedure. The order may be directed generally to any of such officers and executed by the officer receiving it. The officer executing any such order shall take into his custody the person designated therein and detain him upon such order for such length of time as shall be necessary for the officer directing the arrest to reach the place of detention by the ordinary course and means of travel, or until sooner demanded by an officer having a warrant for the arrest of such person, but in no case shall the officer arresting such person upon such order detain him longer than the time hereinbefore mentioned. [R. C. 1895, § 7940.]

Article 8.—Railway Police.

§ 9749. When conductors peace officers. Each conductor of a railway or railroad train carrying passengers, while on duty in this state as such conductor is hereby invested with and possesses the authority of a peace officer of the state. [1889, ch. 106, § 1; R. C. 1895, § 7941.]

§ 9750. Railway companies may appoint police. Every railway or railroad company doing business within this state is hereby authorized to appoint, and at its own expense to employ, such persons as peace officers at its stations or other places along the line of its road within this state, as may be by it deemed necessary, for the protection of its property or the preservation of order on its premises or in or about its cars, depots, grounds, yards, buildings or other structures, or any of the same under its control or in its possession. When any railway or railroad company doing business in this state is in the hands of or being operated by a receiver appointed by a court of this state or of the United States, the authority conferred by this section upon such company is conferred upon and may be exercised by such receiver. [1887, ch. 132; R. C. 1895, § 7942.]

§ **9751. Powers of railway police.** Every conductor mentioned in section 9749 and every person employed as provided in section 9750, shall have and may exercise the authority of a peace officer of the state, to arrest with or without warrant, as other peace officers, any person committing an offense against the laws of the state or the ordinances of any city, village, town or municipality, upon the premises occupied by the company or receiver thereof, by which he is employed, or in or about its cars, depots, grounds, yards, buildings or other structures or any of the same under its control or in its possession. [1887, ch. 132; R. C. 1895, § 7943.]

§ **9752. Procedure on arrest.** Every person arrested by any conductor, or other person exercising authority conferred by this article, must be thereafter proceeded with in all respects as is or may be required by law, in cases of arrests made by other peace officers of the state, except that a conductor may cause a person so arrested by him to be so proceeded with by any other person or officer. [1887, ch. 132; 1889, ch. 106, § 2; R. C. 1895, § 7944.]

§ **9753. Other peace officers.** Nothing in this article contained shall be construed to restrict, in any way. any right, authority or privilege conferred by law, upon any other peace officer of the state within his lawful jurisdiction. [1887, ch. 132; R. C. 1895, § 7945.]

§ **9754. Railway police. No fees.** No person authorized by the provisions of this article to make arrests, shall receive or be allowed any fees or expenses for so doing. [1887, ch. 132; R. C. 1895, § 7946.]

§ **9755. Railway company liable for acts of.** Each of such railway or railroad companies or receivers thereof is, and shall be held responsible for the acts of all conductors or other persons employed by it while acting as peace officers under the provisions of this article to the same extent as for the acts of its general agents or employes. [1887, ch. 132; R. C. 1895, § 7947.]

Article 9.—Retaking After an Escape or Rescue.

§ **9756. Pursuit and rearrest.** If a person arrested escapes or is 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 state. [C. Cr. P. 1877, § 134; R. C. 1899, § 7948.]

§ **9757. 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. [C. Cr. P. 1877, § 135; R. C. 1899, § 7949.]

Article 10.—Preliminary Examinations.

§ **9758. 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. [C. Cr. P. 1877, § 136; R. C. 1899, § 7950.]

§ **9759. Must allow accused 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 upon service of a subpena. [C. Cr. P. 1877, § 137; R. C. 1899, § 7951.]

§ **9760. Examination.** The magistrate before whom the accused is brought, must, unless a change of the place of trial is had under the provisions of the next section, immediately after the appearance of counsel, or if none appears and the accused requires the aid of counsel, after waiting a reasonable time

therefor, proceed to examine the case. [C. Cr. P. 1877, § 138; R. C. 1895, § 7952.]

§ **9761. Change of place of trial.** Whenever a person accused of a public offense is brought before a justice of the peace for examination and, at any time before such examination is commenced, he files with such justice his affidavit stating that by reason of the bias or prejudice of said justice he believes he cannot have a fair and impartial examination before him, such justice must transfer said action, and all the papers therein, including a certified copy of his docket entries, to another justice of the same county, if there is another justice in said county qualified to act; provided, that unless the parties agree upon the justice to whom said action shall be transferred, it shall be sent to the nearest justice of the county, but no more than one change of the place of examination under this section shall be had in an action. [1887, ch. 82, § 1; R. C. 1895, § 7953.]

This statute is mandatory, and upon filing required affidavit justice must transfer action. State v. Weltner, 7 N. D. 522, 75 N. W. 779.

§ **9762. Adjournment.** The examination must be completed at one session unless the magistrate for good cause adjourns it. The adjournment cannot be for more than three days at each time, nor more than fifteen days in all, unless by the consent, or on the motion of the defendant. [C. Cr. P. 1877, § 139; R. C. 1895, § 7954.]

§ **9763. Disposition of accused on adjournment.** If an adjournment is had for any cause and the defendant is charged with a capital offense, he must be committed in the meantime, otherwise the magistrate must commit the defendant for examination, or discharge him from custody, upon sufficient bail or the deposit of money, as provided in this code, as security for his appearance at the time to which the examination is postponed. [C. Cr. P. 1877, § 140; R. C. 1895, § 7955.]

§ **9764. Form. 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..... 19..., at.....o'clock. ....m., at which time you will have his body before me at my office. [C. Cr. P. 1877, § 141; R. C. 1899, § 7956.]

§ **9765. Examination. Procedure.** At the examination the magistrate must, in the first place, read to the accused the complaint on file before him. He must also, after the commencement of the prosecution, issue subpenas for any witnesses required by the prosecution or the defendant. [C. Cr. P. 1877, § 142; R. C. 1899, § 7957.]

§ **9766. Same. Witnesses kept separate.** While a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined. [R. C. 1895, § 7958.]

§ **9767. Same. Who excluded.** The magistrate may also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney general of the state, the state's attorney of the county, the defendant and his counsel and such other person as he may designate, and the officer having the defendant in custody. [R. C. 1895, § 7959.]

§ **9768. How witnesses examined.** The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf. And on demand of the state or the defendant all the testimony in the case must be reduced to writing in the form of depositions, or the testimony may be

taken by stenographer if the state and the defendant consent thereto. [1899, ch. 174; R. C. 1899, § 7960.]

§ 9769. Accused may produce witnesses. When the examination of the witnesses on the part of the state is closed, any witnesses the defendant may produce must be sworn and examined. [C. Cr. P. 1877, § 144; R. C. 1899, § 7961.]

§ 9770. Magistrate. Disposition of depositions. The magistrate or his clerk must keep the depositions taken, and exhibits admitted as evidence on the examination until returned to the proper court; and must not permit such testimony to be examined or copied by any person except a judge of the court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney general of the state, the state's attorney of the county or judicial subdivision, or other prosecuting attorney and the defendant and his counsel. [C. Cr. P. 1877, § 145; R. C. 1895, § 7962.]

§ 9771. Violation, misdemeanor. Every violation of the last section is punishable as a misdemeanor. [C. Cr. P. 1877, § 146; R. C. 1899, § 7963.]

§ 9772. Procedure. Accused discharged. After hearing the evidence on behalf of the respective parties, if it appears 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 complaint over his signature, to the following effect: "There being no sufficient cause to believe the within named..... guilty of the offense within mentioned, I order him discharged." [C. Cr. P. 1877, § 147; R. C. 1899, § 7964.]

§ 9773. Malicious prosecution. Costs taxed. If the defendant on a preliminary examination for a public offense is discharged as provided in section 9772 and if the magistrate finds 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. [1881, ch. 38, § 2; R. C. 1895, § 7965.]

§ 9774. Procedure. Accused held to answer. If, however, it appears 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 complaint an order signed by him; to the following effect: "It appearing to me that the offense in the within complaint 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.....guilty thereof, I order that he be held to answer the same." [C. Cr. P. 1877, § 148; R. C. 1899, § 7966.]

Order of commitment; endorsed upon docket held sufficient. It is the making of the order that gives jurisdiction and not the place of entry. State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Wright, 15 S. D. 628, 91 N. W. 311.

Magistrate must return papers and copy of record to district court. State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Wright, 15 S. D. 628, 91 N. W. 311; State v. Weltner, 7 N. D. 522, 75 N. W. 779.

§ 9775. When offense not bailable. If the offense is 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)." [C. Cr. P. 1877, § 149; R. C. 1899, § 7967.]

§ 9776. When offense 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 9774: "And I have admitted him to bail, to answer, by the undertaking hereto annexed." [C. Cr. P. 1877, § 150; R. C. 1899, § 7968.]

§ 9777. **When bail not taken.** If the offense is bailable, and the defendant is admitted to bail, but bail has not been taken, the following words, or words to the same effect, must be added to the indorsement mentioned in section 9774: "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 is given." [C. Cr. P. 1877, § 151; R. C. 1899, § 7969.]

§ 9778. **Commitment. Procedure.** If the magistrate orders the defendant to be committed as provided in sections 9775 and 9777 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 is not present, to a peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment. [C. Cr. P. 1877, § 152; R. C. 1899, § 7970.]

§ 9779. **Form of commitment.** The commitment must be to the following effect:

State of North Dakota, } ss.
County of .....}

The state of North 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....., 19...

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

[C. Cr. P. 1877, § 153; R. C. 1899, § 7971.]

§ 9780. **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 state, a written undertaking, without surety, to the effect that he will appear and testify at the court to which the complaint and depositions, if any, are to be sent, or that he will forfeit such sum as the magistrate may fix and determine. [C. Cr. P. 1877, § 154; R. C. 1899, § 7972.]

§ 9781. **Sureties may be required.** 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 is 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. [C. Cr. P. 1877, § 155; R. C. 1895, § 7973.]

§ 9782. **Married women and minors.** When a married woman or a minor is a material witness, any other person may be allowed to give an undertaking for the appearance of such witness; or the magistrate may, in his discretion, take the undertaking of such married woman or minor in a sum not exceeding fifty dollars, which is valid and binding in law, notwithstanding the disability of minority. [C. Cr. P. 1877, § 156; R. C. 1895, § 7974.]

§ 9783. **Refusal. Witness committed.** If a witness required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged. [C. Cr. P. 1877, § 157; R. C. 1899, § 7975.]

§ 9784. **Security may be subsequently demanded.** When, in pursuance of section 9780, any material witness on the part of the prosecution has been discharged on his undertaking, without surety, if afterwards, on the sworn application of the state's attorney or other person on behalf of the state, 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 prosecution 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 state, 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 peace officer, to arrest such person and bring him before such magistrate or judge. [C. Cr. P. 1877, § 158; R. C. 1895, § 7976.]

§ 9785. **Witness may be confined.** 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 peace officer, whose duty it shall be to convey such person to the jail mentioned in said warrant, and the person shall remain in confinement until he shall be removed to the grand jury or to the court, for the purpose of giving his testimony, or until he shall have given the undertaking required by said magistrate or judge, or until he is otherwise discharged according to law. [C. Cr. P. 1877, § 159; R. C. 1899, § 7977.]

§ 9786. **Witness fees may be allowed when witness confined.** In any criminal case in which it may be made to appear to the satisfaction of the trial judge that a witness who shall have been required, pursuant to section 9781, to enter into an undertaking, with sureties, for his appearance at the trial court, there to testify on behalf of the state, and who shall have been committed to and confined in prison, under section 9783 was actually unable to obtain and furnish acceptable sureties, by reason of being a stranger or a transient in the community, or for other good and sufficient reason, such judge may, in his discretion, order the allowance to such witness, and the payment by the proper county, of witness fees, at the rate of fifty cents per day for and during the period of his imprisonment. [1897, ch. 151; R. C. 1899, § 7977a.]

§ 9787. **Magistrate must return papers.** When a magistrate has discharged a defendant or has held him to answer, as provided in sections 9772 and 9774, he must return immediately to the district court of the county or judicial subdivision, the warrant, if any, the complaint, the deposition of all the witnesses examined before him, if any have been taken, and exhibits and all undertakings of bail or for the appearance of witnesses, taken by him, together with a certified copy of the record of the proceedings as it appears on his docket. [C. Cr. P. 1877, § 160; R. C. 1899, § 7978.]

CHAPTER 7.

PROCEEDINGS ON INFORMATION OR INDICTMENT.

Article 1.—Preliminary Provisions.

§ 9788. **Public offenses, how prosecuted.** All crimes or public offenses triable in the district courts must be prosecuted by information or indictment, except as provided in the next section. [C. Cr. P. 1877, § 161; R. C. 1895, § 7979.]

§ 9789. **Removal from office.** When the proceedings are for the removal of a district, county, township, city or municipal officer, or of a state officer not liable to impeachment, they may be commenced by an accusation in writing as provided in article 2, chapter 4, of this code. [C. Cr. P. 1877, § 162; R. C. 1895, § 7980.]

§ 9790. **Same. Jurisdiction. Exception.** All accusations against district, county, township or municipal officers, or state officers not liable

to impeachment, must be found, or presented to and filed in the district court; but nothing herein shall be construed to prevent said officers from being proceeded against for a crime or public offense in the same manner as now is or may hereafter be provided by law for proceeding against other persons accused of a crime or public offense, or to limit the power of the court to remove such officers from office, upon conviction, when authorized by law so to do. [R. C. 1895, § 7981.]

Article 2.—The Information.

§ 9791. **Prosecution on information. In what cases.** During each term of the district court held in and for any county or judicial subdivision in this state at which a grand jury has not been summoned and impaneled, the state's attorney of the county or judicial subdivision, or other person appointed by the court, as provided by law, to prosecute a criminal action, shall file an information or informations as the circumstances may require, respectively, against all persons accused of having committed a crime or public offense within such county or judicial subdivision or triable therein:

1. When such person or persons have had a preliminary examination before a magistrate for such crime or public offense and, from the evidence taken thereat, the magistrate has ordered that said person or persons be held to answer to the offense charged or some other crime or public offense disclosed by the evidence.
2. When the crime or public offense is committed during the continuance of the term of the district court in and for the county or judicial subdivision in which the offense is committed or triable.
3. When a person accused of a crime or public offense is arrested and waives, in writing, or if before a magistrate, orally, a preliminary examination therefor.
4. When a person accused of a misdemeanor not within the jurisdiction of the magistrate to try and punish, has been arrested and admitted to bail at a place other than the county or judicial subdivision in which said offense is triable; or,
5. At any time, when the person accused of a crime or public offense is a fugitive from justice and such information may be needed by the governor of this state to demand such person from the executive authority of any other state or territory within the United States, or to aid the proper executive authority of the United States to demand such person of any foreign government. [1890, ch. 71, § 1; R. C. 1895, § 7982.]

Proceedings by information same as by indictment. State v. Kent, 5 N. D. 516, 67 N. W. 1052; State v. King, 9 S. D. 628, 70 N. W. 1046.

Preliminary examination should be had before information. State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. LaCroix, 8 S. D. 369, 66 N. W. 944; State v. Wright, 15 S. D. 628, 91 N. W. 311; State v. Weltner, 7 N. D. 522, 75 N. W. 779; State ex rel Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541.

§ 9792. **State's attorney must inquire into charges.** The state's attorney of the county or judicial subdivision in which any person charged with the commission of a crime or public offense has been held to answer, or other person appointed by the court as provided by law to prosecute, must make full examination and inquiry into the facts and circumstances touching any crime or public offense committed by the accused and triable in said county or judicial subdivision, and must file an information setting forth the crime committed according to the facts ascertained on such examination and inquiry and from the written testimony taken before the magistrate, whether it is the offense charged in the complaint upon which the examination was had or some other offense. [1890, ch. 71, § 7; R. C. 1895, § 7983.]

§ 9793. **Procedure when no information filed.** If the state's attorney or other person appointed to prosecute, in any such case, determines that an

information ought not to be filed, he must make, subscribe and file with the clerk of the district court of the county or judicial subdivision, a statement in writing setting forth his reasons in fact and in law for not filing an information; such statement must be filed at and during the term of the court to which the accused is held to appear for trial. The court must thereupon examine such statement together with the evidence filed in the case, and if, upon such examination, the court is not satisfied with such statement, the state's attorney, or person appointed to prosecute, must be directed and required by the court to file the proper information and bring the case to trial. But if the court does not require that an information be filed and the defendant is not held or wanted to answer for any other crime or public offense, he shall be discharged and his bail exonerated or money deposited refunded to him. [1890, ch. 71, § 7; R. C. 1895, § 7984.]

§ 9794. Information. Filing. Names of witnesses. All informations filed under the provisions of this article, shall be by the state's attorney of the county or judicial subdivision, or by the person appointed to prosecute, as informant; and said state's attorney or person appointed to prosecute shall subscribe his name to said information and indorse or otherwise exhibit thereon the names of all witnesses for the prosecution known to him to be such at the time of the filing of the same, but other witnesses may testify, in behalf of the prosecution, on the trial of said action, the same as if their names had been indorsed upon the information. [1890, ch. 71, § 2; R. C. 1895, § 7985.]

New information may be filed to cure defects without new preliminary examination. State v. Hasledahl, 3 N. D. 36, 53 N. W. 430; State v. Pancoast (Kent), 5 N. D. 516, 67 N. W. 1052; State v. Church, 6 S. D. 89, 60 N. W. 143.

Witnesses not indorsed on information as provided, will be allowed to testify in absence of showing that they were known to state's attorney before trial began. State v. King, 9 S. D. 628, 70 N. W. 1046.

§ 9795. Verification, form of. The information must be verified by the state's attorney or by the person appointed to prosecute, or by the prosecuting witness, or by some other person, and said verification must be signed by the person verifying and may be to the effect that the person verifying has read or heard the information read, and knows the contents thereof, and that he is informed and verily believes that the facts set forth therein are true, and from said knowledge, information and belief he states the same to be true. [1890, ch. 71, § 3; R. C. 1895, § 7986.]

Offense charged should be stated with same precision required in indictment. State v. LaCroix, 8 S. D. 369, 66 N. W. 944.

State's attorney's verification upon information and belief, is sufficient. State v. Donaldson, 12 S. D. 259, 81 N. W. 299.

§ 9796. Information. Form of amendment. The information must conform to the requirements of the article of this code entitled, "Rules of Pleading and Form of the Information or Indictment," and may be amended in matter of form, without a new verification, or of substance with a new verification at any time before the defendant pleads, without leave of the court. The information may be amended at any time thereafter or during the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant. No amendment must cause any delay of the trial unless for good cause shown by affidavit. [1890, ch. 71, § 4; R. C. 1895, § 7987.]

Article 3.—Calling of the Grand Jury.

§ 9797. Grand jury defined. Formation. A grand jury is a body of men, consisting of not less than sixteen nor more than twenty-three persons of the county possessing the qualifications prescribed by law, and impaneled and sworn to inquire into and true presentment make to the district court of

all crimes or public offenses against the laws of this state committed or triable within the county or judicial subdivision for which the court is holden. [1885, ch. 62, § 2; R. C. 1895, § 7988.]

§ 9798. **When grand jury may be called.** No grand jury shall be drawn or summoned to attend at any session of the district court within this state unless the judge thereof shall so direct by order in writing under his hand and filed with the clerk of the court in the county wherein the said grand jury is required to attend. The judge of any district court in and for any county or judicial subdivision must, in the manner herein provided, direct that a grand jury be drawn and summoned to attend at a term of said court whenever:

1. He shall deem the attendance of such grand jury necessary for the due enforcement of the laws of the state; or,
2. The board of commissioners of the county wherein the court is to be held, in writing, requests him so to do; or,
3. A petition in writing requesting the same is presented to the judge, signed by at least ten per cent of the total male vote cast in said county for the office of governor of the state at the last general election preceding the calling of said grand jury.

The request provided for in subdivision 2 of this section and the petition mentioned in subdivision 3 hereof, must be presented to such judge at least fifteen days before the commencement of the term at which the attendance of a grand jury is requested; provided, that the said petition shall be verified on information and belief by three legal electors of such county or judicial subdivision; provided, further, that the formation of any grand jury called hereunder shall not be invalidated should it appear or be proven after the said grand jury has been called or summoned that any of said petitioners therefor were not such electors, and that said petition was not signed by the full ten per cent of electors of the county or judicial subdivision as aforesaid; provided, further, that no grand jury shall remain in session for a longer period than ten days at any one term of the district court, except as the judge of said court may in his discretion by written order filed with the clerk of said court, continue the session of said grand jury to such further time and such further term as he may deem necessary; otherwise said grand jury shall be by law discharged at the close of the tenth day of their session; provided, that Sundays and legal holidays shall not be included in computing the said ten days' limitation. [1890, ch. 71, § 9; R. C. 1895, § 7989; 1905, ch. 126.]

Law abolishing grand jury not unconstitutional. State v. Ayers, 8 S. D. 517, 67 N. W. 611.

Article 4.—Formation of the Grand Jury.

§ 9799. **Challenges. State. Accused.** The state 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. [C. Cr. P. 1877, § 166; R. C. 1899, § 7990.]

§ 9800. **Challenge allowed. Procedure.** Whenever a challenge to the panel or to an individual grand juror is allowed, the court shall make an order to the sheriff or other officer to summon without delay from the body of the county, a sufficient number of persons to complete or to form a grand jury. [C. Cr. P. 1877, § 164; R. C. 1895, § 7991.]

§ 9801. **Twelve jurors may find an indictment.** No indictment shall be found, nor shall any presentment or accusation be made, without the concurrence of at least twelve grand jurors. [C. Cr. P. 1877, § 165; R. C. 1899, § 7992.]

§ 9802. **Challenge to panel. Causes for.** 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. [C. Cr. P. 1877, § 167; R. C. 1899, § 7993.]

§ **9803. Challenge allowed, jury discharged.** If a challenge to the panel is allowed, the grand jury must be discharged. [C. Cr. P. 1877, § 168; R C. 1899, § 7994.]

§ **9804. Challenge to individual grand juror. Causes for.** 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 article 11, chapter 7, 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 a 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 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. [C. Cr. P. 1877, § 169; R. C. 1895, § 7995.]

§ **9805. Challenge may be oral or written.** Challenges may be oral or in writing, and must be tried by the court. [C. Cr. P. 1877, § 170; R. C. 1899, § 7996.]

§ **9806. Challenge allowed or disallowed. Clerk. Entry.** The court must allow or disallow the challenge and the clerk must enter its decision upon the minutes. [C. Cr. P. 1877, § 171; R. C. 1899, § 7997.]

Refusal to grant challenge legally interposed deprives defendant of a substantial right, and vitiates all the proceedings. People v. Wintermute, 1 Dak. 60, 46 N. W. 694.

§ **9807. 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. [C. Cr. P. 1877, § 172; R. C. 1899, § 7998.]

§ **9808. Violation. Punishment.** The grand jury must inform the court of a violation of the last section, and it is punishable by the court as a contempt. [C. Cr. P. 1877, § 173; R. C. 1899, § 7999.]

§ **9809. Challenge must be before jury is sworn.** Neither the state, 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 is 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 descretion, upon a good cause shown, receive and allow a challenge. [C. Cr. P. 1877, § 174; R. C. 1899, § 8000.]

§ **9810. Court may order another grand 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. [C. Cr. P. 1877, § 175; R. C. 1899, § 8001.]

§ **9811. 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. [C. Cr. P. 1877, § 176; R. C. 1899, § 8002.]

§ **9812. Court may 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. [C. Cr. P. 1877, § 177; R. C. 1899, § 8003.]

§ **9813. Oath to 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 state, 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 state, 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." [C. Cr. P. 1877, § 178; R. C. 1899, § 8004.]

§ **9814. 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." [C. Cr. P. 1877, § 179; R. C. 1899, § 8005.]

§ **9815. Court must charge grand jury.** 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. [C. Cr. P. 1877, § 180; R. C. 1899, § 8006.]

§ **9816. Jury must retire.** The grand jury must then retire to a private room and inquire into the offenses cognizable by them. [C. Cr. P. 1877, § 181; R. C. 1899, § 8007.]

§ **9817. Clerk. Appointment. 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. [C. Cr. P. 1877, § 182; R. C. 1899, § 8008.]

§ **9818. When jury to be 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 is completed or not, they are discharged by the final adjournment of the court. [C. Cr. P. 1877, § 183; R. C. 1899, § 8009.]

ARTICLE 5.—POWERS AND DUTIES OF THE GRAND JURY.

§ **9819. 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. [C. Cr. P. 1877, § 184; R. C. 1899, § 8010.]

May indict corporations same as natural persons; presentment may be made against corporation on evidence that would justify such action against individual. State v. Security Bank, 2 S. D. 538, 51 N. W. 337; People v. Sponsler, 1 Dak. 277, 46 N. W. 459.

§ **9820. 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. [C. Cr. P. 1877, § 185; R. C. 1899, § 8011.]

§ **9821. Oath to witness.** The foreman may administer an oath to any witness appearing before the grand jury. [C. Cr. P. 1877, § 187; R. C. 1899, § 8012.]

§ **9822. What evidence receivable.** 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. [C. Cr. P. 1877, § 188; R. C. 1895, § 8013.

§ **9823. Evidence. Legal. Best.** The grand jury can receive none but legal evidence and the best evidence in degree to the exclusion of hearsay or secondary evidence. [C. Cr. P. 1877, § 189; R. C. 1899, § 8014.

§ **9824. Evidence of the accused.** The grand jury shall upon the request of the accused, and may of their own motion, hear the evidence of the accused. 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 order such evidence to be produced and for that purpose the state's attorney shall issue process for the witnesses. [C. Cr. P. 1877, § 190; R. C. 1895, § 8015.]

§ **9825. When indictment ought 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 warrant a conviction by the trial jury. [C. Cr. P. 1877, § 191; R. C. 1899, § 8016.]

§ **9826. Member must 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. [C. Cr. P. 1877, § 192: R. C. 1899, § 8017.]

§ **9827. Concerning what grand jury must inquire.** 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. [C. Cr. P. 1877, § 193; R. C. 1899, § 8018.]

§ **9828. Entitled to access to prisons and public records.** They are also entitled to free access at all reasonable times, to all public prisons, and to the

examination, without charge, of all public records in the county. [C. Cr. P. 1877, § 194; R. C. 1899, § 8019.]

§ **9829. Jury's privilege. Advice. Court. State's attorney.** The grand jury may at all reasonable times ask the advice of the court or of the state's attorney. The state's 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. [C. Cr. P. 1877, § 195; R. C. 1899, § 8020.]

§ **9830. Secrecy. Things said. Votes.** 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. [C. Cr. P. 1877, § 196; R. C. 1899, § 8021.]

§ **9831. 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. [C. Cr. P. 1877, § 197; R. C. 1899, § 8022.]

§ **9832. Grand juror cannot be 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. [C. Cr. P. 1877, § 198; R. C. 1899, § 8023.]

Article 6.—Presentment and Proceedings Therein.

§ **9833. Presentment, how found. Signed.** A presentment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be signed by the foreman. [C. Cr. P. 1877, § 199; R. C. 1899, § 8024.]

§ **9834. Presented to court.** The presentment when found must be presented by the foreman, in presence of the grand jury, to the clerk, and must be filed with the clerk. [C. Cr. P. 1877, § 200; R. C. 1899, § 8025.]

§ **9835. 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. [C. Cr. P. 1877, § 201; R. C. 1899, § 8026.]

§ **9836. Issued by clerk.** The clerk on the application of the judge or state's attorney, may, accordingly, at any time after the order, whether the court is 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 state. [C. Cr. P. 1877, § 202; R. C. 1899, § 8027.]

§ **9837. Form of warrant.** The bench warrant, upon presentment, must be substantially in the following form:

State of North Dakota, } ss.
County of ..... }

To any sheriff, constable, marshal or policeman in this state:

A presentment having been made on the.....day of..... 19..., 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. 19...

By order of the court,

[Seal] ....., Clerk.

[C. Cr. P. 1877, § 203; R. C. 1899, § 8028.]

§ 9838. **Where and how warrant may be served.** The bench warrant may be served in any county or part of the state, and the officer serving it must proceed thereon as upon a warrant of arrest. [C. Cr. P. 1877, § 204; R. C. 1899, § 8029.]

§ 9839. **Magistrate's procedure on warrant.** 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 a complaint. [C. Cr. P. 1877, § 205; R. C. 1895, § 8030.]

Article 7.—Finding and Presentation of the Indictment.

§ 9840. **Finding. Twelve jurors must concur.** 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. [C. Cr. P. 1877, § 206; R. C. 1899, § 8031.]

§ 9841. **When accused must be dismissed.** If twelve grand jurors do not concur in finding an indictment against a defendant who has been held to answer, the original complaint 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. [C. Cr. P. 1877, § 207; R. C. 1899, § 8032.]

§ 9842. **Dismissal of charge. Resubmission.** 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. [C. Cr. P. 1877, § 208; R. C. 1899, § 8033.]

§ 9843. **Names of witnesses on indictment.** 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. [C. Cr. P. 1877, § 209; R. C. 1895, § 8034.]

Provision is mandatory. State v. Stevens, 1 S. D. 480, 47 N. W. 546; State v. Church, 6 S. D. 89, 60 N. W. 143; State v. Pancoast (Kent), 5 N. D. 516, 67 N. W. 1052.

Witnesses not before grand jury may be allowed to testify, without indorsement. State v. Isaacson, 8 S. D. 69, 65 N. W. 430.

§ 9844. **Presentment of indictment.** 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. [C. Cr. P. 1877, § 210; R. C. 1899, § 8035.]

§ 9845. **Person indicted, how arrested.** 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 9874 to 9881 inclusive, against a defendant who fails to appear for arraignment. [C. Cr. P. 1877, § 211; R. C. 1899, § 8036.]

CHAPTER 8.

RULES OF PLEADING AND FORM OF THE INFORMATION OR INDICTMENT.

§ 9846. **Forms of pleadings in criminal actions.** 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. [C. Cr. P. 1877, § 212; R. C. 1899, § 8037.]

§ 9847. First pleading, information or indictment. The first pleading on the part of the state is the information or the indictment. [C. Cr. P. 1877, § 213; R. C. 1895, § 8038.]

§ 9848. What information or indictment must contain. The information or indictment must contain:

1. The title of the action, specifying the name of the court to which the information or 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. [C. Cr. P. 1877, § 214; R. C. 1895, § 8039.]

Names of parties. State v. Hazledahl, 2 N. D. 521, 52 N. W. 315; Territory v. Pratt, 6 Dak. 483, 43 N. W. 711; State v. Kerr, 3 N. D. 523, and note 58 N. W. 27.

Statement of acts constituting offense in ordinary and concise language. State v. Lewis, 13 S. D. 166, 82 N. W. 406; State v. Hellekson, 13 S. D. 242, 83 N. W. 254; State v. Kent, 4 N. D. 577, 62 N. W. 631; State v. Burchard, 4 S. D. 548, 57 N. W. 491; City of Deadwood v. Allen, 8 S. D. 618, 67 N. W. 835.

§ 9849. Things as to which allegations must be certain and direct. The allegations of the information or the indictment must be direct and certain as 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. [C. Cr. P. 1877, § 215; R. C. 1895, § 8040.]

§ 9850. Fictitious name. True name. When a defendant is informed against, 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 prosecuted by the name mentioned in the information or indictment. [C. Cr. P. 1877, § 216; R. C. 1895, § 8041.]

§ 9851. Charge. One offense. Different counts. The information or 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. [C. Cr. P. 1877, § 217; R. C. 1895, § 8042.]

Though charged in separate counts, but one offense must be charged. State v. Smith, 2 N. D. 515, 52 N. W. 320; State v. Belyea, 9 N. D. 353, 83 N. W. 1; State v. Marcks, 3 N. D. 532, 58 N. W. 25.

Defendant may require state to elect between offenses. State v. Valentine, 7 S. D. 98, 63 N. W. 541; State v. Boughner, 7 S. D. 103, 63 N. W. 542.

The charging of homicide by more than one means, allowable. State v. Hall, 14 S. D. 161, 84 N. W. 766.

§ 9852. Time offense committed. The precise time at which the offense was committed need not be stated in the information or in the indictment: but it may be alleged to have been committed at any time before the filing thereof, if an information; or if an indictment, before the finding thereof, except when the time is a material ingredient in the offense. [C. Cr. P. 1877, § 218; R. C. 1895, § 8043.]

Ordinarily the time when facts happen is not material and hence need not be alleged, but when material, must be pleaded. Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512; State v. McDonald, 16 S. D. 78, 92 N. W. 447.

§ 9853. 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. [C. Cr. P. 1877, § 219; R. C. 1899, § 8044.]

Indictment for larceny not void because it fails to properly state who is owner of property. State v. Vincent, 16 S. D. 62, 91 N. W. 347.

§ 9854. **Construction of words.** The words used in an information or in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning. [C. Cr. P. 1877, § 220; R. C. 1895, § 8045.]

Words in an indictment must be construed in their usual acceptance in common language. State v. Dellaire, 4 N. D. 312, 60 N. W. 988; State v. Donaldson, 12 S. D. 259, 81 N. W. 299.

§ 9855. **Statutory words not strictly pursued.** Words used in a statute to define a public offense, need not be strictly pursued in the information or indictment; but other words conveying the same meaning may be used. [C. Cr. P. 1877, § 221; R. C. 1895, § 8046.]

§ 9856. **When information or indictment sufficient.** The information or 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 is not stated.
2. That it was presented by a person authorized by law so to do, if an information; or if an indictment, that it was found by a grand jury of the county or judicial 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 a statement that his true name is to the informant or, as the case may be, to the grand jury, unknown.
4. That the offense was committed at some place within the jurisdiction of the court, except when the act, though done without the local jurisdiction of the county or judicial subdivision, is triable therein.
5. That the offense was committed at some time prior to the time of the presenting of the information or of the finding of 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. [C. Cr. P. 1877, § 222; R. C. 1895, § 8047.]

Time and place where offense was committed must be shown. State v. First Nat. Bank, 3 S. D. 52, 51 N. W. 780; City of Deadwood v. Allen, 8 S. D. 618, 67 N. W. 835.

Allegations must be such as to enable person of common understanding to know what was intended to be charged. State v. Shields, 13 S. D. 464, 83 N. W. 559; State v. LaCroix, 8 S. D. 369, 66 N. W. 944.

§ 9857. **Errors of form disregarded.** No information or 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. [C. Cr. P. 1877, § 223; R. C. 1895, § 8048.]

Defects which do not go to materiality do not render information or indictment insufficient. State v. Pancoast (Kent), 5 N. D. 516, 67 N. W. 1052; State v. LaCroix, 8 S. D. 369, 66 N. W. 944; United States v. Beebe, 2 Dak. 292, 11 N. W. 505; People v. Sponsler, 1 Dak. 277, 46 N. W. 459; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440.

§ 9858. **What need not be stated.** Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an information or in an indictment. [C. Cr. P. 1877, § 224; R. C. 1895, § 8049.]

§ **9859. Pleading judgment. Jurisdictional facts.** 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 jurisdiction; 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. [C. Cr. P. 1877, § 225; R. C. 1899, § 8050.]

§ **9860. Pleading private statute. Title. Day of passage.** 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. [C. Cr. P. 1877, § 226; R. C. 1899, § 8051.]

§ **9861. Libel. Extrinsic facts. Sufficient statements.** An information or 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 information or 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 the trial. [C. Cr. P. 1877, § 227; R. C. 1895, § 8052.]

§ **9862. Forgery. Instrument destroyed. Misdescription.** When the instrument which is the subject of an information or 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 information or indictment and established on the trial, the misdescription of the instrument is immaterial. [C. Cr. P. 1877, § 228; R. C. 1895, § 8053.]

§ **9863. Perjury. Substance. Oath. Authority. Falsity.** In an information or 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 information or 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. [C. Cr. P. 1877, § 229; R. C. 1895, § 8054.]

§ **9864. Larceny. Embezzlement. Sufficient allegations.** In an information or indictment for 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. [C. Cr. P. 1877, § 230; R. C. 1895, § 8055.]

§ **9865. Obscene literature. Sufficient allegations.** An information or indictment for exhibiting, publishing, passing, selling 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. [C. Cr. P. 1877, § 231; R. C. 1895, § 8056.]

§ **9866. Personal property. Several owners. Sufficient allegations.** When an offense is committed upon, or in relation to, any personal property belonging to several partners or owners, the information or indictment for such offense is sufficient, if it alleges such property to belong to any one or more of such partners or owners without naming them all. [R. C. 1895, § 8057.]

§ **9867. Several defendants. Convicted. Acquitted.** Upon an information or indictment against several defendants, any one or more may be convicted or acquitted. [C. Cr. P. 1877, § 232; R. C. 1895, § 8058.]

§ 9868. **Accessories. Principals. Certain distinctions abrogated.** 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 or abet in its commission, though not present, must be prosecuted, tried and punished as principals, and no other facts need be alleged in the information or indictment against such an accessory, than are required in an information or indictment against his principals. [C. Cr. P. 1877, § 233; R. C. 1895, § 8059.]

Certain distinctions between principal and accessories abolished. Punishable, whether present or not. State v. Phelps, 5 S. D. 480, 59 N. W. 471; State v. Kent, 4 N. D. 577, 62 N. W. 631.

§ 9869. **Accessory punished, though principal not.** An accessory to the commission of a felony may be prosecuted, tried and punished, though the principal felon may be neither prosecuted nor tried, and though the principal may have been acquitted. [C. Cr. P. 1877, § 234; R. C. 1895, § 8060.]

§ 9870. **Compounding felony. Punishment.** A person may be prosecuted, tried and convicted, 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 has not been prosecuted. [C. Cr. P. 1877, § 235; R. C. 1895, § 8061.]

CHAPTER 9.

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

Article 1.—Arraignment of the Defendant.

§ 9871. **When and where defendant arraigned.** When the information or indictment is filed, the defendant must be arraigned thereon before the court to which it is presented, if an information; or if an indictment, in which it is found, if triable therein, if not, before the court to which it is removed or transmitted. [C. Cr. P. 1877, § 236; R. C. 1895, § 8062.]

It is not ground for reversal that record does not affirmatively show that the defendant was arraigned or that he pleaded where trial was regularly conducted as upon plea of "not guilty." State v. Reddington, 7 S. D. 368, 64 N. W. 170.

§ 9872. **Felony, defendant present. Misdemeanor, counsel.** If the information or indictment is for a felony the defendant must be personally present, but if a misdemeanor only, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel. [C. Cr. P. 1877, § 237; R. C. 1895, § 8063.]

Defendant need not be present in person on the hearing of a motion to quash. Territory v. Gay, 2 Dak. 125, 2 N. W. 477.

§ 9873. **Presence enforced by direction of court.** When his personal appearance is necessary, if he is 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. [C. Cr. P. 1877, § 238; R. C. 1899, § 8064.]

§ 9874. **Same. Warrant of arrest.** If the defendant has been discharged on bail, or has deposited money instead thereof, and does 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. [C. Cr. P. 1877, § 239; R. C. 1899, § 8065.]

§ **9875. Warrant, clerk to issue.** The clerk, on the application of the state's attorney, may, accordingly, at any time after the order, whether the court is sitting or not, issue a bench warrant into one or more counties. [C. Cr. P. 1877, § 240; R. C. 1899, § 8066.]

§ **9876. Warrant, form. Felony.** The bench warrant upon the information or indictment, must, if the offense is a felony, be substantially in the following form:

State of North Dakota, } ss.
County of ..... }

To any sheriff, constable, policeman or marshal in this state:

An information (or indictment as the case may be) having been filed on the.....day of....., 19..., in the district court in and for the county of (or judicial subdivision of)....., charging..... with the crime of.....(designating it generally), you are therefore commanded forthwith to arrest the above named.....and bring him before that court (or before the court to which the information or indictment may have been removed, naming it), to answer said information (or indictment), or if the court has 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....., 19...

By order of the court.

[Seal] ....., Clerk.

[C. Cr. P. 1877, § 241; R. C. 1895, § 8067.]

§ **9877. Same. Misdemeanor. Bailable felony.** 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 of that county or in the county in which you arrest him, that he may give bail to answer the information (or indictment)." [R. C. 1895, § 8068.]

§ **9878. 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."

[C. Cr. P. 1877, § 243; R. C. 1899, § 8069.]

§ **9879. Arrest. Offense not bailable. Custody.** The defendant, when arrested under a warrant for an offense not bailable, must be held in custody by the sheriff of the county or judicial subdivision in which the information is filed or indictment found. [C. Cr. P. 1877, § 244; R. C. 1899, § 8070.]

§ **9880. Warrant served in any county.** The bench warrant may be served in any county or judicial subdivision of the state in the same manner as a warrant of arrest. [C. Cr. P. 1877, § 245; R. C. 1899, § 8071.]

§ **9881. Magistrate. Taking bail. Procedure.** 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. [C. Cr. P. 1877, § 246; R. C. 1899, § 8072.]

§ **9882. Felony. Bail given. Increased amount.** When the information or indictment is for a felony, and the defendant, before the filing or finding thereof, has given bail for his appearance to answer the charge, the court to which the information or 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 gives bail in an increased amount, to be specified in the order. [C. Cr. P. 1877, § 247; R. C. 1895, § 8073.]

§ 9883. **Procedure. Defendant present. Absent.** 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 article. [C. Cr. P. 1877, § 248; R. C. 1899, § 8074.]

§ 9884. **Arraignment. Counsel for defendant.** If the defendant appears 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 desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him. [C. Cr. P. 1877, § 249; R. C. 1899, § 8075.]

§ 9885. **How arraignment made.** The arraignment must be made by the court, or by the clerk or state's attorney under its direction, and consists of reading the information or indictment to the defendant, and asking him whether he pleads guilty or not guilty to the information or indictment. [C. Cr. P. 1877, § 250; R. C. 1895, § 8076.]

§ 9886. **Defendant's true name.** When the defendant is arraigned, he must be informed that if the name by which he is informed against or indicted is not his true name, he must disclose his true name or be proceeded against by the name in the information or indictment. [C. Cr. P. 1877, § 251; R. C. 1895, § 8077.]

§ 9887. **No other name given.** If he gives no other name, the court may proceed accordingly. [C. Cr. P. 1877, § 252; R. C. 1899, § 8078.]

§ 9888. **Another name given, procedure.** If he alleges 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 information or indictment may be had against him by that name, referring also to the name by which he is informed against or indicted. [C. Cr. P. 1877, § 253; R. C. 1895, § 8079.]

§ 9889. **Time to answer given defendant.** If, on the arraignment, the defendant requires 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 information or indictment. [C. Cr. P. 1877, § 254; R. C. 1895, § 8080.]

§ 9890. **Answer. Motion to set aside. Demurrer. Plea.** If the defendant does not require time, as provided in the last section, or if he does, 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 information or indictment, or may demur or plead thereto. [C. Cr. P. 1877, § 255; R. C. 1895, § 8081.]

Article 2.—Setting Aside the Information or Indictment.

§ 9891. **Causes for setting aside, classified.** The information or indictment must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it is an information:

1. In all cases when the defendant is entitled to a preliminary examination before a magistrate, before the filing of such information, when he has not had such examination and been held to answer before the district court, or has not waived such examination in writing, or orally before a magistrate.
2. When the information is not subscribed by a person authorized to act as informant.
3. When the information is not verified; or,

If it is an indictment:

1. When it is not found, indorsed and presented or filed as prescribed by this code.
2. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or otherwise exhibited thereon.

3. When a person is permitted to be present during the session of the grand jury, while the charges embraced in the indictment are under consideration, except as provided in section 9829.

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. [C. Cr. P. 1877, § 256; R. C. 1895, § 8082.]

Where information adjudged defective in supreme court, not error to allow new information to be filed without granting preliminary examination. State v. Hasledahl, 3 N. D. 36, 53 N. W. 430.

Information filed before legal preliminary examination quashed on motion. State v. Weltner, 7 N. D. 522, 75 N. W. 779.

Variation in name of a witness indorsed, which does not deceive, not material. State v. Phelps, 5 S. D. 480, 59 N. W. 471.

When witnesses whose names are not indorsed on information or indictment may testify. State v. Church, 6 S. D. 89, 60 N. W. 143; Territory v. Godfrey, 6 Dak. 46, 50 N. W. 481; State v. Boughner, 5 S. D. 461, 59 N. W. 736.

Indorsement of names of witnesses mandatory. State v. Isaacson, 8 S. D. 69, 65 N. W. 430; State v. Stevens, 1 S. D. 480, 47 N. W. 546.

§ 9892. **Motion. Form. Contents. Time.** The motion to set aside the information or indictment must be in writing, subscribed by the defendant or his attorney, and must specify clearly the ground of objection to the information or indictment, and said motion must be made before the defendant demurs or pleads, or the objection is waived. [C. Cr. P. 1877, § 257; R. C. 1895, § 8083.]

Motion to set aside information should be made before plea. Territory v. Pratt, 6 Dak. 483, 43 N. W. 711; State v. Pancoast (Kent), 5 N. D. 516, 67 N. W. 1052.

§ 9893. **When motion heard.** The motion must be heard at the time it is made, unless for good cause the court postpones the hearing to another time. [C. Cr. P. 1877, § 258; R. C. 1899, § 8084.]

§ 9894. **Motion denied, answer immediately.** If the motion is denied, the defendant must immediately answer the information or indictment, either by demurring or pleading thereto. [C. Cr. P. 1877, § 259; R. C. 1895, § 8085.]

§ 9895. **Motion granted. Procedure.** If the motion is granted the court must order that the defendant, if in custody, be discharged therefrom, or, if admitted to bail, that the bail be exonerated, or, if he has deposited money instead of bail, that the same be refunded to him, unless the court directs that another or an amended information be filed or that the case be submitted to the same or another grand jury; or, if the case is such that an information might have been filed against the defendant had a grand jury not been called at the time, or the defendant at any time waives a preliminary examination, in writing, the court may direct an information to be filed for the offense charged in the indictment set aside. [C. Cr. P. 1877, § 260; R. C. 1895, § 8086.]

§ 9896. **Further prosecution. Procedure.** If the court directs that another or an amended information be filed or that the case be resubmitted to the same or another grand jury, the defendant, if already in custody, must so remain, unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead therefor, the bail or money is to be answerable for the appearance of the defendant to answer a new information or indictment, and unless another or an amended information or an information in the place of the indictment set aside, as provided in the last section, is filed within ten days from the date of the order, or the filing of the defendant's waiver of a preliminary examination, or a new indictment is found at the same or next term of the district court, as the case may be, the defendant must be discharged and his bail exonerated or money refunded as provided in the preceding section. [C. Cr. P. 1877, § 261; R. C. 1895, § 8087.]

§ 9897. **Order setting aside, not a bar.** An order setting aside an information or indictment, as provided in this article is no bar to a future prosecution for the same offense. [C. Cr. P. 1877, § 262; R. C. 1895, § 8088.]

ARTICLE 3.—DEMURRER.

§ 9898. **Defendant's pleading. Demurrer. Plea.** The only pleading on the part of the defendant is either a demurrer or a plea. [C. Cr. P. 1877, § 263; R. C. 1899, § 8089.]

§ 9899. **Made in open court. Time.** Both the demurrer and the plea must be put in 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. [C. Cr. P. 1877, § 264; R. C. 1899, § 8090.]

§ 9900. **Grounds of demurrer.** The defendant may demur to the information or indictment when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the offense charged therein; or, if an indictment, that the grand jury by which it was found had no authority to inquire into the offense charged, by reason of its not being within the jurisdiction of the county or judicial subdivision.
2. That it does not substantially conform to the requirements of this code.
3. That more than one offense is charged therein.
4. That the facts stated do not constitute a public offense.
5. That it contains any matter, which if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. [C. Cr. P. 1877, § 265; R. C. 1895, § 8091.]

That more than one offense is charged makes information demurrable. State v. Boughner, 5 S. D. 461, 59 N. W. 736.

Failure to demur may waive certain defects in indictment. City of Lead v. Klatt, 13 S. D. 140, 82 N. W. 391; State v. Pancoast (Kent), 5 N. D. 516, 67 N. W. 1052.

§ 9901. **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 information or indictment, or it must be disregarded. [C. Cr. P. 1877, § 266; R. C. 1895, § 8092.]

§ 9902. **Time of hearing.** Upon the demurrer being filed, the objections presented thereby must be heard, either immediately or at such time as the court may appoint. [C. Cr. P. 1877, § 267; R. C. 1899, § 8093.]

§ 9903. **Judgment on demurrer.** 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. [C. Cr. P. 1877, § 268; R. C. 1899, § 8094.]

§ 9904. **Effect if sustained. Further proceedings.** If the demurrer is sustained the judgment is final upon the information or indictment demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is sustained may be avoided in a new information or indictment, directs another or an amended information, or an information in the place of the indictment demurred to as provided by law in case an indictment is set aside, to be filed, or that the case be submitted to the same or another grand jury. [C. Cr. P. 1877, § 269; R. C. 1895, § 8095.]

§ 9905. **Amendment not directed, defendant discharged.** If the court does not permit the information to be amended nor direct that another information be filed or that the case be resubmitted as provided in the preceding section, the defendant, if in custody, must be discharged, or, if admitted to bail his bail is exonerated, or, if he has deposited money instead of bail, the money must be refunded to him. [C. Cr. P. 1877, § 270; R. C. 1895, § 8096.]

§ 9906. **Defendant not discharged, further proceedings.** If the court directs that another or an amended information or an information in place

of the indictment demurred to, as provided by law in case the indictment is set aside, be filed, or that the case be resubmitted to the same or another grand jury, the defendant, if already in custody, must so remain, unless he is admitted to bail, or is already admitted to bail, or money has been deposited instead therefor, the bail or money is to be answerable for the appearance of the defendant to answer to a new information or indictment; and unless another or an amended information or an information in place of the indictment demurred to, is filed within ten days from the date of the order sustaining the demurrer, or the filing of the defendant's waiver of a preliminary examination, or a new indictment is found at the same or the next term of the district court, as the case may be, the defendant must be discharged and his bail exonerated or money refunded as provided in the preceding section. [C. Cr. P. 1877, § 271; R. C. 1895, § 8097.]

§ **9907. Demurrer overruled. Procedure.** If the demurrer is 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. [C. Cr. P. 1877, § 272; R. C. 1899, § 8098.]

§ **9908. Certain objections only taken by demurrer. Exception.** When the objections mentioned in section 9900, appear upon the face of the information or indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the information or 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. [C. Cr. P. 1877, § 273; R. C. 1895, § 8099.]

Article 4.—Plea.

§ **9909. Pleas classified.** There are four kinds of pleas to an information or 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.
4. Once in jeopardy, which may also be pleaded either with or without the plea of not guilty. [C. Cr. P. 1877, § 274; R. C. 1895, § 8100.]

§ **9910. Plea to be oral. Form of plea.** Every plea must be oral, and must be entered upon the minutes of the court, and in substantially the following form:

1. If the defendant pleads guilty: "The defendant pleads that he is guilty of the offense charged in this information (or indictment)."
2. If he pleads not guilty: "The defendant pleads that he is not guilty of the offense charged in this information (or indictment)."
3. If he pleads 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 information (or indictment) by the judgment of the court of.....(naming it), rendered at..... (naming the place), on the.....day of....., 19..."
4. If he pleads once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged in this information (or indictment), (specifying the time, place and court)." [C. Cr. P. 1877, §§ 275, 276; R. C. 1895, § 8101.]

Plea of guilty admits crime charged, and not a lesser offense. Territory v. Miller, 4 Dak. 173, 29 N. W. 7.

Record may be corrected by order of court after plea has been entered. Territory v. Christensen, 4 Dak. 410, 31 N. W. 847.

Former jeopardy. State v. Bronkol, 5 N. D. 507, 67 N. W. 680.

Going to trial without objection waives plea. State v. Reddington, 7 S. D. 368, 64 N. W. 170.

§ **9911. Plea of guilty only put in by defendant. Exception.** A plea of guilty can in no case be put in except by the defendant himself, in open court, unless upon an information or indictment against a corporation, in which case it may be put in by counsel. [C. Cr. P. 1877, § 277; R. C. 1895, § 8102.]

§ **9912. 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. [C. Cr. P. 1877, § 278; R. C. 1899, § 8103.]

It is within discretion of trial court to allow plea of not guilty to be withdrawn for purpose of presenting motion to set aside indictment upon grounds which, if established, would be fatal to verdict. State v. Van Nice, 7 S. D. 104, 63 N. W. 537.

§ **9913. Issues on plea of not guilty.** The plea of not guilty puts in issue every material allegation in the information or indictment. [C. Cr. P. 1877, § 279; R. C. 1895, § 8104.]

§ **9914. Evidence under plea.** All matters of fact tending to establish a defense other than those specified in the third and fourth subdivisions of section 9909, may be given in evidence under the plea of not guilty. [C. Cr. P. 1877, § 280; R. C. 1899, § 8105.]

§ **9915. Acquittal. Variance. Further prosecution.** If the defendant was formerly acquitted on the ground of variance between the information or indictment and the proof, or the information or 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. [C. Cr. P. 1877, § 281; R. C. 1895, § 8106.]

Acquittal on charge of assault with deadly weapon with intent to rob not bar to conviction for a charge of robbery in taking money against person's will. State v. Caddy, 15 S. D. 167, 87 N. W. 927.

§ **9916. Acquittal on merits.** When however, the defendant was acquitted on the merits, he is deemed acquitted of the same offense, notwithstanding a defect in form or substance in the information or indictment on which he was acquitted. [C. Cr. P. 1877, § 282; R. C. 1895, § 8107.]

What is former acquittal. There having been no verdict returned, plea properly overruled. State v. Bronkol, 5 N. D. 507, 67 N. W. 680; People v. Briggs, 1 Dak. 289, 46 N. W. 451; State v. Security Bank, 2 S. D. 538, 51 N. W. 337.

§ **9917. Former acquittal or conviction. Once in jeopardy.** When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an information or indictment, the conviction, acquittal or jeopardy is a bar to another information or 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 the information or indictment. [C. Cr. P. 1877, § 283; R. C. 1895, § 8108.]

§ **9918. Refusal to answer. Procedure.** If the defendant refuses to answer the information or indictment by demurrer or plea, a plea of not guilty must be entered. [C. Cr. P. 1877, § 284; R. C. 1895, § 8109.]

Plea of not guilty must be entered on refusal to plead. State v. Reddington, 7 S. D. 368, 64 N. W. 170.

Article 5.—Removal of the Action Before Trial.

§ **9919. Action removed. Causes therefor specified.** The defendant in a criminal action prosecuted by information, or indictment in any district court of this state, may be awarded a change of the place of trial, upon his petition on oath, or upon the oath of some credible person setting forth that he has reason to believe and does believe, and the facts upon which such belief is based, that he cannot receive a fair and impartial trial in the county or judicial subdivision where said action is pending, upon any of the following grounds:

1. That the prosecuting witness, or state's attorney, or other person appointed by the court to prosecute, or any person or corporation promoting

said prosecution, has an undue influence over the minds of the people of the county or judicial subdivision where the action is pending; or,

2. That the people of the county or judicial subdivision are so prejudiced against the defendant or the offense of which he is accused, that he cannot have a fair and impartial trial; or,

3. That it is impossible to obtain a jury in the county or judicial subdivision that has not formed an opinion, as to the guilt or innocence of the defendant, such as would disqualify them as jurors; or,

4. That any other cause exists in the county or judicial subdivision, where the action is pending, whereby the defendant would probably be deprived of a fair and impartial trial. [C. Cr. P. 1877, § 285; R. C 1895, § 8110.]

§ **9920. Petition. Notice. Time to prepare.** The petition must be presented at the first term of the court at which the action can be tried and before the trial is begun, or, if the action has been continued, at any time before the term to which it is continued, upon reasonable notice to the state's attorney or the attorney appointed to prosecute. The court must, upon request of the defendant or his counsel, grant the defendant at least twenty-four hours after he has been arraigned in which to prepare and present such petition. [C. Cr. P. 1877, § 285; R. C. 1895, § 8111.]

§ **9921. Court must order. Only one change.** The court being satisfied that cause exists therefor, as defined in section 9919, must order a change of the place of trial to some county or judicial subdivision where the cause complained of does not exist. But the defendant shall be entitled to only one change of the place of trial. [C. Cr. P. 1877, § 285; R. C. 1895, § 8112.]

§ **9922. 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. [C. Cr. P. 1877, § 286; R. C. 1895, § 8113.]

§ **9923. 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. [C. Cr. P. 1877, § 287; R. C. 1899, § 8114.]

§ **9924. Court may require bail.** When the court has ordered a removal of the action, it may require the accused, if the offense is 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. [C. Cr. P. 1877, § 288; R. C. 1899, § 8115.]

§ **9925. Witnesses. Undertaking. Notice. Subpena.** If the order of removal is made at a term of the court, it is notice to every person who has entered into an undertaking to appear at such term, to appear at the trial of the action before the court to which the same is removed. In other cases the witnesses must be subpenaed as provided by this code, or the court may require the witnesses on the part of the state, to give security for their appearance before the court in which the defendant is to be tried, as provided by law in other cases. [C. Cr. P. 1877, § 289; R. C. 1895, § 8116.]

§ **9926. Trial. Original pleadings. Copies.** 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 state's attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained. [C. Cr. P. 1877, § 290; R. C. 1899, § 8117.]

§ **9927. Clerk. Neglect. Damages.** If the clerk of the district court neglects or refuses to perform any duty in relation to the removal of a cause, it shall be deemed a breach of his official bond and he forfeits a sum not exceeding five hundred dollars, to be recovered by an action on his official bond in the name of and for the use of the state or in the name of and for the use of the person injured, as the facts may be. [R. C. 1895, § 8118.]

§ **9928. Several defendants. Removal by one.** If there are several defendants in a criminal action and the place of trial is changed as to one or more of them and not as to the others, the others must be tried as if the place of trial had not been changed as to any defendant. [R. C. 1895, § 8119.]

§ **9929. Prejudice of judge. Affidavit. Procedure.** Whenever the defendant, or a defendant, in a criminal action shall file his affidavit stating that he has good reason to believe and does believe that he cannot have a fair and impartial trial of such action on account of the prejudice of the judge of the district court in which said action is pending, the court shall thereafter proceed in said action, as follows:

1. If the defendant, or a defendant, asks for a change of the place of trial of said action on any of the grounds specified in section 9919, and also for the cause mentioned in this section, it shall be the duty of the court to order said action removed for trial to some other county or judicial subdivision in this state, as provided in this article, and to request, arrange for and procure some other judge than the one objected to, to preside at the trial of said action; or,

2. If a change is asked for only on account of the cause mentioned in this section, the court in which said action is pending may order said action removed to a county or judicial subdivision in an adjoining judicial district in which it can be conveniently and expeditiously tried before another judge, or may request, arrange for and procure the judge of another judicial district to preside at said trial in the county or judicial subdivision in which the action is pending. A change upon the ground in this section provided for must be asked before the trial is begun and not more than one change can be granted therefor; but if a trial has been had without a verdict, a change for any of the causes mentioned in this article may be had if asked for at the term at which said trial was had, and before another trial of the action is begun. [C. Cr. P. 1877, § 285; R. C. 1895, § 8120.]

Change of place of trial is discretionary with trial court. Territory v. Egan, 3 Dak. 119, 13 N. W. 568; State v. Hall, 16 S. D. 6, 91 N. W. 325.

Power of judge called into district to try a case, to hear and decide all motions and other matters connected with case. State v. Tomlinson, 7 N. D. 294, 74 N. W. 995.

Change of judges not mandatory in contempt proceeding. Township v. Aasen, 10 N. D. 264, 86 N. W. 742.

Sufficiency of affidavit showing prejudice. State v. Chapman, 1 S. D. 414, 47 N. W. 411; State v. Rodway, 1 S. D. 575, 47 N. W. 1061.

Another judge must be called when affidavit alleging prejudice has been presented. State v. Finder, 12 S. D. 423, 81 N. W. 959; State v. Pancoast (Kent), 5 N. D. 516, 67 N. W. 1052; State v. Palmer, 4 S. D. 543, 57 N. W. 490; State v. Kent, 4 N. D. 577, 62 N. W. 631; Orcutt v. Conrad, 10 N. D. 431, 87 N. W. 982; State v. Henning, 3 S. D. 492, 54 N. W. 536; State v. Finder, 10 S. D. 103, 72 N. W. 97.

§ **9930. Prosecution. Jurisdiction of court.** When the place of trial of a criminal action is changed as in this article provided, the state's attorney

of the county or judicial subdivision, or other person appointed to prosecute, where the action was commenced, shall prosecute the case for the state. The court to which the action is removed for trial shall have full jurisdiction and authority to hear, try and determine the action, and upon conviction to impose the punishment prescribed by law; and the trial shall be conducted in all respects as if the action had been commenced in said court, and the costs accruing from a change of the place of trial and the costs of the trial shall be paid by the county or judicial subdivision where the offense was committed, or otherwise as provided by law. It is hereby made the duty of each judge of the several judicial districts of this state, whenever requested by another judge of the district court to preside at the trial of a criminal action, to respond as speedily as may be, and to preside at any trial to which he may be called under the provisions of this article, and all rulings, orders and acts made or done in carrying out the provisions of this article in any criminal action, shall have the same force and validity as if said action had been tried or said rulings, orders and acts made or done in the judicial district for which such judge was elected. [R. C. 1895, § 8121.]

§ **9931. Removal by state. Procedure.** The state's attorney, on behalf of the state, 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 article, and the proceedings on such removal shall be in all respects as above provided. [C. Cr. P. 1877, § 291; R. C. 1895, § 8122.]

Article 6.—The Mode of Trial.

§ **9932. Issue of fact.** An issue of fact arises:

1. Upon a plea of not guilty.
2. Upon a plea of former conviction or acquittal of the same offense; or,
3. Upon a plea of once in jeopardy. [C. Cr. P. 1877, § 292; R. C. 1895, § 8123.]

§ **9933. How issue of fact tried.** Issues of fact must be tried by a jury, unless a trial by a jury is waived in criminal cases not amounting to felony, by the consent of both parties expressed in open court and entered on the minutes. [C. Cr. P. 1877, § 293; R. C. 1895, § 8124.]

§ **9934. Presence of defendant.** If the information or indictment is for a felony, the defendant must be personally present at the trial; but if it is for a misdemeanor, the trial may be had in the absence of the defendant: if his presence is necessary for any purpose, the court may, upon application of the state's attorney or person appointed to prosecute, by an order or warrant, require the personal attendance of the defendant at the trial. [C. Cr. P. 1877, § 294; R. C. 1895, § 8125.]

Not necessary that defendant should be present when order allowing new information to be filed is made. State v. Hasledahl, 3 N. D. 36, 52 N. W. 430.

§ **9935. Time to prepare for trial.** After his plea the defendant, if he requests it, is entitled to at least one day to prepare for trial. [R. C. 1895, § 8126.]

Article 7.—Formation of the Trial Jury.

§ **9936. Who jurors in criminal actions.** The jurors duly drawn and summoned for the trial of civil actions, are also the jurors for the trial of criminal actions. [C. Cr. P. 1877, § 295; R. C. 1899, § 8127.]

§ **9937. How trial jury formed.** Trial juries for criminal actions may also be formed in the same manner as trial juries in civil actions. [C. Cr. P. 1877, § 296; R. C. 1899, § 8128.]

§ **9938. 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 same cannot be seen, and must deposit them in a sufficient box. [C. Cr. P. 1877, § 297; R. C. 1899, § 8129.]

§ **9939. Parties may require names to 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. [C. Cr. P. 1877, § 298; R. C. 1899, § 8130.]

§ **9940. Manner of drawing jury.** Before the name of any juror is drawn, the box must be closed and shaken so as to intermingle all the ballots therein. The clerk must then without looking at the ballots, draw them from the box. [C. Cr. P. 1877, § 299; R. C. 1899, § 8131.]

§ **9941. 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. [C. Cr. P. 1877, § 300; R. C. 1899, § 8132.]

§ **9942. Same. Jury discharged.** 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. [C. Cr. P. 1877, § 301; R. C. 1899, § 8133.]

§ **9943. Juror absent. Ballot.** If a juror is absent when his name is drawn, or is 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. [C. Cr. P. 1877, § 302; R. C. 1899, § 8134.]

§ **9944. All jurors not appearing. Procedure.** 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. [C. Cr. P. 1877, § 303; R. C. 1899, § 8135.]

§ **9945. Names. Ballots. Deposited 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 9938. [C. Cr. P. 1877, § 304; R. C. 1899, § 8136.]

§ **9946. Drawing the jury.** The clerk must thereupon, under 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. [C. Cr. P. 1877, § 305; R. C. 1899, § 8137.]

Error to call jury from list, instead of taking names from box. May be waived how. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

§ **9947. 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 deliverance to make between the state of North 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. [C. Cr. P. 1877, § 306; R. C. 1899, § 8138.]

§ **9948. Number failing, others summoned.** 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 neces-

sary to complete the jury, must be impaneled and sworn. [C. Cr. P. 1877, § 307; R. C. 1899, § 8139.]

Jurors in box must be exhausted before talesmen can be called. State v. Wright, 15 S. D. 628, 91 N. W. 311.

§ **9949. Juror may affirm.** 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." [C. Cr. P. 1877, § 308; R. C. 1899, § 8140.]

Article 8.—Postponement of the Trial.

§ **9950. Either party may have for cause.** When a criminal action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party, direct the trial to be postponed to another day in the same term or to the next term. Any cause that would be considered a good one for a postponement in a civil action, is sufficient in a criminal action, whether urged by the state or by the defendant. [C. Cr. P. 1877, § 309; R. C. 1899, § 8141.]

Grounds sufficient in civil case, sufficient in criminal. State v. Murphy, 9 N. D. 175, 82 N. W. 738.

CHAPTER 10.

PROCEEDINGS AFTER THE COMMENCEMENT OF THE TRIAL AND BEFORE JUDGMENT.

Article 1.—Challenging the Jury.

§ **9951. 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. [C. Cr. P. 1877, § 310; R. C. 1899, § 8142.]

§ **9952. When several defendants must join.** When several defendants are tried together they cannot sever their challenges, but must join therein. [C. Cr. P. 1877, § 311; R. C. 1899, § 8143.]

§ **9953. 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. [C. Cr. P. 1877, § 312; R. C. 1899, § 8144.]

§ **9954. 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. [C. Cr. P. 1877, § 313; R. C. 1899, § 8145.]

§ **9955. Causes 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 of more of the jurors drawn. [C. Cr. P. 1877, § 314; R. C. 1899, § 8146.]

§ **9956. 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. [C. Cr. P. 1877, § 315; R. C. 1899, § 8147.]

§ **9957. Sufficiency of facts controverted. Procedure.** If the sufficiency of the facts alleged as a ground of challenge is controverted by the adverse party, he 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 therein alleged to be true. [C. Cr. P. 1877, § 316; R. C. 1895, § 8148.]

§ **9958. Facts denied, procedure.** If, on the exception, the court deems the challenge sufficient, it may, if justice requires it, permit the party excepting

to withdraw his exception, and to deny the facts alleged in the challenge. If the exception is allowed, the court may, in like manner, permit an amendment of the challenge. [C. Cr. P. 1877, § 317; R. C. 1899, § 8149.]

§ **9959. Trial of question of fact.** If the facts alleged as the grounds of the challenge are 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. [C. Cr. P. 1877, § 318; R. C. 1899, § 8150.]

§ **9960. Officers may be examined.** 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. [C. Cr. P. 1877, § 319; R. C. 1899, § 8151.]

§ **9961. Challenge taken for officer's bias.** 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. [C. Cr. P. 1877, § 320; R. C. 1899, § 8152.]

Challenge to entire panel. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

Challenge to entire panel; test for disqualification of officer to summon jury is whether he would be qualified to sit as a juror. State v. Kent, 4 N. D. 577, 62 N. W. 631.

Not good grounds for challenge to panel, that officer summoning jury heard former trial of case. State v. Hall, 16 S. D. 6, 91 N. W. 325.

§ **9962. Challenge allowed. Jury discharged.** If upon an exception to the challenge, or a denial of the facts, the challenge is 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, the judge may order a jury to be drawn and summoned in the regular manner. If it is disallowed, the court must direct the jury to be impaneled. [C. Cr. P. 1877, § 321; R. C. 1899, § 8153.]

§ **9963. Challenge of individual juror.** Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror, he must do so when the juror appears, and before he is sworn. [C. Cr. P. 1877, § 322; R. C. 1899, § 8154.]

§ **9964. Nature of challenge.** A challenge to an individual juror is either:

1. Peremptory; or,
2. For cause. [C. Cr. P. 1877, § 323; R. C. 1899, § 8155.]

§ **9965. 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. [C. Cr. P. 1877, § 324; R. C. 1899, § 8156.]

§ **9966. 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. [C. Cr. P. 1877, § 325; R. C. 1899, § 8157.]

§ **9967. Defendant's challenges.** 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 penitentiary, ten jurors.
3. In other prosecutions, six jurors. [1897, ch. 49; R. C. 1899, § 8158.]

§ **9968. Prosecution challenges.** The prosecuting attorney in capital cases may challenge peremptorily, ten jurors; in prosecutions for offenses punishable by imprisonment in the penitentiary, five jurors; in other prosecutions, three jurors. [1897, ch. 49; R. C. 1899, § 8159.]

§ 9969. **Challenge for cause.** A challenge for cause may be taken either by the state or the defendant. [C. Cr. P. 1877, § 328; R. C. 1899, § 8160.]

§ 9970. **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 or trial; or,

2. Particular, that he is disqualified from serving in the case on trial. [C. Cr. P. 1877, § 329; R. C. 1899, § 8161.]

§ 9971. **General causes of challenge specified.** General causes of challenge 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. [C. Cr. P. 1877, § 330; R. C. 1899, § 8162.]

§ 9972. **Particular causes of challenge specified.** Particular causes of challenge 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. [C. Cr. P. 1877, § 331; R. C. 1899, § 8163.]

Fact that juror is strongly opposed to unlawful traffic in liquor not ground for challenge. State v. Tomlinson, 7 N. D. 294, 74 N. W. 995.

§ 9973. **Matters constituting implied bias specified.** A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or relationship 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, landlord and tenant, or debtor and creditor, 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 the employ of either.

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 action.

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

6. Having been one of a jury formerly sworn to try the same charge, 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 is 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. [C. Cr. P. 1877, § 332; R. C. 1895, § 8164.]

Challenge of juror for bias. State v. Chapman, 1 S. D. 414, 47 N. W. 411.

Juror cannot be challenged for cause for holding opinions against capital punishment; he may, however, be asked the question as basis for a peremptory challenge. State v. Garrington, 11 S. D. 178, 76 N. W. 326.

§ **9974. Exemption is not cause.** An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted. [C. Cr. P 1877, § 333; R. C. 1899, § 8165.]

§ **9975. How challenge taken. Cause stated.** In a challenge for implied bias, one or more of the causes stated in section 9973 must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section 9972 must be alleged; but no person shall be disqualified as a juror by reason of the fact that he may have heard from others or read in newspapers or public journals, any statement or statements with regard to the case to be submitted to the jury, if it shall appear to the satisfaction of the court that the impression remaining upon the mind of such person from the statements so communicated to him, will not prevent him from trying the case fairly and impartially. The challenge may be oral, but must be entered upon the minutes of the court. [1897, ch. 39; R. C. 1899, § 8166.]

Decision as to qualification of juror only reversed when such decision is plainly wrong. State v. Church, 6 S. D. 89, 60 N. W. 143.

§ **9976. Exception to the 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 9957, except that if the exception is allowed the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge. [C. Cr. P. 1877, § 335; R. C. 1899, § 8167.]

§ **9977. How tried, by the court.** All challenges, whether to the panel or to individual jurors, shall be tried by the court, without the aid of triers. [C. Cr. P. 1877, § 336; R. C. 1899, § 8168.]

§ **9978. 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. [C. Cr. P. 1877, § 337; R. C. 1899, § 8169.]

§ **9979. Other witnesses. Rules of evidence.** 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. [C. Cr. P. 1877, § 338; R. C. 1899, § 8170.]

§ **9980. Court must allow or disallow challenge.** On the trial of a challenge, the court must either allow or disallow the challenge, and direct an entry accordingly upon the minutes. [C. Cr. P. 1877, § 339; R. C. 1899, § 8171.]

§ **9981. Order of taking challenge.** All challenges to an individual juror, except peremptory, must be taken, first by the defendant, and then by the state, and each party must exhaust all his challenges before the other begins. [C. Cr. P. 1877, § 340; R. C. 1899, § 8172.]

§ **9982. 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. [C. Cr. P. 1877, § 341; R. C. 1899, § 8173.]

§ **9983. Peremptory challenges.** If all challenges on both sides are disallowed, either party, first the state and then the defendant, may take a

peremptory challenge, unless the party's peremptory challenges are exhausted. [C. Cr. P. 1877, § 342; R. C. 1899, § 8174.]

ARTICLE 2.—THE TRIAL.

§ **9984. Order of trial.** The jury having been impaneled and sworn, the trial must proceed in the following order:

1. If the information or indictment is for a felony, the clerk or state's 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 state's attorney or other counsel for the state, must open the case and offer the evidence in support of the information or 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, permits 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 state shall commence, and the defendant or his counsel shall follow; then the counsel for the state shall conclude the argument to the jury.
6. The judge must then charge the jury. [C. Cr. P. 1877, § 343; R. C. 1895, § 8175.]

Prosecution need not call all eye witnesses. State v. McGahey, 3 N. D. 293, 55 N. W. 753.

§ **9985. Charging the jury. Procedure.** In charging the jury, the court shall only instruct as to the law of the case, and all instructions must first be reduced to writing, unless by consent of both parties entered in the minutes, the instructions are given orally and taken down by the stenographer of the court, in shorthand. Either party may request instructions to the jury. Each instruction so requested must be written on a separate sheet of paper, and may be given or refused by the court, and the court shall write on the margin of such requested instructions which he does not give the word "refused," and all instructions asked for by either party shall be given or refused by the court without modification or change, unless modified or changed by the consent of the counsel asking the same. [C. Cr. P. 1877, § 343; 1893, ch. 84, § 1; R. C. 1895, § 8176.]

There should be no expression of views upon credibility or weight of testimony in charge. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Barry, 11 N. D. 428, 92 N. W. 809.

Not error to refuse an instruction when court in the general charge has fully and specifically covered the same points. State v. McGahey, 3 N. D. 293, 55 N. W. 753.

Requests for instruction should be marked "given" or "refused" by court. State v. Campbell, 7 N. D. 58, 72 N. W. 935.

§ **9986. Same.** All instructions given to the jury must be read to them by the court without disclosing to them whether such instructions were requested or not, and must be signed by the judge and may be delivered to the jury, and be taken by them in their retirement and returned into court with the verdict. But when oral instructions are given the jury shall not take any part of the charge in their retirement unless so ordered by the court. [1893, ch. 84, § 1; R. C. 1895, § 8177.]

§ **9987. Instructions. Stenographer. Exceptions.** Upon the close of the trial all instructions given or refused, together with those prepared by the court, if any, must be filed with the clerk, and except as otherwise provided in the next section shall be deemed excepted to by the defendant. If the charge of the court, or any part thereof, is given orally, the same must be taken down by the official stenographer and shall be deemed excepted to by the defendant, and the same as soon as may be after the trial must be written

out at length and filed with the clerk of the court by the stenographer thereof; provided, that in case the defendant is acquitted by the jury the oral instructions need not be transcribed or filed with the clerk. But exceptions in writing to any of the instructions of the court in any manner given, or the refusal of the court to give instructions requested, may be filed by the defendant at his discretion, with the clerk of the court within twenty days after the instructions are all filed as herein provided. The stenographer of the court shall receive for writing out the oral instructions of the court the same fees as for making transcripts. [1893, ch. 84, § 1; R. C. 1895, § 8178.]

Exceptions in writing waive all objectionable matter not specified in writing. State v. Campbell, 7 N. D. 58, 72 N. W. 935.

§ 9988. **Charge. Exceptions before given.** The court may, in its discretion, submit the written instructions which it proposes to give to the jury, to the counsel in the case for examination, and require such counsel after a reasonable examination thereof, to designate such parts thereof as he may deem objectionable, and such counsel must thereupon designate such parts of such instructions as he may deem improper, and thereafter only such parts of said written instructions so designated shall be deemed excepted to, or subject to exception. [1893, ch. 84, § 1; R. C. 1895, § 8179.]

§ 9989. **Order specified 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 section 9984 may be departed from. [C. Cr. P. 1877, § 344; R. C. 1899, § 8180.]

§ 9990. **Court to decide law.** The court must decide all questions of law which arise in the course of the trial. [C. Cr. P. 1877, § 345; R. C. 1899, § 8181.]

§ 9991. **Libel. Jury determine law and fact.** On the trial of an information or indictment for libel, the jury have the right to determine the law and the fact. [C. Cr. P. 1877, § 346; R. C. 1899, § 8182.]

§ 9992. **Other offenses. Determine only facts.** On the trial of an information or indictment for any other offense than libel, questions of law are to be decided by the court, and although the jury have 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. [C. Cr. P. 1877, § 347; R. C. 1899, § 8183.]

Questions of law are to be decided by court. Counsel has no right to read law to jury. State v. Church, 6 S. D. 89, 60 N. W. 143; State v. Boughner, 5 S. D. 461, 59 N. W. 736; Territory v. Stone, 2 Dak. 155, 4 N. W. 697.

§ 9993. **Counsel. Argument restricted.** If the information or indictment is for an offense punishable with death, three counsel on each side may argue the case to the jury. If it is any other offense the court may, in its discretion, restrict the argument to one counsel on each side. [C. Cr. P. 1877, § 348; R. C. 1899, § 8184.]

§ 9994. **Presumption of innocence. Reasonable doubt.** 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. [C. Cr. P. 1877, § 349; R. C. 1899, § 8185.]

In case of reasonable doubt, defendant must be presumed to be innocent. State v. Phelps, 5 S. D. 480, 59 N. W. 471; Teritory v. Bannigan, 1 Dak. 432, 46 N. W. 597; State v. Campbell, 7 N. D. 58, 72 N. W. 935; State v. Serenson, 7 S. D. 277, 64 N. W. 130.

§ 9995. **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. [C. Cr. P. 1877, § 350; R. C. 1899, § 8186.]

§ 9996. **Defendants tried separately.** When two or more defendants are jointly charged with a felony in a criminal action, 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. [C. Cr. P. 1877, § 351; R. C. 1899, § 8187.]

§ **9997. Defendant discharged to testify.** When two or more persons are included in the same information or indictment the court may, at any time before the defendants have gone into their defense, on the application of the state's attorney, direct any defendant to be discharged from the information or indictment, that he may be a witness for the state. [C. Cr. P. 1877, § 352; R. C. 1899, § 8188.]

Defendant who has been granted a separate trial, though not discharged, may be competent witness against his codefendant. State v. Smith, 8 S. D. 547, 67 N. W. 619.

§ **9998. Same. Witness for codefendant.** When two or more persons are included in the same information or indictment, and the court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his codefendant. [C. Cr. P. 1877, § 353; R. C. 1895, § 8189.]

§ **9999. Such discharge an acquittal.** The discharge of a defendant under either of the last two sections is an acquittal of the offense charged in the information or indictment or any offense for which he might have been found guilty thereunder, and is a bar to another prosecution therefor. [R. C. 1895, § 8190.]

§ **10000. Defendant witness in his own behalf.** In the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint or otherwise, the defendant shall, at his own request and not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create or raise any presumption of guilt against him; nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place. [1879, ch. 16, § 1; R. C. 1895, § 8191.]

It is a reversible error for prosecuting attorney to refer to the fact that defendant did not testify. State v. Williams, 11 S. D. 64, 75 N. W. 815; State v. Garrington, 11 S. D. 178, 76 N. W. 326.

§ **10001. Rules of evidence.** The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this code. [C. Cr. P. 1877, § 354; R. C. 1899, § 8192.]

§ **10002. Treason. Witnesses. Overt acts.** Upon a trial for treason the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon his confession in open court; nor can evidence be admitted of an overt act not expressly charged in the information or indictment; nor can the defendant be convicted unless one or more overt acts are expressly charged therein. [R. C. 1895, § 8193.]

§ **10003. Conspiracy. Overt acts. Proof.** 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 are expressly alleged in the information or indictment, nor unless one or more of the acts alleged are proved; but any other overt act, not alleged in the information or indictment, may be given in evidence. [C. Cr. P. 1877, § 355; R. C. 1895, § 8194.]

§ **10004. Accomplice. Evidence. Corroboration.** A conviction cannot be had upon the testimony of an accomplice unless he is 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 shows the commission of the offense, or the circumstances thereof. [C. Cr. P. 1877, § 356; R. C. 1899, § 8195.]

Corroboration must be independent of accomplice. State v. Coudotte, 7 N. D. 109, 72 N. W. 913; State v. Kent, 4 N. D. 577, 62 N. W. 631; State v. Hicks, 6 S. D.

325, 60 N. W. 66; State v. Phelps, 5 S D. 480, 59 N. W. 471; State v. Levers, 12 S. D. 265, 81 N. W. 294.

A female participant in an incestuous intercourse is an accomplice whose testimony must be corroborated to convict. State v. Kellar, 8 N. D. 563, 80 N. W. 476.

§ 10005. **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 instrument, 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, is in writing, either subscribed by, or in the handwriting of the defendant, or unless the pretense is 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. [C. Cr. P. 1877, § 357; R. C. 1899, § 8196.]

§ 10006. **Evidence of abortion and seduction.** Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty 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, under twenty years of age, of previous chaste character, the defendant cannot be convicted upon the testimony of the person injured unless she is corroborated by other evidence. [C. Cr. P. 1877, § 358; R. C. 1895, § 8197.]

Testimony of prosecutrix that offense was committed need not be corroborated. State v. King, 9 S. D. 628, 70 N. W. 1046.

§ 10007. **Mistake in charge. Other proceedings.** When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant must not be discharged, if there appears good cause to detain him in custody; but the court must commit him, or require him to give bail for his appearance to answer to the offense, and may also require the witnesses to give bail for their appearance. The provisions of section 9906 of this code as to the manner and time of prosecution, so far as applicable, shall govern the further proceedings under this section. [C. Cr. P. 1877, § 359; R. C. 1895, § 8198.]

§ 10008. **Same. Not former acquittal nor once in jeopardy.** Upon the trial of an information filed or indictment found, under the provisions of the last section, neither a plea of former acquittal nor of once in jeopardy shall be sustained by the fact of the discharge of the jury on the first information or indictment. [C. Cr. P. 1877, § 360; R. C. 1895, § 8199.]

§ 10009. **New proceedings. Original charge.** If a new information is not filed or a new indictment found within the times limited in section 9906 and the sections therein referred to of this code, the court must again proceed to try the defendant on the original charge. [C. Cr. P. 1877, § 361; R. C. 1895, § 8200.]

§ 10010. **Want of jurisdiction appearing, jury discharged.** The court may direct the jury to be discharged, when it appears that it has not jurisdiction of the offense, or that the facts charged in the information or indictment do not constitute an offense punishable by law. [C. Cr. P. 1877, § 362; R. C. 1895, § 8201.]

§ 10011. **Disposition of accused.** If the jury is discharged because the court has not jurisdiction of the offense charged, and it appears that it was committed out of the jurisdiction of this state, the defendant must be discharged, unless the court orders that he be detained for a reasonable time, to be specified in the order, to enable the state's attorney to communicate with

the chief executive officer of the country, state, territory or district where the offense was committed. [C. Cr. P. 1877, § 363; R. C. 1895, § 8202.]

§ 10012. **Same. Bail.** If the offense was committed within the jurisdiction of another county of this state, the court may 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 is 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. [C. Cr. P. 1877, § 364; R. C. 1895, § 8203.]

§ 10013. **Clerk. Papers. Certified copies sent to proper county.** In the cases provided for in the last section, the clerk must forthwith transmit a certified copy of the information or indictment and of all the papers filed in the action, to the proper county, the expense of which transmission is chargeable to that county. [[C. Cr. P. 1877, § 364; R. C. 1895, § 8204.]

§ 10014. **When accused 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 section 10012 must be discharged. [C. Cr. P. 1877, § 365; R. C. 1895, § 8205.]

§ 10015. **Proceedings if accused 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. [C. Cr. P. 1877, § 366; R. C. 1895, § 8206.]

§ 10016. **Court must discharge accused. Exception.** If the jury is 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 has deposited money instead of bail, that the money deposited be refunded to him, unless in his opinion a new information or indictment can be framed, upon which the defendant can be legally convicted, in which case it may direct the state's attorney to file a new information, or (if an information cannot be sooner legally filed) direct that the case be submitted to the same or another grand jury; and the provisions of section 9896 or 9906 of this code, so far as applicable, as to the time and manner of the prosecution, shall govern the further proceedings under this section. [C. Cr. P. 1877, § 367; R. C. 1895, § 8107.]

§ 10017. **Court may advise jury to acquit.** If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury 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. [C. Cr. P. 1877, § 368; R. C. 1899, § 8208.]

Court may advise jury to acquit. **Territory v. Stone, 2 Dak. 155, 4 N. W. 697.**

§ 10018. **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 to 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. [C. Cr. P. 1877, § 369; R. C. 1899, § 8209.]

§ 10019. **Juror knowing fact. Witness.** If a juror has 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 declares 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. [C. Cr. P. 1877, § 370; R. C. 1899, § 8210.]

§ 10020. **Custody and conduct of jury.** The jurors sworn to try a criminal action, may, at any time before the cause is submitted to the jury, in the discretion of the court, be permitted to separate, or 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 to 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. [C. Cr. P. 1877, § 371; R. C. 1895, § 8211.]

Fact of sheriff and deputy being witnesses against defendant does not of itself render them incompetent to act as bailiffs. State v. Rosencrans, 9 N. D. 163, 82 N. W. 422.

Jury should be kept together after final submission of case. State v. Church, 7 S. D. 289, 64 N. W. 152.

§ 10021. **Court must admonish jury.** 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 upon any subject connected with the trial, or to form or express any opinion thereon, until the case is finally submitted to them. [C. Cr. P. 1877, § 372; R. C. 1899, § 8212.]

§ 10022. **Juror becoming sick. Procedure.** If, before the conclusion of a trial, a juror becomes 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 afterward impaneled. [C. Cr. P. 1877, § 373; R. C. 1899, § 8213.]

Where juror is discharged during trial and another is chosen without dismissing panel, defendant has only peremptory challenges not yet exhausted. State v. Hazledahl, 2 N. D. 521, 52 N. W. 315.

§ 10023. **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, devolve 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. [C. Cr. P. 1877, § 374; R. C. 1899, § 8214.]

Defendant must establish justification by preponderance of evidence. State v. Yokum, 11 S. D. 544, 79 N. W. 835.

§ 10024. **Bigamy, proof of marriage.** 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 state proof of that fact, accompanied with proof of cohabitation thereafter in this state is sufficient to sustain the charge. [C. Cr. P. 1877, § 375; R. C. 1899, § 8215.]

§ 10025. **Forgery. Proof on trial.** 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. [C. Cr. P. 1877, § 376; R. C. 1899, § 8216.]

§ 10026. Charge to jury. Requisites. 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 states 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 refused the court must indorse or sign its decision. [[C. Cr. P. 1877, § 377; R. C. 1895, § 8217.]

Rule in O'Hare case, 1 N. D. 30, 44 N. W. 1003, adhered to. State v. Barry, 11 N. D. 428, 92 N. W. 809.

Failure to indorse ruling on requested instruction will not prevent review of its action in not giving instruction. State v. Hellekson, 13 S. D. 242, 83 N. W. 254.

§ 10027. Jury after charge. Refreshments. 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 refreshments except water unless otherwise ordered by the court, and not to permit any person to speak to or communicate with them, nor to do so himself, unless 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. [C. Cr. P. 1877, § 378; R. C. 1895, § 8218.]

§ 10028. When conviction or acquittal a bar. When the defendant has been convicted or acquitted upon an information or indictment for an offense consisting of different degrees, the conviction or acquittal is a bar to another information or indictment for the offense charged, or for any lower degree of that offense, or for an offense necessarily included therein. [R. C. 1895, § 8219.]

§ 10029. 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. [C. Cr. P. 1877, § 379; R. C. 1899, § 8220.]

§ 10030. Substitute for state's attorney. If the state's attorney fails, or is unable to attend at the trial, the court must appoint some attorney at law to perform the duties of the state's attorney on such trial. [C. Cr. P. 1877, § 380; R. C. 1899, § 8221.]

ARTICLE 3.—CONDUCT OF THE JURY AFTER THE CAUSE IS SUBMITTED TO THEM.

§ 10031. Room provided for jury. A room must be provided by the board of commissioners of a 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. [C. Cr. P. 1877, § 381; R. C. 1899, § 8222.]

§ 10032. Food and lodging for jury. 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. [C. Cr. P. 1877, § 382; R. C. 1899, § 8223.]

§ 10033. What papers jury may take. Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such 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. They may also take with them such parts of the written instructions as the court may direct and notes

of the testimony, or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person. [C. Cr. P. 1877, § 383; R. C. 1895, § 8224.]

§ **10034. Disagreement. Further instructions.** After the jury have retired for deliberation, if there is 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, they 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 state's attorney and the defendant or his counsel, or after they have been called. [C. Cr. P. 1877, § 384; R. C. 1899, § 8225.]

§ **10035. Juror sick, jury discharged.** If, after the retirement of the jury, one of them becomes so sick as to prevent the continuance of his duty, or any other accident or cause occurs to prevent their being kept together for deliberation, the jury may be discharged. [C. Cr. P. 1877, § 385; R. C. 1899, § 8226.]

§ **10036. Disagreement, jury discharged.** 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 appears that there is no reasonable probability that the jury can agree. [C. Cr. P. 1877, § 386; R. C. 1899, § 8227.]

Jury should be kept together after case submitted until discharged. State v. Church, 7 S. D. 289, 64 N. W. 152.

§ **10037. Verdict prevented, cause retried.** In all cases when a jury is discharged or prevented from giving a verdict, by reason of an accident or other cause, except when the defendant is discharged from the information or 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. [C. Cr. P. 1877, § 387; R. C. 1899, § 8228.]

§ **10038. Adjournment during absence of jury.** 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. A final adjournment of the court discharges the jury. [C. Cr. P. 1877, §§ 388, 389; R. C. 1895, § 8229.]

Jury having retired may be brought in on Sunday for further instructions on their request, or judge's own motion. People v. Odell, 1 Dak. 189, 46 N. W. 601.

Article 4.—The Verdict.

§ **10039. 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. [C. Cr. P. 1877, § 390; R. C. 1899, § 8230.]

§ **10040. Presence of defendant. Felony. Misdemeanor.** If the information or 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. [C. Cr. P. 1877, § 391; R. C. 1899, § 8231.]

§ **10041. Procedure 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. [C. Cr. P. 1877, § 392; R. C. 1899, § 8232.]

§ **10042. General or special verdict. Libel.** The jury may either render a general verdict, or when they are in doubt as to the legal effect of the facts

proved, they may, except upon an information or indictment for libel, find a special verdict. [C. Cr. P. 1877, § 393; R. C. 1899, § 8233.]

§ **10043. Oral or in writing. Preparation.** The verdict of the jury may be rendered orally or in writing as the jury may elect, unless the court, at the time the case is submitted to the jury, requires that it be rendered in writing. When the court so requires, the clerk of the court shall, under the direction of the court, provide blank verdicts of suitable form for any verdict the jury may return in the action and said blank verdicts shall be taken by the jury when it retires. [R. C. 1895, § 8234.]

§ **10044. General verdicts. Contents.** 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 information or indictment. Upon a plea of a former conviction or acquittal of the same offense, or once in jeopardy, it is either "for the state," 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 information or indictment and the proof, the verdict must be "not guilty by reason of variance between the information (or indictment) and proof." [C. Cr. P. 1877, § 394; R. C. 1899, § 8235.]

General verdict of guilty or not guilty has reference to the crime charged in the indictment. State v. McDonald, 16 S. D. 78, 91 N. W. 447.

§ **10045. Special verdict to be written.** 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. [C. Cr. P. 1877, § 395; R. C. 1899, § 8236.]

§ **10046. Special verdict, how rendered.** 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. [C. Cr. P. 1877, § 396; R. C. 1899, § 8237.]

§ **10047. 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. [C. Cr. P. 1877, § 397; R. C. 1899, § 8238.]

§ **10048. 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. [C. Cr. P. 1877, § 398; R. C. 1899, § 8239.]

§ **10049. 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 information or indictment, or of any other offense of which he could be convicted under the information or 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, or once in jeopardy, the court must give judgment of conviction or acquittal, according as the facts prove or fail to prove the plea. [C. Cr. P. 1877, § 399; R. C. 1895, § 8240.]

Plea of former conviction or acquittal may be pleaded either with or without a plea of not guilty. People v. Briggs, 1 Dak. 289, 46 N. W. 451.

§ **10050. When new trial must be ordered.** 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. [C. Cr. P. 1877, § 400; R. C. 1895, § 8241.]

§ 10051. 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. Whenever a verdict of guilty is rendered against the accused upon a prosecution for homicide, the jury must find the degree thereof and determine by their verdict the punishment to be inflicted within the limits prescribed by law. [C. Cr. P. 1877, § 401; R. C. 1895, § 8242.]

§ 10052. Finding on charge of previous conviction. Whenever the fact of a previous conviction of another offense is charged in the information or indictment, the jury if they find a verdict of guilty of the offense with which the defendant is charged, must also, unless the answer of defendant admits the charge, find whether or not he has suffered such previous conviction. In addition to the verdict of "guilty" the verdict of the jury upon a charge of previous conviction may be "we also find the charge of previous conviction true," or "we also find the charge of previous conviction not true," as they find that the defendant has or has not suffered such conviction. [R. C. 1895, § 8243.]

§ 10053. Any degree may be found. 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 information or indictment, or of an attempt to commit the offense. [C. Cr. P. 1877, § 402; R. C. 1899, § 8244.]

The lesser is necessarily included in the greater offense. State v. Johnson, 3 N. D. 150, 54 N. W. 547; State v. Marcks, 3 N. D. 532, 58 N. W. 25; State v. Finder, 10 S. D. 103, 72 N. W. 97; State v. Caddy, 15 S. D. 167, 87 N. W. 927; People v. Odell, 1 Dak. 189, 46 N. W. 601; Territory v. Conrad, 1 Dak. 348, 46 N. W. 605.

Degree of crime must be found by jury. State v. Belyea, 9 N. D. 353, 83 N. W. 1; State v. Campbell, 7 N. D. 58, 72 N. W. 935; State v. McDonald, 16 S. D. 78, 91 N. W. 447.

§ 10054. Several defendants. Part convicted. On an information or 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. [C. Cr. P. 1877, § 403; R. C. 1899, § 8245.]

§ 10055. Verdict returned. Duty of court. Punishment. If the jury return a verdict of guilty against the accused, the court must before it is accepted ascertain whether it conforms to the law of the case. If in the opinion of the court, the verdict does not conform to the requirements of the law of the case, the court must with proper instructions as to the error, direct the jury to reconsider the verdict, and the verdict cannot be accepted or recorded until it is rendered in proper form. But, if the punishment imposed by the jury in the verdict, in cases where the jury are authorized by law to determine the punishment, is not in conformity to the law of the case in that regard, the court may proceed as follows:

1. If the punishment imposed by the jury in the verdict is under the limit prescribed by law, for the offense of which the defendant is found guilty, the court may receive the verdict and thereupon render judgment and pronounce sentence for the lowest limit prescribed by law in such cases; or,

2. If the punishment imposed by the jury in the verdict is greater than the highest limit prescribed by law, for the offense of which the defendant is found guilty, the court must disregard the excess and render judgment and pronounce sentence according to the highest limit prescribed by law in the particular case. [R. C. 1895, § 8246.]

§ 10056. Court may reduce punishment. The court has the power in all cases of conviction, to reduce the extent or duration of the punishment imposed by a jury, if in its opinion, the conviction is proper, and the punishment imposed is greater than under the circumstances of the case ought to be inflicted. [R. C. 1895, § 8247.]

§ 10057. Jury reconsider verdict. Acquittal. 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. [C. Cr. P. 1877, § 404; R. C. 1899, § 8248.]

§ 10058. Same. Informal verdict. 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 is 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. [C. Cr. P. 1877, § 405; R. C. 1899, § 8249.]

§ 10059. Judgment if jury persists. Acquittal. 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 is given against him on a special verdict. [C. Cr. P. 1877, § 406; R. C. 1899, § 8250.]

§ 10060. Jury may be polled. Procedure. 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 anyone answers in the negative, the jury must be sent out for further deliberation. [C. Cr. P. 1877, § 407; R. C. 1899, § 8251.]

§ 10061. Clerk to record verdict. Dissent. 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 disagrees, 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. [C. Cr. P. 1877, § 408; R. C. 1899, § 8252.]

§ 10062. Judgment. Acquittal. Accused discharged. Exception. 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 information or indictment, which may be obviated by a new information or indictment, the court may order his detention to the end that a new information or indictment may be preferred in the same manner and with like effect as provided in section 9906 and the sections of this code therein referred to. [C. Cr. P. 1877, § 409; R. C. 1895, § 8253.]

§ 10063. Verdict. Guilty. Procedure. 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. [C. Cr. P. 1877, § 410; R. C. 1899, § 8254.]

§ 10064. When 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 it deems his discharge dangerous to the public peace or safety, order him to be committed to the care of the sheriff until he becomes sane. [C. Cr. P. 1877, § 411; R. C. 1899, § 8255.]

CHAPTER 11.

PROCEEDINGS AFTER VERDICT AND BEFORE JUDGMENT.

ARTICLE 1.—STATEMENT OF THE CASE AND EXCEPTIONS.

§ **10065. Statement of the case defined.** A statement of the case is a statement, in writing, setting forth or showing particularly, one or more of the rulings, decisions or acts excepted to in an action or proceeding, together with the facts and circumstances of the ruling, decision or act and the exception thereto, and settled, certified and filed as provided in this article. [R. C. 1895, § 8256.]

§ **10066. Same. Office of.** The office of a statement of the case is to make such parts of the proceedings or of the evidence in an action, appear of record as otherwise would not so appear. [R. C. 1895, § 8257.]

§ **10067. Same. By whom settled. Where filed.** Except as otherwise provided in this chapter, a statement containing the exceptions must be settled and certified by the judge who presided at the trial, and filed with the clerk of the district court of the county in which the action was tried. [C. Cr. P. 1877, § 413; R. C. 1895, § 8258.]

§ **10068. Matters deemed excepted to by either party.** The decision of the court, in a criminal action or proceeding upon a matter of law is deemed excepted to by either party in the following cases:

1. In granting or refusing a motion to set aside an information or indictment.
2. In allowing or disallowing a demurrer to an information or indictment.
3. In granting or refusing a motion in arrest of judgment.
4. In granting or refusing a motion for a new trial.
5. In making or refusing to make an order after judgment affecting any substantial right of the parties. [R. C. 1895, § 8259.]

§ **10069. Matters deemed excepted to by the defendant.** The decision of the court in a criminal action or proceeding upon a matter of law is deemed excepted to by the defendant in the following cases:

1. In refusing to grant a motion for a change of the place of trial.
2. In refusing to postpone the trial on motion of the defendant.
3. In charging or instructing the jury upon the law, upon the trial of the issue, except as otherwise provided in section 9988 of this code. [R. C. 1895, § 8260.]

§ **10070. Clerk to enter orders. Certified copies.** It shall be the duty of the clerk of the district court in which any criminal action or proceeding is pending or tried, to enter carefully and correctly in the minutes of such court, each ruling or decision of the court, made in open court, upon any matter by section 10068 and subdivisions 1 and 2 of section 10069 of this article declared to be deemed excepted to, and a certified copy of any or all such entries shall be and become a part of the record of said action. [R. C. 1895, § 8261.]

§ **10071. Matters defendant may except to.** Upon a trial of a criminal action or proceeding, exceptions may be taken by the defendant to a decision of the court:

1. In disallowing a challenge to a 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 of a juror for actual bias.

3. In admitting or rejecting witnesses or evidence or in deciding any matter of law, not purely discretionary, on the trial of the issue. [C. Cr. P. 1877, § 412; R. C. 1895, § 8262.]

Exceptions should be to matters of law, not facts. State v. Chapman, 1 S. D. 414, 47 N. W. 411; State v. Reddington, 7 S. D. 368, 64 N. W. 170; Territory v. Stone, 2 Dak. 155, 4 N. W. 697.

§ 10072. Code construed. Nothing in this code contained is to be construed so as to deprive either party of the right of excepting to any action or decision of the court in a criminal action or proceeding, which affects any other material or substantial right of either party, whether before or after the trial, or on such trial. [R. C. 1895, § 8263.]

§ 10073. Exceptions. Settled at trial. In all cases when the court is proceeding without a stenographer, the exceptions must be settled and certified, at the trial, unless the court otherwise directs. If the exceptions are settled at the trial, the point of the exception must be particularly stated in writing and delivered to the court, and must immediately be corrected or added to, until it is made conformable to the truth. The exceptions so settled and certified shall constitute a statement of the case. [C. Cr. P. 1877, § 414; R. C. 1895, § 8264.]

Statement of case in criminal action, what constitutes. State v. Weltner, 7 N. D. 522, 75 N. W. 779; Territory v. Stone, 2 Dak. 155, 4 N. W. 697.

§ 10074. Same. Not settled at trial. If the exceptions are not settled at the trial and in all cases when the testimony is taken down by an official stenographer, a statement of the case containing the exceptions must be prepared and served within thirty days thereafter, on the state's attorney or other person appointed to prosecute, who may within five days thereafter, serve on the defendant or his attorney, amendments thereto. The defendant may then, within five days, serve the state's attorney, or other person appointed to prosecute with a notice to appear before the judge, who presided at the trial at a specified place and time, not less than five nor more than ten days thereafter, to have the statement of the case settled. At the place and time appointed, or as soon thereafter as the same can be done, the judge must settle the statement of the case, and certify the same to be correct, and thereupon the same must be filed with the clerk of the district court of the county in which the action was tried. The judge who presided at the trial may settle, and certify a statement of the case after as well as before he ceases to be such judge. [C. Cr. P. 1877, § 415; 1887, ch. 21, § 5; R. C. 1895, § 8265.]

§ 10075. When supreme court may settle statement. If the judge who presided at the trial in any case refuses to allow an exception in accordance with the facts, or to settle or certify a statement of the case or has died or removed from the state, the party desiring the statement may apply by petition to the supreme court at any term thereof, or to any judge of said court in vacation, to settle and approve the same. The application may be made in the manner and under such regulations as the court may prescribe by order or in its rules, or as may be required by the judge of said court to whom application is made. The statement of the case or any exception when allowed, must be certified by the chief justice of the court (if application is made to the court) or by the judge allowing the same (when made to a judge), as correct, and filed with the clerk of the district court of the county in which the action was tried, and when so filed, it has the same force and effect as if settled by the judge who presided at the trial of the action. In all cases when there is no provision of law governing the allowance and settlement of statements or exceptions, the same shall be allowed, settled and certified as directed in this section. [C. Cr. P. 1877, § 416; 1885, ch. 20, § 1; R. C. 1895, § 8266.]

Bill of exceptions, unless corrected in manner provided by statute, is conclusive upon supreme court. State v. Dorman, 9 S. D. 528, 70 N. W. 848.

§ 10076. **Time may be extended.** The times for preparing the statement of the case, or the amendments thereto, or for settling and certifying the same, may be extended before or other times fixed after they have elapsed, by the agreement of the parties or by the judge who presided at the trial, or in the cases provided for in section 10075 of this code, by the supreme court, or by a judge thereof. [C. Cr. P. 1877, § 417; R. C. 1895, § 8267.]

§ 10077. **What statement to contain.** The statement of the case 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 statement, whether agreed to by the parties or not, strike out all other matters therein. No particular form of exception is required, but the objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more; only the substance of the stenographer's notes of the evidence shall be stated; documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made. [C. Cr. P. 1877, § 419; R. C. 1895, § 8268.]

§ 10078. **Instructions. Exceptions. Record. Errors.** The instructions requested by the defendant and refused, or by the prosecutor and given, and all the instructions given to the jury, by the court in writing, or orally and written out by the stenographer of the court and filed with the clerk, except as otherwise provided in section 10006, are deemed excepted to, and need not be embodied in the statement of the case, but the same and each of them with the indorsements, if any, showing the action of the court thereon, form a part of the record of the action. The decision of the court upon any matters of law in this article declared to be deemed excepted to, need not be embodied in any statement of the case, and forms a part of the record of the action. Any statement of the case or exception, settled, certified and filed as provided in this article also forms a part of the record of the action. Any error committed by the court in or by any decision, ruling, instruction or other act and appearing in the record of the action may be taken advantage of upon a motion for a new trial or in the supreme court on an appeal. [R. C. 1895, § 8269.]

Article 2.—New Trials.

§ 10079. **New trial defined.** 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 information or indictment. [C. Cr. P. 1877, § 422; R. C. 1899, § 8270.]

§ 10080. **Causes for granting new trial.** When a verdict has been rendered against the defendant, the court in which the trial was had, may upon his application, grant a new trial in the following cases only:

1. When the trial has been had in his absence, if the information or indictment is for a felony.
2. When the jury has received out of court any evidence other than that resulting from a view of the premises, or any communication, document or paper referring to the case.
3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have 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 other means 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 or has done or allowed any act in the action prejudicial to the substantial rights of the defendant.

6. When the verdict is contrary to law or clearly against the evidence.

7. When new evidence is discovered material to the defense, and which the defendant could not, with reasonable diligence, have discovered and produced at the trial.

When the application for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing in support thereof, the affidavits of the persons by whom such evidence is expected to be given; and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable. But the court may, when the affiants are residents of this state, compel their personal attendance before it; and they may be examined and cross-examined under oath, touching the matters set forth in their affidavits. [C. Cr. P. 1877, § 423; 1885, ch. 115, § 1; R. C. 1895, § 8271.]

Separation of jury. State v. King, 5 N. D. 516, 67 N. W. 1052; State v. Church, 7 S. D. 289, 64 N. W. 152.

On grounds of surprise. Gaines v. White, 1 S. D. 434, 47 N. W. 524; Adams v. Rathbun, 14 S. D. 552, 86 N. W. 629.

New trial will be granted where counsel for state calls attention to fact that defendant has not testified. State v. Williams, 11 S. D. 64, 75 N. W. 815; State v. Garrington, 11 S. D. 178, 76 N. W. 326.

Affidavit of juror incompetent to impeach verdict. State v. Keifer, 16 S. D. 180, 91 N. W. 1117; State v. Andre, 14 S. D. 215, 84 N. W. 783; Territory v. King, 6 Dak. 131, 50 N. W. 623; Territory v. Taylor, 1 Dak. 451, 46 N. W. 597; State v. Vincent, 16 S. D. 62, 91 N. W. 347.

§ **10081. Application for new trial. Notice.** The application for a new trial must be made upon not less than one nor more than five days' written notice, and if based upon any of the grounds mentioned in subdivisions 2, 3, 4 and 7, of section 10080, such written notice must be served and filed within thirty days after the discovery of the facts upon which the party relies in support of his application; and in all other cases the notice must be served and filed within ten days after the rendition of the verdict, or within such further or other time as the court may allow or fix. [1885, ch. 115, § 2; R. C. 1895, § 8272.]

§ **10082. Same. Affidavits. Upon minutes of the court.** The application for a new trial, if made for any of the causes mentioned in subdivisions 1, 2, 3, 4 and 7, of section 10080 must be based upon affidavits which must be filed before the notice is served; in all other cases the application may be made upon the minutes of the court or upon the record of the action and the notice must designate generally the grounds upon which the motion will be made as near as may be in the language of section 10080. When the application is made upon the minutes of the court, the notice must specify particularly the errors relied upon and upon the hearing reference may be had to any and all papers on file in the action, the clerk's minutes and the stenographer's notes of the testimony. The application must be heard on the day specified in the notice, or as soon as practicable thereafter. In all cases when the notice is served before judgment, the court may in its discretion, stay all further proceedings in the action until such application is disposed of. When the application is made upon the minutes of the court and a statement of the case becomes necessary, the draft thereof, and amendments thereto may be proposed and served and the statement settled, certified and filed in the manner and times and after the notices in this article specified. If a review of the decision upon such application is sought on appeal, the errors specified in the notice must be embodied in the statement as settled and certified. [1885, ch. 115, § 2; R. C. 1895, § 8273.]

§ 10083. **Same. Time within which made.** The application for a new trial, except in case of a sentence of death, must be made before the time for an appeal has elapsed. In case of a sentence of death, the application may be made at any time before the execution. [1885, ch. 115, § 2; R. C. 1895, § 8274.]

ARTICLE 3.—ARREST OF JUDGMENT.

§ 10084. **Motion in arrest of judgment defined.** A motion in arrest of judgment is an application on the part of the defendant, that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on a plea of former conviction or acquittal or once in jeopardy. It may be founded on any of the defects in the information or indictment mentioned in section 9900, unless the objection has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment. [C. Cr. P. 1877, § 425; R. C. 1895, § 8275.]

§ 10085. **Court, without motion, may arrest judgment.** 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 information was filed or the indictment found. [C. Cr. P. 1877, § 426; R. C. 1895, § 8276.]

§ 10086. **Judgment arrested. Further prosecution. Acquittal.** If, from the evidence in a trial, there is reason to believe the defendant guilty, and a new information or 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 admitted to bail anew, to answer the new information or indictment. If the evidence shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution. 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 must be exonerated, or if money has been deposited instead of bail, it must be refunded, and the arrest of judgment shall operate as an acquittal of the defendant of the charge upon which the information or indictment was founded. [C. Cr. P. 1877, § 427; R. C. 1895, § 8277.]

CHAPTER 12.

JUDGMENT AND EXECUTION.

ARTICLE 1.—THE JUDGMENT.

§ 10087. **After conviction, judgment. Time.** After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal or once in jeopardy, if the judgment is not arrested or a new trial granted, the court must appoint a time for pronouncing judgment. [C. Cr. P. 1877, § 428; R. C. 1895, § 8278.]

§ 10088. **Time specified.** The time appointed must be at least two days after the verdict, if the court intends to remain in session so long; or if not, at as remote a time as can reasonably be allowed. [C. Cr. P. 1877, § 429; R. C. 1899, § 8279.]

§ 10089. **Defendant's presence. Felony. Misdemeanor.** For the purpose of judgment, if the conviction is for a felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence. [C. Cr. P. 1877, § 430; R. C. 1895, § 8280.]

§ 10090. **Officer to produce defendant.** 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. [C. Cr. P. 1877, § 431; R. C. 1899, § 8281.]

§ 10091. 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. [C. Cr. P. 1877, § 432; R. C. 1899, § 8282.]

§ 10092. Same. Duty of clerk. The clerk, on the application of the state's attorney, may, accordingly, at any time after the order, whether the court is sitting or not, issue a bench warrant into one or more counties. [C. Cr. P. 1877, § 433; R. C. 1899, § 8283.]

§ 10093. Form of bench warrant. The bench warrant must be substantially in the following form:

State of North Dakota, } ss.
County of .....}

To any sheriff, constable, marshal or policeman in this state:

A. B. having been on the.....day of....., A. D. 19..., 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. 19...

By order of the court.

[Seal] ....., Clerk.

[C. Cr. P. 1877, § 434; R. C. 1899, § 8284.]

§ 10094. Where and how served. The bench warrant may be served in any county of the state, and in the same manner as a warrant of arrest. [C. Cr. P. 1877, § 435; R. C. 1895, § 8285.]

§ 10095. Disposal of defendant on arrest. 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. [C. Cr. P. 1877, § 436; R. C. 1899, § 8286.]

§ 10096. Defendant informed of rights. 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 charge against him, 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. [C. Cr. P. 1877, § 437; R. C. 1899, § 8287.]

§ 10097. Defendant 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 state hospital for the insane, until he becomes sane, or is otherwise committed according to law, and when notice is given of the 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. [C. Cr. P. 1877, § 438; R. C. 1899, § 8288.]

§ 10098. Judgment rendered. If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered. [C. Cr. P. 1877, § 439; R. C. 1899, § 8289.]

§ **10099. Court to hear evidence. Degree of crime.** Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, if said plea is accepted and the defendant does not designate in his plea the degree thereof, before passing sentence, determine the degree, and the provisions, so far as applicable, of section 10101 and of 10102 shall govern in said determination. [R. C. 1895, § 8290.]

§ **10100. Same. Aggravation. Mitigation.** After a plea or verdict of guilty, in a case when 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. [C. Cr. P. 1877, § 440; R. C. 1899, § 8291.]

§ **10101. How evidence 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 taken 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. [C. Cr. P. 1877, § 441; R. C. 1899, § 8292.]

§ **10102. 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. [C. Cr. P. 1877, § 442; R. C. 1899, § 8293.]

§ **10103. Successive terms of imprisonment.** If the defendant has 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. [C. Cr. P. 1877, § 443; R. C. 1899, § 8294.]

§ **10104. Judgment for fine and costs.** A judgment that the defendant pay a fine and costs, may also direct that he be imprisoned until both the fine and costs are satisfied, specifying the extent of the imprisonment, which must not exceed one day for every two dollars of the fine and costs, but such imprisonment does not discharge the judgment for fine and costs or either, and said judgment may at any time thereafter within the time limited by law, be collected upon execution issued thereon. [C. Cr. P. 1877, § 444; R. C. 1895, § 8295.]

Judgment may be enforced by fine and imprisonment. State v. Hogan, 8 N. D. 301, 78 N. W. 1051.

§ **10105. Same. To be docketed.** A judgment that the defendant pay a fine and costs or either, must be docketed and thereafter constitutes a lien upon the real estate of the defendant in like manner as a judgment for money rendered in a civil action. [C. Cr. P. 1877, § 445; R. C. 1895, § 8296.]

§ **10106. Judgment. Entered in minutes. Record.** 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, as soon as may be, annex together and file the following papers which constitute a record of the action:

1. The information or indictment and all the papers filed in the action together with a copy of the minutes of the plea or demurrer.
2. A copy of the minutes of the trial.
3. The written charges given or refused, with indorsements if any thereon; the written instructions given by the court and the copy of any oral instructions by the court and filed with the clerk.
4. A copy of the judgment. [C. Cr. P. 1877, § 446; R. C. 1895, § 8297.]

ARTICLE 2.—THE EXECUTION.

§ 10107. **Execution to officer.** When a judgment other than 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. [C. Cr. P. 1877, § 447; R. C. 1899, § 8298.]

§ 10108. **For fine and costs.** If the judgment is for a fine and costs or either alone, execution may issue thereon as on a judgment in a civil action. [C. Cr. P. 1877, § 448; R. C. 1895, § 8299.]

§ 10109. **For imprisonment or fine and imprisonment.** If the judgment is imprisonment, or a fine and imprisonment until such fine is paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with. [C. Cr. P. 1877, § 449; R. C. 1899, § 8300.]

§ 10110. **Judgment, by what officer executed.** When the judgment is imprisonment in the county jail, or a fine and that the defendant be imprisoned until it is 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. [C. Cr. P. 1877, § 450; R. C. 1899, § 8301.]

§ 10111. **Judgment of imprisonment in penitentiary.** If the judgment is for imprisonment in the penitentiary, 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 penitentiary. 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 a return thereof to the court. [C. Cr. P. 1877, § 451; R. C. 1895, § 8302.]

§ 10112. **Authority while conveying defendant.** 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 state, in securing the defendant, and in retaking him if he escapes, as if the sheriff was in his own county; and every person who refuses or neglects to assist the sheriff, when so required, is punishable as if the sheriff was in his own county. [C. Cr. P. 1877, § 452; R. C. 1899, § 8303.]

§ 10113. **Imprisonment in penitentiary is at hard labor.** In all cases when by law a person is sentenced to imprisonment in the penitentiary, it shall be at hard labor, whether so designated by the jury or court or not. [R. C. 1895, § 8304.]

§ 10114. **Judgment of death. Warrant to execute.** When the 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 upon which the judgment is to be executed, which must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter. [C. Cr. P. 1877, § 453; R. C. 1895, § 8305; 1903, ch. 99, § 14.]

§ 10115. **Statement and evidence sent governor.** 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. [C. Cr. P. 1877, § 454; R. C. 1899, § 8306.]

§ 10116. **Governor. Judges of supreme court.** The governor may thereupon require the opinion of the judges of the supreme court or any of them, upon the statement so furnished. [C. Cr. P. 1877, § 455; R. C. 1899, § 8307.]

§ 10117. **Governor only can reprieve.** No judge, court or other officer, other than the governor, can reprieve or suspend the execution of the judg-

ment of death, except the warden or his duly acting deputy, as provided in this article, unless an appeal is taken. [C. Cr. P. 1877, § 456; R. C. 1895, § 8308; 1903, ch. 99, § 15.]

§ **10118. Death penalty, how inflicted.** The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead. [1903, ch. 99, § 1.]

§ **10119. Executions at penitentiary.** The warden of the North Dakota penitentiary, or in case of his death, inability or absence, a deputy warden shall be the executioner; and when any person shall be sentenced, by any court of the state having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the North Dakota penitentiary at Bismarck, within an inclosure to be prepared for that purpose under the direction of the warden of the penitentiary and the board of trustees thereof, which inclosure shall be higher than the gallows, and so constructed as to exclude public view. [1903, ch. 99, § 1.]

§ **10120. Trial judge to fix date of execution.** All executions of the death penalty by hanging shall take place according to the provisions of this article, and on the day designated by the judge passing sentence, but before the hour of sunrise of the designated day. [1903, ch. 99, § 2.]

§ **10121. Compensation of executioner.** The warden or deputy warden executing the sentence shall receive for his services twenty-five dollars, which amount shall be in addition to other compensation allowed said warden or deputy warden by law. [1903, ch. 99, § 2.]

§ **10122. Duty of sheriff.** When a person is sentenced to death, all writs for the execution of the death penalty shall be directed to the sheriff by the court issuing the same, and the sheriff of the county wherein the prisoner has been convicted and sentenced, shall, within the next ten days thereafter, in as private and secure a manner as possible to be done, convey the prisoner to the North Dakota penitentiary, where the said prisoner shall be received by the warden, superintendent or keeper thereof, and securely kept in close confinement until the day designated for the execution, and the sheriff must also deliver to the warden or other proper officer a certified copy of the judgment and warrant to execute, as described in section 10114, and take from the warden or other proper officer a receipt for the defendant and make due return thereof to the court. [1903, ch. 99, § 3.]

§ **10123. Fees.** The sheriff shall receive for conducting the prisoner sentenced to death to the North Dakota penitentiary, the same fees and mileage from the county where the conviction was had, that is provided by law for the conducting of other prisoners sentenced to the state penitentiary, when duly approved by the board of county commissioners of said county. [1903, ch. 99, § 3.]

§ **10124. Whom allowed at execution.** Besides the warden and such number of guards as he thinks necessary, or his deputy, the following persons may be present at the execution, but none others: The sheriff of any county in the state, the board of trustees and physician of the North Dakota penitentiary, the clergyman in attendance upon the prisoner, and such other persons as the prisoner may designate, not exceeding five in number, representatives of the newspapers in the county in which the crime was committed, and one reporter from each newspaper published in the city of Bismarck. [1903, ch. 99, § 4.]

§ **10125. Duty of warden or deputy.** Unless a suspension of the execution be ordered by the governor, the warden or deputy warden shall proceed at the time and place named in the warrant, to cause the prisoner sentenced to be hanged by the neck until he be dead; and of the manner of his execution of the warrant and his doings thereon, he shall forthwith make return to the clerk of the district court of the county from whence the prisoner was

sentenced, who shall record the warrant and return in the record of the case. [1903, ch. 99, § 5.]

§ **10126. Disposition of body.** The body of the executed person shall be returned to the friends in any county in the state for burial, that they may request in writing, if made on the warden the day before the day set for execution; providing, that all expenses for the transportation and burial shall be borne by the person or persons making such request. If no such request is made, burial is to be made under the supervision of the warden or other proper officer of the penitentiary. [1903, ch. 99, § 6.]

§ **10127. Proceeding in case of escape.** If the accused escapes after sentence, and be not retaken before the time fixed for execution, he may be re-arrested and committed to the jail of the proper county, and the sheriff shall make return thereof to the court in which the sentence was passed: and thereupon the court shall again fix the time for execution, which shall be carried into effect as provided in this article. [1903, ch. 99, § 7.]

§ **10128. When convict appears insane.** If a convict sentenced to death appears to be insane the sheriff of the county wherein conviction was had, upon notice thereof from the warden of the penitentiary, or his deputy, shall forthwith give notice thereof to the judge of the district court wherein the convict was sentenced, and to the state's attorney, and shall summon a jury of six impartial men to inquire into such insanity at the time and place to be fixed by the judge. [1903, ch. 99, § 8.]

§ **10129. Who shall attend inquiry.** The judge, clerk of court and state's attorney shall attend the inquiry; witnesses may be produced and examined before the jury; if it be found that the convict is sane, the sheriff must forthwith return the prisoner to the penitentiary together with a certified copy of the findings at the examination and the warden or his deputy must execute the judgment; if the convict is found insane, the judge shall suspend the execution until the sheriff receives a warrant from the governor directing the same; and the finding of the jury and order of the judge, certified by the judge, shall be entered on the journal of the court by the clerk. [1903, ch. 99, § 9.]

§ **10130. Duty of sheriff.** The sheriff shall immediately transmit a certified copy of such finding to the governor, who may, as soon as he is convinced that the convict has become of sound mind, issue a warrant appointing a time for his execution. The sheriff must thereupon in the same manner deliver the prisoner to the warden or other proper officer of the penitentiary, in like manner as described in section 10122, except that the sheriff shall deliver to the said warden or other proper officer of the penitentiary, a certified copy of the warrant of the governor only. [1903, ch. 99, § 10.]

§ **10131. When convicted female is pregnant.** When there is good reason to suppose that a female against whom judgment of death is rendered is pregnant, the warden or other proper officer of the penitentiary, must summon a jury of three regularly practicing physicians of this state to inquire into the supposed pregnancy. [1903, ch. 99, § 11.]

§ **10132. Sentence suspended, when.** If by such finding it appears that such female convict is with child, the warden or other proper officer shall in like manner suspend the execution of her sentence, and shall transmit the findings to the governor, who, on being satisfied that such woman is no longer pregnant, shall issue a warrant directed to the warden or other proper officer, appointing a day for her execution. [1903, ch. 99, § 12.]

§ **10133. Fees and mileage.** All fees and mileage incurred under this article shall, when duly approved by the warden of the penitentiary, be paid out of any fund on hand appropriated for the maintenance and support of the North Dakota penitentiary. [1903, ch. 99, § 13.]

CHAPTER 13.

APPEALS.

ARTICLE 1.—NOTICE OF APPEAL AND SERVICE.

§ **10134. Appeal, who may take.** Either the defendant or the state may take an appeal as provided in this article. [R. C. 1895, § 8325.]

§ **10135. Defendant's right to appeal.** An appeal to the supreme court may be taken by the defendant as a matter of right from any judgment against him. [R. C. 1895, § 8326.]

§ **10136. Title of action on appeal.** The party appealing is known as the appellant and the adverse party as the respondent; but the title of the action is not changed in consequence of the appeal. [C. Cr. P. 1877, § 474; R. C. 1895, § 8327.]

§ **10137. From what defendant may appeal.** An appeal may be taken 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 denying a motion for a new trial.
4. From an order made after judgment affecting any substantial right of the party. [C. Cr. P. 1877, § 475; R. C. 1895, § 8328.]

§ **10138. From what the state may appeal.** An appeal may be taken by the state:

1. From a judgment for the defendant on a demurrer to the information or indictment.
2. From an order granting a new trial.
3. From an order arresting judgment.
4. From an order made after judgment, affecting any substantial right of the state.
5. From an order of the court directing the jury to find for the defendant. [C. Cr. P. 1877, § 476; R. C. 1895, § 8329.]

§ **10139. Time for appeal limited.** An appeal from a judgment may be taken within one year after its rendition, and from an order within sixty days after it is made. [C. Cr. P. 1877, § 477; R. C. 1895, § 8330.]

§ **10140. Manner of taking appeal. Notice.** An appeal is taken by the party taking it or the attorney of such party, serving upon the adverse party, or the attorney of the adverse party who acted as an attorney of record in the district court at the trial, or at the time the order was made or judgment rendered, a copy of the notice of appeal, and by filing the original thereof, with the clerk of the district court of the county in which the order or judgment appealed from is made, entered or filed. [R. C. 1895, § 8331.]

§ **10141. Personal service not made. Publication.** If personal service cannot be made, the judge of the district court in which the action is pending or was tried, upon proof thereof, may make an order for publication of the notice in some newspaper, for a period not exceeding thirty days. Such publication is equivalent to personal service. [R. C. 1895, § 8332.]

§ **10142. When appeal deemed taken.** The appeal is deemed to be taken when notice thereof as required by sections 10140 or 10141 is filed in the office of the clerk of the district court of the county in which the order or judgment appealed from is made, entered or filed, with evidence of the service or publication thereof indorsed thereon or attached thereto. [R. C. 1895, § 8333.]

§ **10143. Appeal by state. Effect.** An appeal taken by the state in no case stays or affects the operation of the judgment in favor of the defendant until the judgment is reversed. [R. C. 1895, § 8334.]

§ **10144. What judgments superseded by appeal.** An appeal to the supreme court from 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 district court of the county in which the conviction was had, a certificate of the judge who presided at the trial, or of a judge of the supreme court that in his opinion there is probable cause for the appeal, but not otherwise, except as hereinafter provided. [C. Cr. P. 1877, § 479; R. C. 1895, § 8335.]

§ **10145. Certificate. Duty of sheriff.** If the certificate provided for in the last section is filed, the sheriff must, if the defendant is 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 on the appeal. [C. Cr. P. 1877, § 480; R. C. 1895, § 8336.]

§ **10146. Execution suspended.** If, before the granting of the certificate, the execution of the judgment has commenced, the further execution thereof is suspended, and upon service of a copy of such certificate upon the sheriff of the county in which such judgment was entered, the defendant must be restored, by the officer in whose custody he is, to his original custody. [C. Cr. P. 1877, § 481; R. C. 1899, § 8337.]

§ **10147. Duty of clerk when appeal taken.** Upon the appeal being taken, it shall be the duty of the clerk of the district court with whom the notice of appeal is filed, without charge and without unnecessary delay, to make out a full and perfect transcript of all the papers in the case on file in his office, except the papers returned by the committing magistrate on the preliminary examination when there has been one, and of all the entries made in his minutes, and certify the same under his hand and the seal of the court, and transmit the same to the clerk of the supreme court, and upon receipt thereof, the clerk of the supreme court must file the same and perform the same services as in civil cases without charge. [C. Cr. P. 1877, § 482; R. C. 1895, § 8338.]

§ **10148. Appeal by less than all defendants.** When several defendants are prosecuted and tried jointly, any one or more of them may join in taking an appeal, but those who do not join shall take no benefit therefrom, yet they may appeal afterwards. [R. C. 1895, § 8339.]

§ **10149. Appeal. Stay. Custody of defendant.** An appeal taken by the defendant does not stay the execution of the judgment in any case not capital, unless bail is put in, except when the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or other officer having the defendant in custody, to detain him in custody without taking him to the penitentiary, to abide the judgment on appeal, if the defendant desires it. [R. C. 1895, § 8340.]

§ **10150. Appeal taken. Bail put in. Clerk. Sheriff.** When an appeal is taken by the defendant, and bail is put in, it is the duty of the clerk to give forthwith to the defendant, his agent or attorney, a certificate under his hand and the seal of the court, stating that an appeal has been taken and bail put in, and the sheriff or other officer having the defendant in custody, must, upon the delivering of such certificate to him, discharge the defendant from custody when imprisonment forms a part of the judgment and cease all further proceedings in execution of the judgment, and return forthwith to the clerk of the court who issued it, the execution or certified copy of the entry of judgment under which he acted, with his return thereon, if such execution or certified copy has been issued; and if such execution or certified copy has not been issued, it shall not be issued, but shall abide the judgment on the appeal. [R. C. 1895, § 8341.]

ARTICLE 2.—DISMISSING APPEAL FOR IRREGULARITY.

§ 10151. In substantial particulars. Notice. If the appeal is irregular in any substantial particular, but not otherwise, the supreme court may on any day, on motion of the respondent, upon five days' notice accompanied with the copies of the papers upon which the motion is founded, order it to be dismissed. The dismissal of an appeal affirms the judgment. But if the irregularities complained of are corrected in a reasonable time, the appeal shall not be dismissed and the supreme court must fix the time and direct the manner of correcting the irregularity. [C. Cr. P. 1877, § 487; R. C. 1895, § 8342.]

§ 10152. When appeal must not be dismissed. An appeal must not be dismissed for any informality or defect in the taking thereof. If the same is corrected within a reasonable time after an appeal has been dismissed, another appeal may be taken. If an undertaking has been given which is defective in any respect, a new one may be filed on appeal in the supreme court. [R. C. 1895, § 8343.]

ARTICLE 3.—ARGUMENT OF THE APPEAL.

§ 10153. Appeal stands for argument at first term. An appeal in a criminal action shall stand for argument at the first term after the record is filed, unless for good cause shown the hearing is postponed to a subsequent term, but the parties or their attorneys may by stipulation fix an earlier day for the hearing with the approval of the supreme court. [C. Cr. P. 1877, § 489; R. C. 1895, § 8344.]

§ 10154. When judgment must be affirmed. Reversal. The judgment may be affirmed if the appellant fails to appear, but may be reversed only after argument, though the respondent fails to appear. [C. Cr. P. 1877, § 491; R. C. 1895, § 8345.]

§ 10155. Number of counsel heard. Upon the argument of the appeal if the offense is punishable with death, three counsel upon 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. [C. Cr. P. 1877, § 492; R. C. 1899, § 8346.]

§ 10156. Defendant need not appear in supreme court. The personal appearance of the defendant in the supreme court on the hearing of an appeal, is in no case necessary. [R. C. 1895, § 8347.]

ARTICLE 4.—JUDGMENT IN SUPREME COURT.

§ 10157. Technical errors to be disregarded. After hearing the appeal, the court must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties. [C. Cr. P. 1877, § 493; R. C. 1895, § 8348.]

Technical errors to be disregarded. State v. Finder, 10 S. D. 103, 72 N. W. 97; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; State v. Reddington, 7 S. D. 368, 64 N. W. 170.

§ 10158. Court may review intermediate orders. Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment adversely to the defendant. [R. C. 1895, § 8349.]

§ 10159. Power of supreme court on appeal. The supreme court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all the proceedings subsequent to, or dependent upon such judgment or order, and may if proper, order a new trial. In either case the action must be remanded to the district court with proper instructions, together with the opinion of the court. [R. C. 1895, § 8350.]

May modify judgment or order new trial. Vallied v. Brakke, 7 S. D. 551, 64 N. W. 1119; Territory v. Conrad, 1 Dak. 348, 46 N. W. 605; State v. Reddington, 8 S. D. 315, 66 N. W. 464.

§ 10160. New trial ordered, where had. When a new trial is ordered it must be had in the district court of the county from which the appeal was taken, or in some other county, or as directed by the supreme court. [R. C. 1895, § 8351.]

§ 10161. Judgment reversed. When defendant discharged. 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. [C. Cr. P. 1877, § 495; R. C. 1899, § 8352.]

§ 10162. Judgment affirmed, must be enforced. If a judgment against the defendant is affirmed, the original judgment must be enforced. [C. Cr. P. 1877, § 496; R. C. 1895, § 8353.]

§ 10163. Judgment of court entered. Certificate. 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 from which the appeal was taken. [C. Cr. P. 1877, § 497; R. C. 1899, § 8354.]

§ 10164. Certificate remitted, district court only has jurisdiction. After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings therein, and all orders necessary to carry the judgment into effect must be made by the district court to which the certificate is remitted. [C. Cr. P. 1877, § 498; R. C. 1895, § 8355.]

§ 10165. Appeal by state. Power of supreme court. If the appeal is taken by the state, the supreme court cannot reverse the judgment or modify it so as to increase the punishment, but may affirm it, and shall point out any errors in the proceedings or in the measure of punishment and its opinion shall be obligatory on the district court as the correct exposition of the law. [R. C. 1895, § 8356.]

§ 10166. Imprisonment. Reversal. Reimprisonment. Deduction. If a defendant has during the pendency of an appeal, been imprisoned in the execution of the judgment appealed from, and upon a new trial ordered by the supreme court shall again be convicted, the period of his former imprisonment shall be deducted by the district court from the period of imprisonment to be fixed on the last verdict of conviction. [R. C. 1895, § 8357.]

CHAPTER 14.

WITNESSES AND EVIDENCE.

ARTICLE 1.—COMPELLING THE ATTENDANCE OF WITNESSES.

§ 10167. Subpena defined. The process by which the attendance of a witness before a court or magistrate is required, is a subpena. [C. Cr. P. 1877, § 499; R. C. 1899, § 8358.]

§ 10168. Magistrate may issue. A magistrate before whom a complaint is laid, or to whom a presentment of a grand jury is sent, may issue subpenas, subscribed by him, for witnesses within the state, either on behalf of the state or the defendant. [C. Cr. P. 1877, § 500; R. C. 1899, § 8359.]

§ 10169. State's attorney, for grand jury. The state's attorney may issue subpenas, subscribed by him, for witnesses within the state, 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. [C. Cr. P. 1877, § 501; R. C. 1899, § 8360.]

§ 10170. Same. Attendance upon trial. The state's attorney may in like manner issue subpenas for witnesses within the state, in support of an

information or an indictment, to appear before the court at which it is to be tried. [C. Cr. P. 1877, § 502; R. C. 1895, § 8361.]

§ 10171. Clerk issue blanks for defendant. The clerk of the court at which a criminal action is to be tried, must, at all times, upon the application of the defendant, and without charge, issue as many blank subpenas, under the seal of the court and subscribed by him as clerk, for witnesses within the state, as may be required by the defendant. [C. Cr. P. 1877, § 503; R. C. 1899, § 8362.]

§ 10172. Form of subpena. A subpena, authorized by the last four sections, must be substantially in the following form:

In the name of the state of North 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 state of North Dakota against E. F.

Dated at the town of.....(as the case may be), the.....day of....., 19...

"G. H., justice of the peace," or "I. K., state's attorney," or "by order of the court, L. M., clerk," (as the case may be). [C. Cr. P. 1877, § 504; R. C. 1899, § 8363.]

§ 10173. Subpena duces tecum. If any books, papers or documents are required, a direction to the following effect must be contained in the subpena:

And you are required also to bring with you the following: (describe intelligibly the books, papers or documents required.) [C. Cr. P. 1877, § 505; R. C. 1899, § 8364.]

§ 10174. Subpena, by whom served. Peace officer. A subpena may be served by any person, but a peace officer must serve in his county any subpena delivered to him for service, either on the part of the state or of the defendant, and must without delay, make a written return of the service, subscribed by him, with the title of his office, stating the time, place and manner of service. [C. Cr. P. 1877, § 506; R. C. 1899, § 8365.]

§ 10175. How served. A subpena is served by showing the original to the witness personally and informing him of its contents. [C. Cr. P. 1877, § 507; R. C. 1899, § 8366.]

§ 10176. Indigent witness. Expenses. When a person attends before a magistrate, grand jury or court, as a witness in a criminal action, upon a subpena or in pursuance of an undertaking, and it appears that he has come from a place outside of the county, or that he is poor and unable to pay the expenses of such attendance, the court at its discretion, if the attendance of the witness is upon a trial, by order upon its minutes, or in any other case, the judge, at his discretion, by a written order, may direct the county treasurer to pay the witness a reasonable sum to be specified in the order for the necessary expenses of his attendance. [C. Cr. P. 1877, § 508; R. C. 1899, § 8367.]

§ 10177. Duty of county treasurer. 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. [C. Cr. P. 1877, § 509; R. C. 1899, § 8368.]

§ 10178. When witness must attend out of his 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 subpena, unless the committing magistrate before whom the defendant is brought or the judge of the court in which the offense is triable, or a judge of the district court or a judge of the supreme court upon an affidavit of the state's attorney or

prosecutor, or of the defendant, or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse upon the subpena an order for the attendance of the witness. [1899, ch. 175; R. C. 1899, § 8369.]

§ 10179. Disobedience. Comtempt. Punishment. Disobedience to a subpena, or a refusal to be sworn or to testify, may be punished by the court or magistrate as for a contempt, in the manner provided in the code of civil procedure. [C. Cr. P. 1877, § 511; R. C. 1895, § 8370.]

§ 10180. Witness for defendant, disobeying subpenas. A witness disobeying a subpena issued on the part of the defendant in a criminal action, unless he shows good cause for his nonattendance, is liable to the defendant in the sum of fifty dollars, which may be recovered in a civil action. [C. Cr. P. 1877, § 512; R. C. 1899, § 8371.]

§ 10181. Witness. Forfeiture of undertaking. When a witness has entered into an undertaking to appear, upon his failure to do so, the undertaking is forfeited in the same manner as undertakings of bail. [R. C. 1899, § 8372.]

§ 10182. Witness for state confined. How attendance effected. When the testimony of a witness for the state is required in a criminal action, before a court of record of this state, and such witness is confined in the penitentiary or in a county jail, an order for his temporary removal from the penitentiary or such jail and for his production before such court, may be made by the court in which the action is pending or by the judge authorized by law to preside at the trial of such action, but in case the penitentiary or such jail is not in the county in which the application is made, such order shall only be made upon the affidavit of the state's attorney or some other person on behalf of the state showing that the testimony is material and necessary, and even then the granting of the order shall be in the discretion of the court or such judge. The order must be executed by the sheriff of the county in which it is made in the following manner:

1. If the person required as a witness is confined in the penitentiary, by delivering to the warden thereof a copy of such order, and it shall be the duty of the warden to deliver the person so required to such officer and to take such officer's receipt for such person indorsed upon the copy of such order; or,

2. If the person required as a witness is confined in the county jail, by delivering to the jailer a copy of such order and it shall be the duty of the jailer to deliver the person so required to such officer, and take such officer's receipt for such person indorsed upon said copy of such order.

It shall be the duty of the officer receiving any such person to take him before the proper court, safely to keep him, and when he is no longer required as a witness, to return him to the custody from which he was received. Neither the warden nor the jailer shall be responsible for any such person until his return, and upon the return of any such person the warden or jailer, as the case may be, shall indorse his receipt upon the original order. The sheriff executing any such order shall return the same to the clerk of the district court of the county from which it was issued, and said clerk shall file and preserve the same among the papers in the action. The expense of executing such order shall be paid by the county in which the order shall be made. [R. C. 1895, § 8373.]

Article 2.—Depositions in Criminal Actions.

§ 10183. Right of defendant to take. When a defendant has been held to answer a charge for a public offense, he may either before or after an information has been filed or an indictment has been found, have witnesses examined conditionally, on his behalf as prescribed in this article and not otherwise. [1885, ch. 44, sub-ch. 1, § 1; R. C. 1899, § 8374.]

§ 10184. **In case of sick witness.** When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable ground for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally. [1885, ch. 44, sub-ch. 1, § 2; R. C. 1899, § 8375.]

§ 10185. **Application. Affidavit, what to contain.** The application must be made upon affidavit, stating:

1. The nature of the offense charged.
2. The state of the proceedings in the action.
3. The name and residence of the witness, and that his testimony is material to the defense of the action.
4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial. [1885, ch. 44, sub-ch. 1, § 3; R. C. 1899, § 8376.]

§ 10186. **Same. Notice of.** The application may be made to the court or to a judge thereof, and must be made upon three days' notice to the state's attorney. [1885, ch. 44, sub-ch. 1, § 4; R. C. 1899, § 8377.]

§ 10187. **Court to issue order for examination.** If the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally at a specified time and place, and that a copy of the order be served on the state's attorney within a specified time before that fixed for the examination. [1885, ch. 44, sub-ch. 1, § 5; R. C. 1899, § 8378.]

§ 10188. **Contents of order. Service.** The order must direct that the examination be taken before a magistrate named therein; and on proof being furnished to such magistrate of service upon the state's attorney of a copy of the order, if no counsel appears on the part of the state, the examination must proceed. [1885, ch. 44, sub-ch. 1, § 6; R. C. 1899, § 8379.]

§ 10189. **When examination shall not proceed.** If the state's attorney or other counsel appears on behalf of the state, and it is shown to the satisfaction of the magistrate by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place, otherwise it must proceed. [1885, ch. 44, sub-ch. 1, § 7; R. C. 1899, § 8380.]

§ 10190. **How attendance of witness enforced.** The attendance of the witness may be enforced by subpena issued by the magistrate before whom the examination is to be taken, or from the court where the trial is to be had. [1885, ch. 44, sub-ch. 1, § 8; R. C. 1899, § 8381.]

§ 10191. **Testimony must be written. Authentication.** The testimony of the witness must be taken down in writing by the magistrate or by some person under his direction; or the magistrate may, in his discretion, order the testimony and proceedings to be taken down in shorthand and for that purpose he may appoint a stenographer. The deposition or testimony of the witness must show and contain:

1. The name of the witness, his age, his place of residence, and his business or profession.
2. The questions put to the witness and his answers thereto, consecutively as the questions are asked and answers given. Each answer must be distinctly read to the witness as it is taken down and corrected or added to until it conforms to what he declares to be the truth. But in cases when the testimony is taken down in shorthand the answer or answers need not be read to him.
3. A statement of the grounds on which an objection to a question on either side is sustained or on which the witness declines to answer it.
4. The signature of the witness to the deposition, or if he refuses to sign it, his reasons for refusing must be stated in writing as he gives them. In

cases when the deposition is taken down in shorthand, it must not be signed by the witness.

5. It must be certified by the magistrate when reduced to writing by him or under his direction, and signed by him.

When taken down in shorthand a transcript of the stenographer's record certified by him as being a correct statement of the testimony of the witness and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings. The stenographer shall within five days after the close of such examination make a full and complete written or typewritten transcript of his shorthand record and deliver the same to the magistrate before whom the same was taken, and thereupon said magistrate must add his certificate as if reduced to writing by him, and transmit the same carefully sealed up to the clerk of the court in which the action is pending, or may come for trial. [1885, ch. 44, sub-ch. 1, § 9; R. C. 1899, § 8382.]

§ **10192. Deposition may be read in evidence.** The deposition or certified copy thereof may be read in evidence by either party on the trial upon its appearing that the witness is unable to attend by reason of his death, insanity, sickness or infirmity, or of his continued absence from the state. Upon reading the depositions in evidence the same objections may be taken to a question or answer contained therein as if the witness had been examined orally in court. [1885, ch. 44, sub-ch. 1, § 9; R. C. 1899, § 8383.]

§ **10193. Witness confined in penitentiary. Procedure.** When a material witness for a defendant under a criminal charge is confined in the penitentiary, or in the county jail of a county other than that in which the defendant is to be tried, his deposition may be taken, on behalf of the defendant, in the manner provided for in the case of a witness who is sick, and the provisions of this code, commencing with section 10183 and ending with section 10192, so far as applicable, govern in the application for and in the taking and use of such depositions. Such depositions may be taken before any magistrate or notary public of the county in which the penitentiary or jail is situated, or in case the witness is confined in the penitentiary and the defendant is unable to pay for taking the deposition, before the warden, whose duty it shall be to act without compensation. Every officer before whom testimony shall be taken by virtue hereof, shall have authority to administer and shall administer an oath to the witness, that his testimony shall be the truth, the whole truth and nothing but the truth. [1885, ch. 44, sub-ch. 1, § 10; R. C. 1899, § 8384.]

Article 3.—Taken Without the State.

§ **10194. Deposition, when witness not in state.** When an issue of fact is joined upon an indictment or information, the defendant may have any material witness, residing out of the state, examined in his behalf as prescribed in this article, and not otherwise. [1885, ch. 44, sub-ch. 2, § 1; R. C. 1899, § 8385.]

§ **10195. Commissioner. Interrogatories. Instruction.** When a material witness for the defendant resides out of the state, the defendant may apply for an order that the witness be examined on a commission, to be issued under the seal of the court and the signature of the clerk, directed to some party designated as commissioner, authorizing him to examine the witness upon oath on interrogatories annexed thereto, and to take and certify the deposition of the witness and return it according to the instructions given with the commission. [1885, ch. 44, sub-ch. 2, § 2; R. C. 1895, § 8386.]

Application for continuance to take testimony of nonresident witness will not be allowed unless made in connection with application for appointment of commission to take testimony. State v. Murphy, 9 N. D. 175, 82 N. W. 738.

§ 10196. Application. Affidavit. Contents. Application must be made upon affidavit stating:

1. The nature of the offense charged.
2. The state of the proceedings in the action, and that an issue of fact has been joined therein.
3. The name of the witness, and that his testimony is material to the defense of the action.
4. That the witness resides out of the state. [R. C. 1895, § 8387.]

§ 10197. Same. Notice of. The application may be made to the court or a judge thereof, and must be upon three days' notice to the state's attorney. [1885, ch. 44, sub-ch. 2, § 4; R. C. 1899, § 8388.]

§ 10198. Order of court. Commission. If the court or judge to whom the application is made, is satisfied of the truth of the facts stated and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and the court or judge may insert in the order a direction that the trial be stayed for a specified time reasonably sufficient for the execution of the commission and return thereof, or the case may be continued. [1885, ch. 44, sub-ch. 2, § 5; R. C. 1899, § 8389.]

§ 10199. Interrogatories, service of. When the commission is ordered the defendant must serve upon the state's attorney without delay, a copy of the interrogatories to be annexed thereto, with three days' notice of the time at which they will be presented to the court or judge. The state's attorney may in like manner serve upon the defendant or his counsel cross interrogatories, to be annexed to the commission, with like notice. In the interrogatories, either party may insert any question pertinent to the issue. When the interrogatories and cross interrogatories are presented to the court or judge, according to the notice, the court or judge must modify the questions, so as to conform them to the rules of evidence, and must indorse upon them his alterations, and annex them to the commission. [1885, ch. 44, sub-ch 2, § 6; R. C. 1899, § 8390.]

§ 10200. Court must direct manner of return. Unless the parties otherwise consent by an indorsement upon the commission, the court or judge must indorse thereon the direction and manner in which it must be returned, and may in his discretion direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the action is pending, designating his name, and the place where his office is kept. [1885, ch. 44, sub-ch. 2, § 7; R. C. 1899, § 8391.]

§ 10201. Manner of executing commission. The commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He must administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth and nothing but the truth.
2. He must cause the examination of the witness to be reduced to writing and subscribed by him.
3. He must write the answers of the witness as nearly as possible in the language in which he gives them, and read to him each answer so taken down, and correct or add to it until it conforms to what he declares is the truth.
4. If the witness declines to answer a question, that fact, with the reason assigned by him for declining, must be stated.
5. If any papers or documents are produced before him, and proved by the witness, they or copies of them must be annexed to the deposition, subscribed by the witness, and certified by the commissioner.
6. The commissioner must subscribe his name to each sheet of the deposition, with the papers and documents proved by the witness, or copies thereof, to the commissioner, and must close it up under seal, and address it as directed by the indorsement thereon.

7. If there is direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest post office. If any other direction is made by the written consent of the parties, or by the court or judge, to the commissioner as to its return, the commissioner must comply with the directions. A copy of this section must be annexed to the commission. [1885, ch. 44, sub-ch. 2, § 8; R. C. 1899, § 8392.]

§ 10202. **Commission delivered to an agent.** If the commission and return are delivered by the commissioner to an agent, he must deliver the same to the clerk to whom it is directed, or to the judge of the court in which the action is pending, by whom it may be received and opened upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it. [1885, ch. 44, sub-ch. 2, § 9; R. C. 1899, § 8393.]

§ 10203. **Agent becoming incapacitated. Procedure.** If the agent is dead, or from sickness or other cause is unable personally to deliver the commission and return as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent, that the agent is dead, or, from sickness or other casualty, unable to deliver it, and it has not been opened or altered since the person making the affidavit received it, and that he believes it has not been opened or altered since it came from the hands of the commissioner. [1885, ch. 44, sub-ch. 2, § 10; R. C. 1899, § 8394.]

§ 10204. **Commission and return must be filed.** The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment or information is pending. If the commission and return is transmitted by mail, the clerk to whom it is addressed must receive it from the post office, and open and file it in his office, where it must remain unless otherwise directed by the court. [1885, ch. 44, sub-ch. 2, § 11; R. C. 1899, § 8395.]

§ 10205. **Same. Constitute public record.** The commission and return must at all times be open to the inspection of all persons, who must be furnished a copy of the same or any part thereof, by the clerk on payment of his fees. [1885, ch. 44, sub-ch. 2, § 12; R. C. 1899, § 8396.]

§ 10206. **Depositions may be read on trial.** Depositions taken under a commission may be read in evidence by either party on the trial, upon its being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories, or to the answers in the deposition, as if the witness had been examined orally in court. [1885, ch. 44, sub-ch. 2, § 13; R. C. 1899, § 8397.]

CHAPTER 15.

MISCELLANEOUS PROVISIONS.

ARTICLE 1.—INQUIRING INTO THE INSANITY OF THE DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

§ 10207. **Insane person cannot be tried or punished.** 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. [C. Cr. P. 1877, § 514; R. C. 1899, § 8398.]

§ 10208. **Doubt arising, question to be tried.** When a criminal action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be

submitted to a jury; and the trial or pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, at the discretion of the court, during the pendency of the issue of insanity. The jury may be impaneled from the jurors summoned and returned for the term, if not discharged, or others may be summoned by direction of the court as provided in sections 9944 to 9949, both inclusive. [C. Cr. P. 1877, §§ 515, 516; R. C. 1895, § 8399.]

§ **10209. Procedure and 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 state may then open its 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, permits 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 state must commence, and the defendant or his counsel may conclude the argument to the jury.
5. If the action is 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 is 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. [C. Cr. P. 1877, § 517; R. C. 1899, § 8400.]

§ **10210. Charge of court. Sections applicable.** The provisions of sections 9990 and 9992 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 10026 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. [C. Cr. P. 1877, § 518; R. C. 1895, § 8401.]

§ **10211. If found sane, trial to proceed.** If the jury find the defendant sane, the trial of the action must proceed, or judgment may be pronounced, as the case may be. [C. Cr. P. 1877, § 519; R. C. 1899, § 8402.]

§ **10212. Defendant found insane.** If the jury finds that the defendant is insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be, in the meantime, committed by the sheriff to the state hospital for the insane, and that upon his becoming sane, he be redelivered to the sheriff. [C. Cr. P. 1877, § 520; R. C. 1895, § 8403.]

§ **10213. Commitment exonerates 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. [C. Cr. P. 1877, § 521; R. C. 1899, § 8404.]

§ **10214. Defendant becoming sane. Procedure.** If the defendant is received into the state hospital for the insane, he must be detained there until he becomes sane. When he becomes sane the superintendent must give notice of that fact to the sheriff and state's attorney of the county. The sheriff must thereupon without delay, bring the defendant from the said hospital and place him in the proper custody, until he is brought to trial or to judgment, as the case may be, or is legally discharged. The sheriff must receive the actual expenses incurred and no more. [C. Cr. P. 1877, § 522; R. C. 1895, § 8405.]

§ **10215. Expenses, how paid.** The expense of taking the defendant to the state hospital for the insane and of bringing him back shall be met and paid in the manner and as provided by law for the payment of the

delivery thereto of persons admitted to said hospital by the commissioners of insanity of the county. [C. Cr. P. 1877, § 523; R. C. 1895, § 8406.]

ARTICLE 2.—COMPENSATION FOR ATTORNEYS AND WITNESSES.

§ **10216. Indigent defendant, attorney appointed.** In all criminal actions when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall appoint and assign counsel for his defense and allow and direct to be paid by the county in which such trial is had, a reasonable and just compensation to the attorney so assigned for such services as he may render; provided, however, that such attorney shall not be paid a sum to exceed twenty-five dollars in any one case. [1879, ch. 7, § 1; R. C. 1895, § 8407.]

§ **10217. Same. Witnesses subpenaed for.** Whenever it appears to the court before which a criminal action is about to be tried that the defendant is unable to pay the witnesses in his behalf, such court must make an order, to be entered in the minutes, that such witnesses, naming them, as may be deemed reasonable be subpenaed and attend at such trial at the expense of the county liable to pay the costs of the prosecution of such action and such witnesses shall be paid accordingly. [R. C. 1895, § 8408.]

ARTICLE 3.—COMPROMISING MISDEMEANORS BY LEAVE OF THE COURT.

§ **10218. When misdemeanor may be compromised.** When a defendant is held to answer on a charge of misdemeanor, for which the person injured 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. [C. Cr. P. 1877, § 524; R. C. 1899, § 8409.]

§ **10219. Stay of proceedings upon compromise.** If the party injured appears before the court in which the trial is to be had, at any time before the trial, and acknowledges 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 such cases the reasons for the order must be set forth therein and entered on the minutes. [C. Cr. P. 1877, § 525; R. C. 1899, § 8410.]

§ **10220. Order to stay is a bar.** The order authorized by the last section is a bar to another prosecution for same offense. [C. Cr. P. 1877, § 526; R. C. 1899, § 8411.]

§ **10221. Compromise limited.** 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 10218 and 10219. [C. Cr. P. 1877, § 527; R. C. 1899, § 8412.]

ARTICLE 4.—CORPORATIONS, CRIMINAL ACTIONS AGAINST.

§ **10222. Magistrate. Summons, requirements of.** Whenever a presentment by a grand jury or a complaint in writing is laid before a magistrate charging a corporation within his jurisdiction, of a public offense within its ability to commit, the magistrate must file the same and thereupon issue a summons signed by him, with his name of office, requiring such corporation to appear before him to answer the charge at a specified place and time, not less than ten days after the issuance of the summons. [C. Cr. P. 1877, § 528; R. C. 1895, § 8413.]

A corporation may be indicted in the first instance as may an individual. State v. Security Bank, 2 S. D. 538, 51 N. W. 337; State v. First Nat. Bank, 2 S. D. 568, 51 N. W. 587.

§ 10223. **Form of summons.** The summons must be in substantially the following form:

State of North Dakota, } ss.
County of .....}

In the name of the state of North 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 complaint 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....., 19...

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

[C. Cr. P. 1877, § 529; R. C. 1899, § 8414.]

§ 10224. **Summons, manner of service.** 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. [C. Cr. P. 1877, § 530; R. C. 1899, § 8415.]

§ 10225. **Charge investigated. Manner of.** 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. [C. Cr. P. 1877, § 531; R. C. 1899, § 8416.]

§ 10226. **Certificate of magistrate. Procedure.** After hearing the proofs, the magistrate must certify upon the presentment or the complaint either that there is, or is not, sufficient cause to believe the corporation guilty of the offense charged, and must return the complaint and certificate and the depositions of witnesses, if any have been taken, and exhibits together with a certified copy of the proceedings as they appear on his docket, and in the same manner as prescribed in section 9787. [C. Cr. P. 1877, § 532; R. C. 1895, § 8417.]

§ 10227. **Certificate of probable cause. Procedure.** If the magistrate returns a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the state's attorney may, at the next term of the district court, file an information therefor, as in the case of a natural person held to answer. The state's attorney of the county may, by leave of the court, file an information against a corporation in like manner charging it with the commission of a public offense, or the grand jury may return an indictment therefor, without any previous action on the part of a magistrate. [C. Cr. P. 1877, § 533; R. C. 1895, § 8418.]

§ 10228. **Appearance of corporation. Pleas.** If an information is filed or an indictment returned, the corporation may appear by counsel to answer the same. If it does not thus appear a plea of not guilty must be entered, and the same proceedings had thereon as in other cases. [C. Cr. P. 1877, § 534; R. C. 1895, § 8419.]

§ 10229. **Information filed or indictment returned. Summons.** When an information is filed, without a preliminary examination, or an indictment returned against a corporation, the clerk of the district court must issue a summons in its corporate name, commanding it to appear and answer the information or indictment, and such summons must be served in the manner provided for the service of a summons in the code of civil procedure. [R. C. 1895, § 8420.]

§ 10230. **Defendant's default. Plea. Fine collected.** When the sheriff or other officer returns the summons with his certificate showing due service thereof, the corporation, on and after the day appointed in such summons for

its appearance, must be considered in default, and the court must order the clerk to enter the plea of not guilty for said corporation in the minutes of the court, and all further proceedings shall be had in said action as if the corporation had appeared and pleaded not guilty to the information or indictment; and if upon the trial the corporation is found guilty, the court must impose a fine upon it as prescribed by law and enter judgment for the amount of such fine and the costs of said action in the same manner as on a judgment in a civil action. [C. Cr. P. 1877, § 535; R. C. 1895, § 8421.]

ARTICLE 5.—ENTITLING AFFIDAVITS.

§ 10231. **Affidavits need not be entitled.** It is not necessary to entitle an affidavit or deposition in an action, whether taken before or after information or indictment or upon an appeal; 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 refers to the proceedings, information, indictment or appeal in which it is made. [C. Cr. P. 1877, § 536; R. C. 1899, § 8422.]

ARTICLE 6.—ERRORS AND MISTAKES IN PLEADINGS OR OTHER PROCEEDINGS.

§ 10232. **Informalities in pleadings 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. [C. Cr. P. 1877, § 537; R. C. 1899, § 8423.]

Not rendered invalid by informalities. New information may be filed. State v. Hazledahl, 3 N. D. 36, 53 N. W. 430; State v. LaCroix, 8 S. D. 369, 66 N. W. 944; Territory v. King, 5 Dak. 244, 38 N. W. 440.

ARTICLE 7.—DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

§ 10233. **Stolen property 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. [C. Cr. P. 1877, § 538; R. C. 1899, § 8424.]

§ 10234. **Magistrate to give order for delivery.** On satisfactory proof of the title of the owner of the property, the magistrate before whom the complaint 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. [C. Cr. P. 1877, § 539; R. C. 1895, § 8425.]

§ 10235. **Magistrate. Property stolen. Delivery.** If property stolen or embezzled comes 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. [C. Cr. P. 1877, § 540; R. C. 1899, § 8426.]

§ 10236. **Court may order delivery.** If property stolen or embezzled has 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. [C. Cr. P. 1877, § 541; R. C. 1899, § 8427.]

§ 10237. **Not claimed in six months. County treasurer.** If the property stolen or embezzled is not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or officer having it in custody must on the payment of the necessary expenses incurred in its preservation, deliver it to the county treasurer, by whom, if it is money, it must be paid into the county treasury, or if it is not money, it must be sold and the proceeds paid into such treasury. [C. Cr. P. 1877, § 542; R. C. 1895, § 8428.]

§ 10238. **Receipt to accused. Clerk. Magistrate.** When money or other property is taken from a defendant arrested upon a charge of a public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of the money, or the kind of property taken, one of which receipts he must deliver to the defendant, and the other of which he must forthwith file with the clerk of the court to which the complaint and other papers in the case are, by law, required to be sent. When such property is taken by a police officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the clerk or other person in charge of the police office in such city or town, or, if there is no such clerk or other person, then to the magistrate before whom such defendant may be taken for examination or trial. [C. Cr. P. 1877, § 543; R. C. 1895, § 8429.]

§ 10239. **Duty of clerk or magistrate.** The said clerk or other person or magistrate must enter in a suitable book every amount of money and a description of every article of property taken from each person so arrested, and must attach a number to every amount of money and every article of property and make a corresponding entry thereof, but when the receipt and property, as provided in the last section, are delivered to a magistrate it shall be sufficient compliance with the provisions hereof if the entries are made in his docket. [R. C. 1895, § 8430.]

Article 8.—Reprieves, Commutations and Pardons.

§ 10240. **Board of pardons.** The governor shall have power in conjunction with the board of pardons of which the governor shall be ex-officio a member, and the other members of which shall consist of the attorney general of the state of North Dakota, the chief justice of the supreme court of the state of North Dakota and two qualified electors who shall be appointed by the governor, to remit fines and forfeitures, to grant reprieves, commutations and pardons after conviction for all offenses except treason and cases of impeachment, in the manner and under the conditions hereinafter prescribed, but not otherwise. [1901, ch. 34, § 1.]

§ 10241. **Governor may suspend execution for treason.** Upon conviction for treason the governor shall have the power to suspend the execution of sentence until the case shall be reported to the lgislative assembly at its next regular session, when the legislative assembly shall either pardon or commute the sentence, direct the execution of the sentence or grant further reprieve. [1901, ch. 34, § 1.]

§ 10242. **Report to legislature.** The governor shall communicate to the legislative assembly at each regular session each case of remission of fine, reprieve, commutation or pardon granted by the board of pardons, stating the name of the convict, the crime for which he is convicted, the sentence and its date and the date of the remission, commutation, pardon or reprieve, with their reasons for granting the same. [1901, ch. 34, § 1.]

§ 10243. **Unanimous vote required. Quorum.** Every pardon or commutation of sentence shall be in writing and shall have no force or effect unless the same be granted by unanimous vote of those present of said board convened as such, four of whom shall constitute a quorum. A reprieve in a case where capital punishment has been imposed may be granted by the governor, but for such time only as may be reasonably necessary to secure a meeting of said board of pardons for the consideration of an application for a reprieve, pardon or commutation of the sentence of the person so reprieved. Said board may grant an absolute or conditional pardon, and any conditional pardon shall state the terms and conditions on which it was granted. Such board of pardons may issue its warrant under the seal of said board to any proper officers to carry into effect such pardon, which warrant shall be obeyed and

executed instead of the sentence which was first originally pronounced. [1901, ch. 34, § 2; 1903, ch. 42.]

§ 10244. **Pardon, commutation or reprieve, officer to make return of.** Whenever any convict is pardoned by such board, or his punishment is commuted or a reprieve is granted, the officer to whom the warrant for that purpose is issued, after executing the same, shall make return thereof under his hand with his doings thereon, to the governor, as soon as may be, and he shall also file with the clerk of the court in which the offender was convicted, an attested copy of the warrant and return, a brief abstract of which the clerk shall subjoin to the record of his conviction. [1901, ch. 34, § 3.]

§ 10245. **Board meetings to be held, when.** The board of pardons shall hold at least two regular meetings in each calendar year; and may hold such other meetings as it shall deem expedient. Such regular meetings shall be held on the second day of June and the second day of December of each year at the executive office. All other meetings of said board shall be held in the executive chamber at the state capitol, or in such other place as may be ordered by said board. [1901, ch. 34, § 4; 1905, ch. 53.]

§ 10246. **Applications, how made.** Every application for a pardon, reprieve or commutation of sentence shall be in writing, addressed to the board of pardons, and shall be signed by the convict or some person in his behalf. It shall concisely state the grounds upon which the pardon, reprieve or commutation is sought, and in addition shall contain the following facts:

1. The name under which the convict was indicted, and every alias by which he has been known.
2. The date and terms of sentence and the name of the offense for which it was imposed.
3. The name of the trial judge and of the state's attorney who participated at the trial of the convict, together with that of the county in which he was tried.
4. A succinct statement of the evidence adduced at the trial with the indorsement of the judge or county attorney who tried the case, that the same is substantially correct. If such statement and indorsement are not furnished, the reason thereof shall be stated.
5. The age, birthplace, parentage, occupation, residence during five years immediately preceding conviction, of convict.
6. A statement of other arrests, indictments and convictions, if any, of the convict.

The board of pardons may adopt such other rules and regulations not inconsistent with the provisions of this article, as may appear to them proper and necessary to carry out the provisions thereof. [1901, ch. 34, § 5.]

§ 10247. **Duty of clerk of board.** All applications for pardons, reprieves or commutations of sentence shall be filed with the clerk of the board of pardons. The said clerk shall, immediately upon receipt of such application, mail notice thereof, and of the time and place of hearing thereof, to the judge of the court wherein the applicant was tried and sentenced, and to the state's attorney who prosecuted the applicant, or his successor in office; provided, that a reprieve in capital cases may be granted as provided in section 10243 without such notice, and provided further, the pardons or commutations of sentence of persons committed to a county jail or to a workhouse may be granted by said board without notice. [1901, ch. 34, § 6.]

§ 10248. **Clerk of board. Records.** The governor's private secretary, or in his absence the executive clerk, shall be and act as the clerk of the board of pardons and shall perform the duties herein required of such clerk, and such other duties as may be prescribed by said board of pardons without other or further compensation. The board shall be supplied by the secretary of state with such books, blanks and stationery as shall be necessary. Said

board shall preserve a record of every petition received for a pardon, reprieve or commutaion of sentence, and of every pardon, reprieve or commutation of sentence granted or refused and the reasons assigned therefor. The clerk shall keep such records and perform such duties in relation thereto as shall be prescribed by the board, and all such records and files shall be kept and preserved in the office of the governor at the state capitol, and shall be open to the inspection of the public at all reasonable times. [1901, ch. 34, § 7.]

§ **10249. Powers of board.** The board of pardons shall supply itself with a seal, with which every pardon, reprieve or commutation of sentence shall be attested. It may issue process requiring the presence of any person before it, or the presence of any officer before it, with or without books and papers, in the matter pending before said board, and may take whatever reasonable steps in such matter as it may deem necessary to a proper determination thereof. Whenever a person is summoned before the board by its authority he may be allowed such compensation for travel and attendance as the board, in its discretion, may deem reasonable. [1901, ch. 34, § 8.]

§ **10250. Appropriation. Compensation of members of board.** The sum of six hundred dollars, or so much thereof as may be necessary, is hereby annually appropriated for the purpose of carrying out and enforcing the provisions of this article. The two qualified electors to be appointed on the board shall receive as compensation five dollars per diem while necessarily employed in attendance upon the sessions of the board and all traveling expenses necessarily incurred therein, to be paid as provided by law for the payment of trustees under section 10335. [1901, ch. 34, § 9.]

§ **10251. Restoration of citizenship, when.** The board of pardons is hereby empowered to restore to citizenship any person convicted of any offense committed against the state, upon cause being shown, either after the execution or expiration of sentence or at any other time. [1901, ch. 34, § 10.]

§ **10252. Governor may issue warrant.** The governor is hereby empowered to issue his warrant to all proper officers to carry into effect any act which he has power to do and which is regulated in this article and all such officers are hereby required to obey such warrant. [R. C. 1895, § 8442.]

Article 9.—Bail.

§ **10253. Admission to bail defined.** Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon an undertaking with sufficient sureties for his appearance. [R. C. 1895, § 8443.]

§ **10254. Taking of bail defined.** The taking of bail consists of the acceptance by a competent court or magistrate, or legally authorized officer, of the undertaking with sufficient sureties for the appearance of the defendant in person, according to the terms of the undertaking or that the sureties will pay to the state a specified sum. [R. C. 1895, § 8444.]

§ **10255. When bail must be taken.** Bail by sufficient sureties, shall be admitted upon all arrests in criminal actions when the offense is not punishable by death, and in such actions it may be taken by any competent court, magistrate or legally authorized officer. [C. Cr. P. 1877, § 552; R. C. 1895, § 8445.]

§ **10256. Bail upon capital charge.** Bail by sufficient sureties may be admitted upon arrests in criminal actions when the offense is punishable by death unless the proof of guilt is evident or the presumption thereof great. In such actions it shall be taken only by the supreme court or a judge thereof, or by a district court or a judge thereof, and the taking thereof shall be discretionary, regard being had to the nature and circumstances of the offense and to the evidence and to the usages of law. The finding of an indictment or the filing of an information does not add to the strength of the proof or the presumption to be drawn therefrom. In case the action has been tried

by jury, and the jury have not agreed on a verdict and have been discharged by reason of inability to agree, then the defendant shall be entitled to bail, unless it shall appear to the court or judge, by proof, that such disagreement was occasioned by the misconduct of the jury or the defendant or his counsel. [1885, ch. 19, § 1; R. C. 1895, § 8446.]

Bail in capital cases, where proof of guilt is evident or presumption great, is a matter of discretion. State ex rel West v. Collins, 10 N. D. 464, 88 N. W. 88.

§ 10257. Bail on appeal after conviction. After a conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:

1. As a matter of right, when the appeal is from a judgment imposing a fine only.

2. As a matter of discretion in all other cases. [C. Cr. P. 1877, § 554; R. C. 1895, § 8447.]

A convict is not entitled to liberty on bail until he has sued out writ of error. In re Markuson, 5 N. D. 180, 64 N. W. 939.

§ 10258. Before conviction. After conviction. If the offense is bailable the defendant may be admitted to bail before conviction.

1. For his appearance before the magistrate during the pendency of a trial or on the examination of the charge before being held to answer.

2. To appear before the court to which the magistrate holds him to appear upon the defendant being held to answer after examination.

3. After information filed or indictment found, either before the warrant is issued for his arrest, or upon any order of the court committing him or increasing the amount of bail, or upon his being surrendered by his bail to answer the information or indictment in the court in which it is filed or found, or to which it may be transferred for trial.

And after conviction:

1. If the appeal is from a judgment imposing a fine only, on an undertaking of bail that he will pay the same or such part thereof as the appellate court may direct, if the judgment is affirmed or modified, or the appeal is dismissed.

2. If a judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case the judgment is reversed and the cause remanded for a new trial, he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof. [R. C. 1895, § 8448.]

§ 10259. Qualifications of bail. 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. [C. Cr. P. 1877, § 555; R. C. 1899, § 8449.]

§ 10260. Bail taken. Order of discharge. Upon the allowance of bail and the execution of the requisite undertaking to the state, the court under whose process he is held, or the magistrate or other officer must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the officer having him in custody, the defendant must be discharged. [C. Cr. P. 1877, § 556; R. C. 1895, 8450.]

§ 10261. 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. If the defendant has given bail, he may at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned therein, and upon the deposit being made the bail is exonerated. Every deposit of money under the provisions of this section shall be with the clerk of the court in which the defendant is held to answer. [C. Cr. P. 1877, § 557; R. C. 1895, § 8451.]

§ 10262. Notice to state's attorney. When the admission to bail is a matter of discretion, the court, magistrate or officer to whom the application is made, must require reasonable notice thereof to be given to the state's attorney of the county. [R. C. 1895, § 8452.]

§ 10263. Who may take bail. In every case where there is no provision of law authorizing a court, magistrate or other officer to take bail, the same may be taken by the supreme court or a judge thereof, or by the district court of the county in which the offense for which the defendant is arrested is triable or by the judge thereof. [R. C. 1895, § 8453.]

§ 10264. Form of undertaking of bail. Bail is put in by a written undertaking, executed by at least two sufficient sureties (with or without the defendant in the discretion of the court, or judge or magistrate), and acknowledged in substantially the following form:

"An order having been made (or an information having been filed or an indictment having been found), on the.....day of.....19...., by ....., justice of the peace of ..... county (or an information filed or an indictment found in the district court of the ..... district in and for the county of .....), that ..... be held to answer upon a charge of (stating briefly the nature of the offense) or, (as the case may be), charging ..... (name of defendant) with the crime of (designating it generally) and he having been admitted to bail in the sum of ..... dollars;

Now, therefore, we, ...and ..... (as the fact may be), of ....., (stating their place of residence and occupation), jointly and severally, hereby undertake that the above named ..... (naming the defendant) will appear and answer the charge above mentioned (or the information or indictment above mentioned, as the case may be) in whatever court it may be presented, and will at all times hold (or surrender) himself amenable to the orders and process of the court, and if convicted, will appear for judgment, and render himself in execution thereof, or, if he fails to perform either of these conditions, that he will pay to the state of North Dakota the sum of.....dollars (inserting the sum in which the defendant is admitted to bail). [R. C. 1895, § 8454.]

§ 10265. Who may make order admitting to bail on appeal. In cases in which the defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made only by the supreme court or a judge thereof, or the district court before which the trial was had, or the judge presiding at such trial. The bail must possess the qualifications and must be put in, in all respects as provided in other cases of bail, except that the undertaking must be conditioned as prescribed in section 10258 for undertakings of bail on appeal. [1897, ch. 33; R. C. 1899, § 8455.]

§ 10266. Defendant may be arrested by his bail. Any person charged with a public 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 state; or by a written authority indorsed on a certified copy of the undertaking of bail, they 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 requisite 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 undertaking of bail or certified copy thereof, after notice to the state's attorney, and if no cause to the contrary appears, the discharge and exoneration of such bail; and the party so committed shall be held in custody until discharged by due course of law. C. Cr. P. 1877, § 558; R. C. 1895, § 8456.]

Bondsmen have authority to arrest and surrender principal. State v. Green, 6 S. D. 537, 62 N. W. 135.

§ 10267. **Forfeiture of bail. Excuse.** If, without sufficient excuse, any person who has given an undertaking in a criminal action or proceeding neglects to appear according to the terms or conditions of the same, either as a witness or 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 matters to be entered upon its minutes and the 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, such person or his bail appears and satisfactorily excuses his neglect the court may direct the forfeiture to be discharged upon such terms as may be just. After the forfeiture, the state's attorney must proceed with all due diligence, by action against the bail jointly or severally in his discretion upon the undertaking so forfeited. If money instead of bail is so forfeited, the clerk of the court or other officer with whom it is deposited, must immediately after the final adjournment, or at such time as the court may direct, pay over the money deposited to the county treasurer. [C. Cr. P. 1877, § 559; R. C. 1895, § 8457.]

§ 10268. **Additional security may be required.** 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 state, 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 commitment, or a new warrant therefor may be issued by such judge or magistrate, setting forth the cause thereof. [C. Cr. P. 1877, § 560; R. C. 1899, § 8458.]

§ 10269. **Action on undertaking. Defects not fatal.** No action brought on an undertaking of bail is barred or defeated, nor shall judgment thereon be arrested by reason of any neglect or omission to note or record the default of any principal or surety at the term or session when such default happened, nor by reason of any defect in the form of the undertaking, if it sufficiently appears, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken, was authorized and required to take the same. [R. C. 1895, § 8459.]

§ 10270. **When surety may be discharged.** Any surety on such undertaking may be discharged from further liability thereon, at any time before final judgment against him, by surrendering to the court or proper officer the principal in such undertaking, if such principal is a defendant in a criminal action, or if such principal is held as a witness in such action and it has not been tried; or by paying to the clerk of the court the amount specified in such undertaking, with costs as the court may direct. [R. C. 1895, § 8460.]

Article 10.—Search Warrants.

§ 10271. **Search warrant defined.** A search warrant is an order in writing, in the name of the state, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magistrate. [C. Cr. P. 1877, § 561; R. C. 1899, § 8461.]

§ 10272. **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. [C. Cr. P. 1877, § 562; R. C. 1899, § 8462.]

§ **10273. Only upon 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. [C. Cr. P. 1877, § 563; R. C. 1899, § 8463.]

§ **10274. Sworn complaint must be made.** The magistrate must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. The depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. [C. Cr. P. 1877, § 564; R. C. 1895, § 8464.]

§ **10275. Requisites of warrant.** If the magistrate is 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. [C. Cr. P. 1877, § 565; R. C. 1899, § 8465.]

§ **10276. Form of search warrant.** The warrant must be in substantially the following form:

State of North Dakota, }
County of ..... } ss.

In the name of the state of North 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 10272, or if the affidavit is 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 10280 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.....19....

.....

Justice of the peace of the city (or town) of.....
(or as the case may be.)

[C. Cr. P. 1877, § 566; R. C. 1899, § 8466.]

§ **10277. 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. [C. Cr. P. 1877, § 567; R. C. 1899, § 8467.]

§ **10278. Officer may break open 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 is refused admittance. [C. Cr. P. 1877, § 563; R. C. 1899, § 8468]

§ **10279. Same for liberating assistant.** 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. [C. Cr. P. 1877, § 569; R. C. 1899, 8469.]

§ **10280. When warrant may be served at night.** The magistrate must insert a direction in the warrant that it be served in the daytime, 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. [C. Cr. P. 1877, § 570; R. C. 1899, § 8470.]

§ **10281. Warrant 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 that time the warrant, unless executed, is void. [C. Cr. P. 1877, § 571; R. C. 1899, § 8471.]

§ **10282. How property 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 10235 to 10238, both inclusive. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section 10272, 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. [C. Cr. P. 1877, § 572; R. C. 1899, § 8472.]

§ **10283. 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 are 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. [C. Cr. P. 1877, § 573; R. C. 1899, § 8473.]

§ **10284. 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. [C. Cr. P. 1877, § 574; R. C. 1899, § 8474.]

§ **10285. Complaint controverted.** If the grounds on which the warrant was issued are controverted, the magistrate must proceed to take testimony in relation thereto. [C. Cr. P. 1877, § 575; R. C. 1899, § 8475.]

§ **10286. How testimony taken.** The testimony given by each witness must be reduced to writing and authenticated in the manner prescribed in sections 9768 and 9770. [C. Cr. P. 1877, § 576; R. C. 1899, § 8476.]

§ **10287. When property to be restored.** If it appears 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. [C. Cr. P. 1877, § 577; R. C. 1899, § 8477.]

§ **10288. Papers to be returned to district court.** The magistrate must annex together the depositions, the search warrant and return and the inventory, and return them to the next term of the district court having authority and jurisdiction to inquire into the offense in respect to which the search warrant was issued, at or before its opening on the first day. [C. Cr. P. 1877, § 578; R. C. 1899, § 8478.]

§ **10289. Procuring search warrant without cause.** A person who maliciously and without probable cause, procures a search warrant to be issued and

executed, is guilty of a misdemeanor. [C. Cr. P. 1877, § 579; R. C. 1899, § 8479.]

§ 10290. Officer exceeding his 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. [C. Cr. P. 1877, § 580; R. C. 1899, § 8480.]

§ 10291. Search of accused for dangerous weapons. 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. [C. Cr. P. 1877, § 581; R. C. 1899, § 8481.]

Article 11.—Proceedings Against Fugitives from Justice.

§ 10292. Governor may offer reward for criminal. The governor may offer a reward not exceeding one thousand dollars, payable out of the state treasury, for the apprehension:

1. Of any convict who has escaped from the penitentiary; or,
2. Of any person who has committed, or is charged with the commission of an offense punishable with death. [C. Cr. P. 1877, § 582; R. C. 1899, § 8482.]

§ 10293. Delivery of fugitives upon 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 state, must, on demand of the executive authority of the state or territory from which he fled, be delivered up by the governor of this state, to be removed to the state or territory having jurisdiction of the crime. [C. Cr. P. 1877, § 583; R. C. 1899, § 8483.]

§ 10294. 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 state. [C. Cr. P. 1877, § 584; R. C. 1899, § 8484.]

§ 10295. Proceedings for arrest and commitment. 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 state. 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. [C. Cr. P. 1877, § 585; R. C. 1899, § 8485.]

§ 10296. Accused may be committed. Time. If from the examination it appears that the accused has committed the crime alleged, the magistrate, by warrant reciting the accusation must commit him to the proper custody of his county, for such time to be specified in the warrant, as the magistrate may deem reasonable, to enable the arrest of the fugitive under the warrant of the executive of this state, on the requisition of the executive authority of the state or territory in which he committed the offense, unless he gives bail as provided in the next section, or until he is legally discharged. [C. Cr. P. 1877, § 586; R. C. 1899, § 8486.]

§ 10297. Accused may be admitted 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 state. [C. Cr. P. 1877, § 587; R. C. 1899, § 8487.]

§ 10298. Notice to state's attorney. Immediately upon the arrest of the person charged, the magistrate must give notice to the state's attorney. [C. Cr. P. 1877, § 588; R. C. 1899, § 8488.]

§ **10299. Duty of state's attorney.** The state's 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. [C. Cr. P. 1877, § 589; R. C. 1899, § 8489.]

§ **10300. When accused must be discharged.** The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking he is arrested under the warrant of the governor of this state. [C. Cr. P. 1877, § 590; R. C. 1899, § 8490.]

§ **10301. Magistrate to make return. Duty of district court.** 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 is in custody, or the time for his arrest has 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. [C. Cr. P. 1877, § 591; R. C. 1899, § 8491.]

§ **10302. Fugitive granted twenty-four hours. Counsel. Habeas corpus.** Any person who is arrested within this state, by virtue of a warrant issued by the governor of this state upon a requisition of the governor of any other state or territory, as a fugitive from justice, under the laws of the United States, shall not be delivered to the agent of such state or territory until notified of the demand made for his surrender, and given twenty-four hours to make demand for counsel; and should such demand be made for the purpose of suing out a writ of habeas corpus, the prisoner shall be forthwith taken to the nearest judge of the district court, and ample time given to sue out such writ, such time to be determined by the said judge of the district court. [1887, ch. 57, § 1; R. C. 1899, § 8492.]

§ **10303. Penalty for disobedience of last section.** Any officer who shall deliver such person to such agent for extradition without first having complied with the provisions of the preceding section, shall be deemed guilty of a misdemeanor. [1887, ch. 57, § 2; R. C. 1899, § 8493.]

§ **10304. Governor may demand fugitives. Appoint agents for return of. Payment of agents.** The governor of this state may in any case authorized by the constitution and laws of the United States, demand of the executive authority of any other state or territory within the United States, any fugitives from justice or any person charged with the commission of treason, felony, or other crimes in this state, and appoint agents to receive such persons for and on behalf of this state. The account of any such agent or agents employed for such purpose shall in cases of treason and felony be paid by the state, and for other crime be audited by the board of county commissioners of the county in which the crime was committed, and paid by such county; provided, that only the sheriff of said county, or one of his deputies, or a constable or policeman thereof, shall be appointed such agent, and such agent shall not be paid more than his actual expenses, and a per diem of three dollars while in the actual discharge of his duty. [C. Cr. P. 1877, § 592; R. C. 1895, § 8494; 1901, ch. 102.]

§ **10305. No compensation allowed. Exceptions.** No compensation, fee or reward of any kind, can be paid to, or received by a public officer of this state, 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 state, or detaining him herein, except as provided in section 10304. [C. Cr. P. 1877, § 593; R. C. 1899, § 8495.]

§ **10306. Violation a misdemeanor.** A violation of the last section is a misdemeanor. [C. Cr. P. 1877, § 594; R. C. 1899, § 8496.]

ARTICLE 12.—DISMISSAL OF THE ACTION BEFORE OR AFTER INFORMATION OR INDICTMENT FOUND FOR WANT OF PROSECUTION.

§ 10307. **Prosecution to be dismissed. Information. Indictment.** The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

1. When a person has been held to answer for a public offense, if an information is not filed or an indictment found against him at the next regular term of the district court.

2. If a defendant whose trial has not been postponed upon his application is not brought to trial at the next term of the district court in which the information or indictment is triable after it is filed if an information, or if an indictment after it is found. [C. Cr. P. 1877, §§ 595, 596; R. C. 1895, § 8497.]

§ 10308. **Court may order a continuance.** If the defendant is not prosecuted or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody, on his own undertaking or on an undertaking of bail for his appearance to answer the charge at the time to which the action is continued. [C. Cr. P. 1877, § 597; R. C. 1899, § 8498.]

§ 10309. **Action dismissed. Effect of.** If the court directs 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. [C. Cr. P. 1877, § 598; R. C. 1899, § 8499.]

§ 10310. **Reasons for dismissal set forth in order.** The court may, either of its own motion or upon the application of the state's attorney, and in furtherance of justice, order an action, information 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 on the minutes. [C. Cr. P. 1877, § 599; R. C. 1899, § 8500.]

§ 10311. **Nolle prosequi abolished.** The entry of a nolle prosequi is abolished, and the state's attorney cannot discontinue or abandon a prosecution for a public offense, except as provided in the last section. [C. Cr. P. 1877, § 600; R. C. 1899, § 8501.]

§ 10312. **Dismissal not a bar.** An order for the dismissal of the action, as provided in this article, is not a bar to any other prosecution for the same offense. [C. Cr. P. 1877, § 601; R. C. 1899, § 8502.]

CHAPTER 16.

GENERAL PROVISIONS AND DEFINITIONS APPLICABLE TO THIS CODE.

§ 10313. **Rule of construction of code.** 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 state 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. [C. Cr. P. 1877, § 602; R. C. 1899, § 8503.]

Penal statutes to receive liberal construction. State ex rel Van Nice v. Whealey, 5 S. D. 427, 59 N. W. 211.

§ 10314. **Code not retroactive.** No part of this code is retroactive unless expressly so declared. [C. Cr. P. 1877, § 603; R. C. 1899, § 8504.]

§ 10315. **Construction of certain 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. [C. Cr. P. 1877, § 604; R. C. 1899, § 8505.]

§ **10316. What writing includes.** The term "writing," includes printing and typewriting. [C. Cr. P. 1877, § 605; R. C. 1895, § 8506.]

§ **10317. What oath includes.** The term "oath," includes an affirmation. [C. Cr. P. 1877, § 606; R. C. 1899, § 8507.]

§ **10318. 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. [C. Cr. P. 1877, § 607; R. C. 1899, § 8508.]

§ **10319. To what this code applies.** This code applies to criminal actions and to all other proceedings in criminal cases which are herein provided for. [C. Cr. P. 1877, § 608; R. C. 1899, § 8509.]

§ **10320. Common law prevails when code silent.** The procedure, practice and pleadings in the district courts of this state, in criminal actions or in matters of a criminal nature, not specially provided for in this code, shall be in accordance with the procedure, practice and pleadings under the common law. [C. Cr. P. 1877, § 609; R. C. 1895, § 8510.]

§ **10321. County, subdivision and judicial subdivision defined.** Whenever the terms, "county," "subdivision" or "judicial subdivision" are employed in this code, in defining or describing the territorial or local jurisdiction of any magistrate or court, or in restraining, enlarging or otherwise conferring authority upon any court, officer or person of this state, they are deemed to be employed in the same sense and interchangeably, except when a different sense plainly appears; as for example:

1. The term "county" when so employed includes an organized county, or an organized county and such unorganized counties or other territory or parts of this state as now are or as may be hereafter, by law, attached to such organized county for judicial purposes.
2. The term "subdivision" when so employed includes an organized county, or an organized county and such unorganized county or counties, or other territory or parts of this state, as now are or as may be hereafter, by law, attached to such organized county for judicial purposes.
3. The term "judicial subdivision" when so employed, includes an organized county or an organized county and such unorganized county or counties, or other territory or parts of this state, as now are or as may be hereafter, by law, attached to such organized county for judicial purposes. [R. C. 1895, § 8511.]

CHAPTER 17.

THE PENITENTIARY AND STATE REFORM SCHOOL.

ARTICLE 1.—THE PENITENTIARY.

§ **10322. Penitentiary at Bismarck. Continuation and use.** The penitentiary located at Bismarck in the county of Burleigh, shall continue to be the general penitentiary and prison of this state, for the punishment and reformation of offenders against the laws thereof, and in which shall be securely confined, employed and governed in the manner provided by law, all offenders who have been or may be convicted or sentenced according to law, to the punishment of imprisonment or confinement therein. [1883, Sp. ch. 30, §§ 1-10; R. C. 1895, § 8512.]

§ 10323. **Within jurisdiction of Burleigh county.** The said penitentiary and the grounds and precincts thereof, for the purpose of all judicial proceedings shall be deemed to be within and a part of the county of Burleigh, and the courts of said county shall have jurisdiction of all crimes or public offenses committed within the same. [1883, Sp. ch. 30, § 11; R. C. 1895, § 8513.]

§ 10324. **Who may serve process within.** All process to be served within the grounds or precincts of said penitentiary, either upon persons confined therein or committed thereto, or upon persons or officers employed within the grounds or precincts of said penitentiary, except the warden, shall be served and returned by the warden; provided, that all persons committed to the penitentiary, and all persons or officers in charge of or caring for, any inmates or persons committed to said penitentiary, at any place, shall be deemed to be within the grounds and precincts thereof. All officers and employes of the penitentiary shall be exempt from serving upon juries in any of the courts of this state. [1883, Sp. ch. 30, § 12; R. C. 1895, § 8514.]

Article 2.—State Reform School.

§ 10325. **State reform school at Mandan. Continuation and use.** The state reform school located at Mandan, in the county of Morton, shall continue to be the general reform and industrial school of the state for the detention, instruction and reformation of such juvenile offenders against the laws and good order thereof, of both sexes under the age of eighteen years, as may be committed to it according to law for detention, instruction and discipline therein. [1890, ch. 164, § 1; R. C. 1895, § 8515.]

§ 10326. **Within jurisdiction of Morton county.** The said state reform school and the grounds and precincts thereof, for the purpose of all judicial proceedings shall be deemed to be within and a part of the county of Morton, and the courts of said county shall have jurisdiction of all crimes or public offenses committed within the same. [R. C. 1895, § 8516.]

§ 10327. **Who may serve process.** All process to be served within the grounds or precincts of such reform school, either upon persons detained thereat or committed thereto or upon officers or persons employed within the grounds or precincts thereof, except the superintendent, shall be served and returned by such superintendent; provided, that all officers or persons in charge of or caring for, any inmate or person committed to such reform school, at any place, shall be deemed to be within its grounds and precincts. All officers and employes of the reform school shall be exempt from serving upon juries in any of the courts of this state. [R. C. 1895, § 8517.]

§ 10328. **Temporary provision for maintenance.** To provide temporarily for the erection and maintenance of the state reform school, the board of trustees of said school may receive such sum or sums of money as can be actually used in the construction of permanent buildings and other needed and necessary improvements to be made and expense incurred in connection therewith not exceeding the sum of twenty thousand dollars, and to each person, association, organization or corporation so subscribing and advancing money as aforesaid, the said board of trustees shall issue a certificate stating the date of issue and the amount of such subscription, which said certificate shall bear interest at a rate of interest not exceeding six per cent per annum and shall be made payable from the funds to accumulate in the interest and income fund arising from interest on permanent fund or from rents received from any land set apart for said school, or from any appropriation that may hereafter be made for that purpose; provided, that until a sufficient amount of money accumulates in the fund provided for that purpose, with which to pay said certificates, the holders thereof, shall each be paid a pro rata

share of such fund to be paid out on said indebtedness; provided, further, that no part of any appropriation hereinafter to be made from the funds of the state of North Dakota, unless specifically appropriated for that purpose, shall ever be used in payment of said indebtedness or any part thereof. [1897, ch. 122, § 1; R. C. 1899, § 8517a.]

§ 10329. Money deposited with state treasurer. All money that shall arise from the interest received on all moneys derived from the sale of lands hereinbefore or that may hereafter be appropriated for said reform school, including all moneys that may be received from the renting of said land, and all moneys that may be hereafter appropriated for said reform school by the state of North Dakota, including all moneys raised in any other manner or donated to said school shall be deposited with the state treasurer, to be by him kept in a separate fund, which shall be known as the reform school fund, and be used exclusively for the benefit of said reform school as may be herein or hereafter provided. [1897, ch. 122, § 2; R. C. 1899, § 8517b.]

§ 10330. Record of proceedings. Every duty and contract to be performed by said trustees must receive the approval of the majority of the board in regular session duly called in order to make binding and valid. All proceedings of said board shall be recorded in a book kept for that purpose, and open to the inspection of anybody on request. [1897, ch. 122, § 3; R. C. 1899, § 8517c.]

§ 10331. Moneys, how paid out. All moneys that may come into the treasury of the state of North Dakota and credited to the reform school shall be paid out to the parties entitled thereto, and the state auditor is hereby directed to draw his warrant on the funds in the hands of the state treasurer belonging to said reform school upon the written order of the said board of trustees, which order shall be accompanied by itemized vouchers for the full amount of such order; provided, no such order shall be issued until there is cash in the treasury with which to pay the same. The trustees shall receive no compensation while performing the duties herein prescribed. [1897, ch. 122, §§ 4, 5; R. C. 1899, § 8517d.]

Article 3.—Governing Boards, Their Appointment, Qualification, Organization and Duties.

§ 10332. Board of management. Penitentiary. Reform school. The penitentiary and the reform school shall each be governed by a separate board of trustees consisting of five members to be appointed by the governor as hereinafter in this article provided, and the term of office of each trustee shall commence on the first Tuesday of April next succeeding his appointment, except as otherwise in this article specified. [1897, ch. 106, § 1; R. C. 1899, § 8518.]

§ 10333. How trustees appointed. Terms. Vacancies. The governor shall nominate, and by and with the advice and consent of the senate, appoint, during the regular session of the legislative assembly held in 1897, five trustees for each of such institutions, of whom three shall be designated to hold their offices for the term of two years and two for the term of four years. The governor at each regular session of the legislative assembly thereafter shall nominate, and by and with the advice and consent of the senate, appoint, three trustees of each of such institutions in place of those whose terms of office shall thereafter first expire, of whom two shall be designated to hold their offices for the term of four years and one for the term of two years. Each trustee shall hold his office until his successor is appointed and qualified; provided, the governor may fill any vacancy in either of said boards by appointment to extend only to the first Tuesday of April succeeding the next regular session of the legislative assembly; provided, further, that the governor shall, during such next legislative assembly, nominate, and by and with the advice and consent of the senate, appoint a trustee to fill such

vacancy for the remainder of the term unexpired. No more than one member of either of such boards shall be appointed from the same county. [1897, ch. 106, § 2; R. C. 1899, § 8519.]

§ **10334. How trustees qualify. Bond. Oath.** Each of said trustees shall, before entering upon the duties of his appointment, execute a bond, jointly and severally with two or more sureties to be approved by the governor as to sufficiency and by the attorney general as to form, in the penal sum of five thousand dollars, to the state of North Dakota and conditioned to the effect that he will faithfully and impartially perform the duties imposed upon him by said appointment according to law, and shall take and subscribe an oath to be indorsed upon said bond or appended thereto, that he will support the constitution of the United States, the constitution of the state of North Dakota and faithfully and impartially discharge the duties of his said appointment according to law and to the best of his ability, and said bond and oath shall be filed and retained in the office of the state treasurer. [1890, ch. 164, § 3; R. C. 1895, § 8520.]

§ **10335. Sessions of boards. Compensation. Payment.** One session of each of said boards of trustees shall be held each month at the institution under its charge, and the sessions of either board shall not in any year exceed twenty-four days in the aggregate, but the governor may, when deemed necessary, call or authorize additional sessions of either board or limit its sessions to less than twenty-four days in the aggregate each year. Each trustee shall receive three dollars per day for each day necessarily employed in attendance upon said sessions and all traveling expenses necessarily incurred therein, to be paid upon the presentation of the proper vouchers containing an itemized statement of the number of days attendance and money actually expended as above provided, duly verified by his oath and approved by the president or secretary of the board; and the state auditor shall audit said claims and draw his warrant upon the state treasurer for the amount allowed, to be paid out of the state treasury. [1889, ch. 93, §§ 3, 4; 1890, ch. 164, § 4; R. C. 1895, § 8521.]

§ **10336. Presidents of boards. Records. Visiting trustee. Duties.** At the first session of either board of trustees after the appointment of new members for a full term the trustees shall choose one of their number president of the board. Each board of trustees shall keep regular records of its meetings and proceedings which shall be signed by its president and attested by its secretary, and each board shall have power from time to time, as may be deemed necessary, to appoint some member of the board as visiting trustee, and it shall be the duty of such visiting trustee, at least once in each month, to visit the institution of which he is trustee, without previous notice to the officers thereof, and inspect the books and all its concerns and ascertain whether the officers are competent and faithful and the inmates properly governed, cared for and employed, and said visiting trustee shall have power to direct any alteration or change in such matters with the assent of the board of trustees. [1883, Sp. ch. 30, § 16; 1890, ch. 164, § 7; R. C. 1895, § 8522.]

§ **10337. Duties of boards. Inspect buildings. Examine inmates.** Such boards of trustees respectively shall at each regular session thereof, carefully inspect the buildings, rooms, grounds and precincts of the institution under its charge, and inquire into and examine all matters connected with the government, discipline and management thereof, the punishment and employment of the inmates; and they may, from time to time, require reports from the officers in regard to any and all of said matters. Each board of trustees shall also inquire into any improper conduct alleged to have been committed by any officer or employe and for that purpose the president of the board, by direction of the board to be entered in the records of its proceedings, is hereby empowered to issue subpenas to compel the attendance of witnesses

and the production of papers, books and writings before said board, in the same manner and with like effect as any officer or court of this state. And the said trustees may examine witnesses and persons appearing before said board, on oath, to be administered by the president of the board, or in his absence, by any other member thereof. [R. C. 1895, § 8523.]

§ **10338. General reports. Contents. Special reports.** Each of such boards shall make full and complete reports to the governor, to be by him communicated to the legislative assembly at each regular session, of all its doings, and the matters pertaining to the institution under its charge, specifying the number of officers and persons employed at the same and in what capacity and the amount paid to each, and shall also give in detail a statement of the entire business of such institution for the preceding two years including receipts from all sources and all expenditures and for what services or material the same were made, and also all the matters pertaining to the general business, improvement and discipline of such institution; also a full statement of the number of persons committed to and received into the same, and from what county received and for what crimes or cause; the number discharged therefrom and by what authority; the number that have died or escaped and the general health of the inmates. The governor may, at any time, in writing to be left with the secretary of the board or any member thereof, call upon and require either of such boards to make to him a general report in regard to the transactions of the institution under its charge, or a special report in regard to any part thereof, and it shall be the duty of said board to make said report and deliver the same to the governor, within fifteen days from the next regular monthly meeting after said call. [1883, Sp. ch. 30, § 8; 1890, ch. 164, § 7; R. C. 1895, § 8524.]

§ **10339. Records open to inspection.** All books, records and documents relating to the concerns and business of either of such institutions shall, at all times, be open to the examination of the board of trustees or any member thereof or any citizen of this state. [1883, Sp. ch. 30, § 17; R. C. 1895, § 8525.]

§ **10340. Officers must not be interested in contract.** Neither of said boards of trustees nor any member thereof, nor any officer, guard, agent, overseer or employe at such institution shall be pecuniarily interested or concerned directly or indirectly in any contract, either verbal or written, that may be entered into by any person or persons on behalf of the state for any purpose whatever connected with the business of such institution. [1883, Sp. ch. 30, § 21; R. C. 1895, § 8526.]

§ **10341. Inventory of personal property. Contents.** Each board of trustees and the warden, or superintendent, shall annually, between the first and fifteenth days of November, and at each change of warden or superintendent, make out in triplicate an inventory in detail of all the personal property at or pertaining to the institution under their charge, and belonging to the state, or in which the state has any interest; one copy of which shall be retained in the office of the warden, or superintendent, and one copy delivered to the governor and one copy to the state auditor. Said inventory shall specify what articles or items are intended to be kept for use and what articles or items are intended for immediate consumption. Each inventory after the first shall particularly note any and all changes in, losses from or additions to the articles or items intended to be kept for use. Said inventories shall also contain a particular enumeration by name of all the books, records, reports, contracts or other papers required by law to be kept at such institution or that may be there kept, but not the certified copy of the judgment and sentence of the court ordering the imprisonment or commitment of any person, after said person is discharged. [R. C. 1895, § 8527.]

§ **10342. Contracts. Approval. How executed. How property kept.** The warden shall make all contracts on the part of the state on account of

the business of the penitentiary, and the superintendent shall make all contracts on the part of the state on account of the business of the reform school. Before such contracts shall take effect, they shall be reduced to writing and approved by the board of trustees of the institution for which they are made; provided, that when the wants or necessities of either require the immediate purchase of supplies of any kind the warden or superintendent, as the case may be, may purchase the same for the time being in open market, without any contract, or otherwise in such manner and upon such terms and conditions as in his judgment will best promote the interests of the state. All contracts lawfully made by the warden or superintendent, on account of the business of the penitentiary or reform school respectively, shall be executed in the name of the state and deemed the contracts of the state, and all property of every kind and money in charge of the warden or superintendent, or that shall come to his hands or under his control on account of the institution under his charge or from the business thereof is the property of the state and shall at all times be kept separate and apart from his own; provided, that the money and effects, except clothing, in possession of each inmate when committed to the penitentiary or reform school, shall be preserved by the warden or superintendent and returned to such inmate when discharged. [1883, Sp. ch. 30, § 22; R. C. 1895, § 8528.]

§ **10343. Supplies. Yearly contract. Proposals.** The necessary provisions, fuel, lights, clothing, bedding, medicines and all other supplies and materials for such institution shall be furnished thereat by the year by contract when the same is practicable, to be made by the warden or superintendent under the direction and subject to the approval of the board of trustees, upon competitive bids, with such persons as will furnish the same on the best terms. The warden or superintendent shall publish previous notice, for at least three successive weeks, in at least two newspapers published in the state, of the articles, supplies and materials wanted, the quantity and quality thereof, as near as the same can be ascertained, the time and manner of delivery and the period during which such articles, supplies and materials shall be received; and in awarding said contracts perference shall be given to proposals from persons residing and doing business within this state. [1883, Sp. ch. 30, § 23; R. C. 1895, § 8529.]

§ **10344. Proposals in writing. Opening. Powers of board.** All proposals shall be in writing and sealed and upon the day appointed in the notice provided for in the last section, which shall be a day appointed for a regular monthly meeting of the board of trustees, the proposals shall be opened by the warden or superintendent, in the presence of the board of trustees and such bidders as may desire to be present, and submitted to said board. The board of trustees and the warden or superintendent, as the case may be, shall thereupon ascertain from the proposals submitted the person or persons offering the best terms and award the contract accordingly; provided, it shall appear that said proposal is as low as the fair market price, but in case no proposal is accepted notice may again be published and all proceedings had anew as hereinbefore provided; provided, further, that the person or persons whose proposal or proposals are so accepted shall execute a written contract with the state in accordance with such proposal or proposals and give bond to the state with good and sufficient sureties, to be approved by the warden, or superintendent, for the performance of such contract. The notice hereinbefore provided for shall require said bond and specify its amount, to be twice the estimated value of the articles, supplies or materials to be contracted for, but in no case shall the amount of said bond exceed the sum of three thousand dollars. The said notice shall reserve the right to accept or reject any bid or part of a bid, and require each proposal to be accompanied by a certified check for at least one hundred dollars, payable to the order of the warden or superintendent, to be forfeited to the state in

case the person or persons whose proposal or proposals are accepted shall fail to execute the contract and give the bond as hereinbefore provided within fifteen days after notice of said acceptance, or otherwise in case said contract is executed and bond given or in case a proposal is not accepted, to be returned to the bidder. Any and all proposals not deemed advantageous to the state may be rejected. [1883, Sp. ch. 30, § 24; R. C. 1895, § 8530.]

Article 4.—The Warden and Officers of the Penitentiary and Their Duties.

§ **10345. Officers of penitentiary. Residence.** The officers of the penitentiary shall be one warden, who shall be its general superintendent and secretary of the board of trustees; one deputy warden, who shall be chief turnkey; one bookkeeper, who shall be assistant gatekeeper; one, or in the discretion of the board of trustees and warden, two chaplains, and such other officers, guards, overseers, agents and employes as may be necessary. The warden and deputy warden shall reside at the penitentiary. [1899, ch. 119; R. C. 1899, § 8531.]

§ **10346. Appointment of officers. Term of office.** The board of trustees of the penitentiary shall appoint the warden and may remove him at any time. The term of office of the warden, unless sooner removed by the board of trustees, shall be two years and until his successor is appointed and qualified. All other officers and employes shall be appointed by the warden, subject to the approval of the board of trustees, and shall hold office during the pleasure of the warden. [1883, Sp. ch. 30, § 14; R. C. 1895, § 8532.]

§ **10347. Warden, how shall qualify. Other officers.** The warden shall, before entering upon the duties of his appointment, execute a bond, jointly and severally, with two or more sureties, to be approved by the board of trustees, in the penal sum of fifteen thousand dollars, to the state of North Dakota and conditioned to the effect that he will faithfully and impartially perform the duties imposed upon him by such appointment and according to law, and that he will, at all times, faithfully account for all moneys and property that shall come to his hands or under his control by virtue of his office or under color thereof, and shall also take and subscribe an oath, to be indorsed upon said bond or appended thereto, that he will support the constitution of the United States, the constitution of the state of North Dakota and faithfully and impartially discharge the duties of his appointment according to law and to the best of his ability, and said bond and oath shall be filed and retained in the office of the state treasurer. And each of the other officers and employes shall, before entering upon the duties of his appointment, take and subscribe an oath of like import and such oath shall be filed and retained by the warden. The board of trustees may require the warden to execute and file a new and additional bond, with other and satisfactory sureties, in a larger sum than that specified above whenever in its judgment it may be deemed necessary. [1883, Sp. ch. 30, § 19; R. C. 1895, § 8533.]

§ **10348. Salary of warden. Other officers.** The warden shall receive a salary to be fixed by the board of trustees but not to exceed two thousand dollars per annum, and all other officers and employes such amounts as the board of trustees may, from time to time, determine and establish. [1883, Sp. ch. 30, § 15; R. C. 1895, § 8534.]

§ **10349. Powers and duties of warden. Visitors. Records.** It shall not be lawful for both the warden and deputy warden to be absent from the penitentiary at the same time, except by permission of the board of trustees, but in such case such board shall in its discretion designate one of its number to act as warden during such absence. The warden shall, under the direction of the board of trustees, have the charge, custody and control of the peni-

tentiary and the persons committed thereto, together with all lands, buildings, furniture and tools, implements, stock and provisions and every other species of property pertaining thereto or within the precincts thereof, and shall superintend and be responsible for the police of the penitentiary and the discipline of the inmates; he shall keep and preserve accurate records of all the meetings of the board of trustees; he may make such rules and regulations for the admission of visitors, including a gate fee for their admission, as may be deemed necessary, subject to the approval of the board of trustees, and may designate days for the admission of visitors and limit such days to not less than two in each week. The warden shall be his own clerk and keep a correct record of all transactions of his office and a correct account of all his doings; he shall keep a daily journal of the proceedings of the penitentiary, in which he shall note all infractions of the rules and regulations thereof by any officer or employe, and shall enter in such journal a memorandum of every complaint made by any inmate, of cruel or unjust treatment by any officer or other person, or a want of proper clothing or food, and also any infraction of the rules and regulations of the penitentiary by any of the inmates, naming him and specifying the offense, and the punishment, if any, inflicted therefor, and said journal and memorandum shall be laid before the board of trustees at every meeting. [1883, Sp. ch. 30, § 18; R. C. 1895, § 8535.]

§ **10350. Warden to make rules and regulations.** The warden shall make such rules and regulations not inconsistent with the laws of this state, for the government of the officers, employes and inmates of the penitentiary, as he may deem necessary and proper, subject to the approval of the board of trustees, and he may, from time to time, with the approval of the board of trustees, make such changes in said rules and regulations as he may deem necessary and a printed copy of the rules and regulations of the penitentiary shall be furnished to each and every person committed to the penitentiary at the time he is received, and to each and every officer, overseer, guard and employe thereof at the time he is appointed and sworn, and ten copies to the state library for the use of the state officers and the public. [1883, Sp. ch. 30, § 20; R. C. 1895, § 8536.]

§ **10351. Deputy warden. Bond. Duties.** Whenever there is a vacancy in the office of warden or the warden is absent, all the duties of the warden shall devolve upon and be performed by the deputy warden until the vacancy is filled or the warden returns. The deputy warden before entering upon the duties of his appointment shall execute a bond to the state in the sum of ten thousand dollars conditioned to the effect that he will at all times faithfully and impartially discharge the duties of his appointment according to law and the rules and regulations of the penitentiary. [R. C. 1895, § 8537.]

§ **10352. Whom employed as chaplain. Compensation.** The warden shall employ the resident clergymen of Bismarck or its vicinity of all denominations, to officiate alternately as chaplain at the penitentiary at a sum not exceeding five dollars per week. [R. C. 1895, § 8538.]

§ **10353. Duties of employes. Acts prohibited.** All officers and persons employed in and about the penitentiary shall perform such duties in the oversight and charge thereof, the use and care of the property belonging thereto, and the custody, discipline, government and employment of the inmates as shall be required of them by the warden, in conformity to law and the rules and regulations of the penitentiary; and no such officer or employe shall be engaged directly or indirectly in procuring a pardon for any person confined therein. Any officer or employe violating the provisions of this section shall be immediately removed. [1883, Sp. ch. 30, § 29; R. C. 1895, § 8539.]

ARTICLE 5.—HOW PERSONS COMMITTED TO THE PENITENTIARY.

§ 10354. Sheriffs. Commitments to penitentiary. The sheriff of each county, or some person appointed by the court, shall convey to the penitentiary all persons convicted in his county and sentenced to be confined in said penitentiary, and as soon as may be after such conviction and sentence shall have been had; and after delivering such person or persons to the warden, together with a copy of the judgment and sentence of the court ordering such imprisonment certified by him, the warden shall deliver to such sheriff a receipt in which he shall acknowledge the delivery to him of such person, naming him, and the sheriff shall return said receipt to the clerk of the court where said conviction and sentence were had and said clerk shall file and retain the same in his office; and it shall be the duty of the warden to receive any person so convicted, sentenced and delivered to him, and such person to retain and confine and imprison in the penitentiary until the expiration of the term of his sentence or until otherwise lawfully entitled to be released. It shall also be the duty of the warden immediately upon receipt of any person committed to the penitentiary to enter in a book to be by him kept for that purpose and as an official record of the penitentiary, the name, age, sex, color, height and nationality and each and every other fact, characteristic and condition, natural or artificial, that may in any way tend to aid in the identification of such person. [1883, Sp. ch. 30, § 27; 1885, ch. 57, § 1; R. C. 1895, § 8540.]

§ 10355. Inmates of penitentiary in custody of warden. All inmates of the penitentiary shall be in the charge and custody of the warden and he shall care for, govern and employ them in the manner prescribed by law, the rules and regulations of the penitentiary and in conformity to the respective sentences under which they are confined. [1883, Sp. ch. 30, § 28; R. C. 1895, § 8541.]

ARTICLE 6.—DIMINUTION OF SENTENCE FOR GOOD CONDUCT.

§ 10356. Diminution regulated. Powers of trustees. Every person committed to the state penitentiary under sentence other than for life, who shall have no infraction of the rules and regulations of the prison or laws of the state recorded against him, shall be entitled to a deduction from the term of the sentence for each year, or pro rata for any part of a year, when the sentence is for more or less than one year, as follows: From and including the first year up to the third year, a deduction of two months for each year; from and including the third year, up to the fifth year, a deduction of seventy-five days for each year; from and including the fifth year and up to the seventh year, a deduction of three months for each year; from and including the seventh year up to the eleventh year, a deduction of one hundred and five days for each year; from and including the eleventh year up to the period fixed for the expiration of the sentence, a deduction of four months for each year; and it shall be the duty of the warden to discharge any such person from the penitentiary when he shall have served the term of his sentence less the time he may be entitled to have deducted therefrom for good behavior as hereinbefore provided, and in the same manner as if no deduction had been made; provided, that if any person committed to the penitentiary shall be guilty of the violation of any of the rules and regulations thereof, or of the laws of the state, the board of trustees or warden may and are hereby empowered at their discretion to deprive such person of a portion or all, according to the flagrancy of his infraction of the rules and regulations, of the diminution of the term of his sentence. [1897, ch. 107; R. C. 1899, § 8542.]

§ 10357. Warden shall keep record. The warden shall keep a true record of the conduct of each inmate of the state penitentiary, showing each infraction of the rules and regulations thereof, with the date and character of each

offense, which record shall be open to the inspection of the board of trustees at any regular or special meeting thereof; provided, that if any inmate of the penitentiary is deprived of any portion or all of his good time by reason of the violation of the rules and regulations of the prison, he shall be notified of the same by the warden, and a record thereof made in the deportment register, with reasons for such deduction; provided, further, that any person confined in the state penitentiary at the taking effect of this article shall be entitled to the benefits of its provisions for the remainder of his term; the deductions from the term of his sentence for good conduct to be based on the length of time he has served, as provided in the preceding section. [1897, ch. 107; R. C. 1899, § 8543.]

§ **10358. Reward for good behavior.** Whenever any inmate of the penitentiary, by continued good behavior, diligence in labor or study or otherwise, shall surpass the general average of the inmates, he may be compensated therefor at the discretion of the governor in addition to the diminution of the term of his sentence hereinbefore provided for, upon the recommendation in writing of the board of trustees, either by the further diminution of the term of his sentence, or by the payment of money or by both. [1883, Sp. ch. 30, § 49; R. C. 1895, § 8544.]

§ **10359. Punishment for infraction may be alleviated.** Whenever any person committed to the penitentiary, and as a punishment for any infraction of the rules and regulations thereof, is being deprived of any of the ordinary privileges enjoyed by the other inmates, periodically or otherwise, shall conduct himself in a peaceful, obedient and industrious manner, the board of trustees may suspend the further infliction of such punishment during his good behavior. [1883, Sp. ch. 30, § 42; R. C. 1895, § 8545.]

Article 7.—Discipline, Employment and Discharge of Inmates.

§ **10360. Employment and discipline of inmates of penitentiary.** All persons sentenced to the punishment of imprisonment in the penitentiary and committed thereto shall be constantly employed for the benefit of the state. No communication shall be allowed between such persons and any person without the penitentiary except under such supervision as may be prescribed by the rules and regulations thereof. No person shall, without the consent of the warden bring into or carry out any writing or any information to or from any inmate of the penitentiary. Persons committed to the penitentiary shall be confined in separate cells at night, whenever there are cells sufficient, and in the daytime all intercourse between them shall be prevented as far as practicable. All communications between male and female inmates shall be prevented. [1883, Sp. ch. 30, § 31; R. C. 1895, § 8546.]

§ **10361. Spirituous liquors prohibited. Physician's orders.** No spirituous or fermented liquors shall, under any pretense whatever, be brought into the penitentiary or upon the grounds except by the direction in writing of the physician and the fact noted in the journal of that day; nor shall spirituous liquors or any article of indulgence be allowed any inmate except by order of the physician, which order shall be in writing and for a definite and limited period. The warden may, in his discretion, make a moderate allowance of tea, coffee or tobacco to inmates as a reward for industry and good behavior. [1883, Sp. ch. 30, § 33; R. C. 1895, § 8547.]

§ **10362. Food of inmates of penitentiary.** The daily sustenance of the inmates of the penitentiary not in the hospital, shall consist of wholesome coarse food, with such proportions of meats and vegetables as the warden shall deem best for the health of the inmates. [1883, Sp. ch. 30, § 32; R. C. 1895, § 8548.]

§ **10363. Beds and clothing of inmates.** The clothing and bedding of the inmates shall be of such quality and quantity as the warden may direct,

regard being had to their health and comfort. [1883, Sp. ch. 30, § 34; R. C. 1895, § 8549.]

§ 10364. Warden to maintain discipline. Assistance. All necessary means shall be used, under the direction of the warden, to maintain order in the penitentiary, enforce obedience, suppress insurrections and effectually prevent escapes, even at the hazard of life, for which purpose he may at all times command the aid of the officers of the penitentiary and of the citizens outside the precincts thereof and any citizen refusing to obey such command shall be liable to such fines, penalties and forfeitures as apply to persons refusing to obey a sheriff or other officer calling upon the aid of the county to assist in serving process or for quelling an insurrection. [1883, Sp. ch. 30, § 35; R. C. 1895, § 8550.]

§ 10365. Refractory inmates may be restrained. Whenever any inmate of the penitentiary offers violence to any officer or guard thereof or to any other person or inmate, either within the grounds or precincts of the penitentiary or at any place where said inmate may be or may be employed, or attempts to do any injury to the buildings or any workshop or to any appurtenances thereof, or disobeys or resists any reasonable command of any officer or guard, such officers and guards shall use all reasonable means to defend themselves, and to enforce the observance of discipline. [R. C. 1895, § 8551.]

§ 10366. Uniform kindly treatment of inmates. The warden and all officers of the penitentiary shall uniformly treat the inmates thereof with kindness, and the warden shall require of the officers and guards that, in the execution of their respective duties, they shall in all cases refrain from boisterous and unbecoming language in giving their orders and commands. There shall be no corporal or other painful or unusual punishment inflicted upon the inmates of the penitentiary for violation of the rules and regulations thereof. [1883, Sp. ch. 30, § 36; R. C. 1895, § 8552.]

§ 10367. Discharge of inmates. Clothing. Employment. Every person committed to the penitentiary shall, when discharged, be provided with a decent suit of clothes and a sum of money, not to exceed five dollars, and also transportation to the place where he received sentence. He may be allowed employment at or in the penitentiary, under the rules and regulations established for the government of the inmates, for such period of time and at such rate of compensation, as the warden shall deem proper and equitable; provided, that any person so discharged who has no infraction of the rules recorded against him, may be employed by any lessee of the workshop at the penitentiary for such time and for such wages and in such manner as may be agreed upon and approved by the warden; provided, however, that no person discharged from the penitentiary shall, in any way, be given supervision or authority over any inmate thereof. [1883, Sp. ch. 30, § 38; R. C. 1895, § 8553.]

§ 10368. Employment of inmates. Escapes. If the warden shall at any time deem it for the interest of the state, he may employ the inmates of the penitentiary outside the yard thereof in cultivating and improving any ground belonging thereto or in doing any work necessary to be done in the prosecution of the business of the penitentiary, or in the erection, repair or improvement of any or all the state buildings at Bismarck including the executive mansion, and the grounds of such buildings and mansion; and in all such cases the warden shall detail such force from the officers, guards and employes of the penitentiary as he shall deem necessary to watch and guard them; and in case any person committed to the penitentiary and so employed as in this section provided, shall escape, he shall be deemed to have escaped from the penitentiary proper and punished accordingly; provided, however, that the warden shall be held responsible for the escape of any such person through the negligence of himself or any of his subordinates. [1883, Sp. ch. 30, § 40; R. C. 1895, § 8554.]

Article 8.—Escapes.

§ **10369. Escapes generally. Rewards. Payment.** When any inmate escapes from the penitentiary the warden shall use every means at his command for the apprehension of such person and for that purpose he may offer a reward, not to exceed one hundred dollars, and not less than twenty-five dollars; provided, that if such escape was by reason of the negligence of the warden or any officer under him, the reward thus offered shall be paid by the warden, and the board of trustees are hereby empowered finally to determine the liability of the warden for any such reward. The warden may adopt such other measures as he may deem proper, with the approval of the board of trustees, to aid in the detection and capture of persons escaping from the penitentiary. [1883, Sp. ch. 30, § 43; R. C. 1895, § 8555.]

Article 9.—Parole of Inmates.

§ **10370. Board of trustees may parole. Rules. Approval.** The board of trustees of the penitentiary are hereby empowered to parole persons confined in the penitentiary and not hereinafter excepted and to establish rules and regulations under which such persons may be allowed to go upon parole outside of the buildings and inclosures thereof. The rules and regulations as established by the board of trustees shall not take effect until submitted to and approved by the governor. [1891, ch. 92, § 1; R. C. 1895, § 8556.]

§ **10371. What inmates may not be paroled.** The following described persons shall not under any circumstances be paroled from the penitentiary:

1. A person convicted and sentenced for the crime of murder either in the first or second degree.
2. A person finally convicted, in any jurisdiction, of a felony other than that for which he is being punished.
3. A person who has not served the minimum time of imprisonment prescribed by law for the crime of which he was convicted.
4. A person who has not maintained a good record at the penitentiary for at least six months previous to his parole. [1891, ch. 92, § 1; R. C. 1895, § 8557.]

§ **10372. Requirements precedent to parole.** No parole shall be granted to any person confined in the penitentiary unless:

1. The warden in writing recommends his parole to the board of trustees.
2. At least four members of the board of trustees approve and indorse said recommendation.
3. The governor approves and indorses such recommendation.
4. The friends of such person have furnished satisfactory evidence to the board of trustees, in writing, that employment has been secured for him with some responsible citizen of the state and certified to be such by the judge of the county court of the county where such citizen resides.
5. The board of trustees is convinced that he will conform to the rules and regulations adopted by said board. [1891, ch. 92, §§ 2, 3; R. C. 1895, § 8558.]

§ **10373. Grounds for recommending parole.** It shall not be lawful for the warden, the board of trustees or the governor or any or either of them in considering or recommending the parole of any person confined in the penitentiary to receive, hear or entertain any petition or any argument of attorneys, but the only ground for such recommendation shall be such person's general demeanor and record of good conduct at the penitentiary. [1891, ch. 92, § 3; R. C. 1895, § 8559.]

§ **10374. Breach of parole. Order of recommitment.** Any person when on parole from the penitentiary shall be deemed to be in custody, and under control of the board of trustees and subject at any time until the expiration of the term for which he was sentenced, to be taken into actual custody and returned to the penitentiary. The board of trustees is hereby fully empowered

to enforce the rules and regulations made by it for the paroling of persons committed to the penitentiary, and, at any time, when satisfactorily informed that any person out on parole has violated any of such rules and regulations, may order that such person be taken into actual custody and recommitted to and confined in the penitentiary as provided in his sentence. The board shall enter in the record of its proceedings any such order and a copy of such order certified by the secretary of the board may be delivered to any sheriff or other peace officer of the state, for service and return, and it shall be the duty of any such officer to receive the same and to apprehend and immediately return and deliver to the warden at the penitentiary any such person named in such order, and the warden shall receive and reimprison such person as upon his original sentence. [1891, ch. 92, § 1; R. C. 1895, § 8560.]

§ 10375. Execution of order. Fees and payment. The officer executing any such order of the board of trustees shall indorse thereon a return of his doings thereunder and the said certified copy and return, delivered to the warden with the person named therein, and the warden shall give to such officer, to be retained by him, a certificate acknowledging the receipt of such person and such certified copy of the order and his return. The fees of any officer for executing any order of the board of trustees for the return of any person to the penitentiary shall be the same as provided by law for the commitment of a person to the penitentiary under a sentence of the court, but in no case shall the fees exceed the sum of one hundred dollars The board of trustees shall provide in its rules and regulations that any person before being paroled from the penitentiary shall deposit with the warden a sum of money not exceeding one hundred dollars to defray the expenses of his return, and the manner of auditing and paying such expenses; provided, that any money so deposited and not so used shall be returned to the person so depositing it at the expiration of the term of sentence of the person, or upon his final discharge from the penitentiary. [1891, ch. 92, § 1; R. C. 1895, § 8561.]

ARTICLE 10.—ESTABLISHMENT AND REGULATION OF TWINE AND CORDAGE PLANT.

§ 10376. Establishment and operation. The board of trustees of the state penitentiary is hereby authorized and empowered to establish a hard fibre twine and cordage plant at the said penitentiary and to operate the same for the benefit of the state in the manner hereinafter prescribed. [1899, ch. 163, § 1; R. C. 1899, § 8562.]

§ 10377. Buildings, how constructed. The said board of trustees shall at as early a date as practicable construct the necessary buildings and purchase the machinery, tools, fixtures and all other things that may be necessary to establish such twine and cordage plant at a cost not to exceed the sum of fifty thousand dollars. [1899, ch. 163, § 2; R. C. 1899, § 8563.]

§ 10378. Purchase of stock and supplies. Whenever in their judgment it shall seem wise the said board of trustees shall purchase the stock, material, supplies and all other things necessary or incident to the successful operation of said plant and shall proceed to operate the same, subject to the conditions hereinafter contained and under such regulations as said board of trustees may from time to time prescribe. [1899, ch. 163, § 3; R. C. 1899, § 8564.]

§ 10379. Appropriation. In the operation of said plant the said board of trustees shall be, and are hereby authorized to use the balance of the one hundred and fifty thousand dollars appropriated in and by section 10383 for the purpose of establishing and operating such plant, which may remain after the expenditures referred to in section 10377 have been made, and they are further authorized to use for the purposes specified in this section and the last preceding section, any additions to this fund arising from sales of product of the plant, or so much thereof as may be necessary, and the funds

or money referred to in this section shall be known as the "operating fund." [1899, ch. 163, § 4; R. C. 1899, § 8565.]

§ 10380. Auditor authorized to draw warrants. The expenditures under this article shall be made in all respects as now provided by law, except that the state auditor is hereby authorized and required to issue his warrant on the state treasurer for the cost of fibre and transportation charges on the same, and for any other item or thing purchased which must be paid for in cash before delivery, at such times and in such amounts as may be needed by said board of trustees to pay for the fibre purchased and transportation charges thereon, and are to be issued upon the written application therefor, signed by the officers of said penitentiary who are authorized from time to time, to sign the expense lists and orders for the institution; and contracts for the delivery of such fibre and bills for transportation of same must be delivered to said state auditor, by said officers of the penitentiary, at the time of making such written application, and are to be accepted and held by him as vouchers for the warrants issued by him, until such time as the regular vouchers therefor can be obtained and filed with the state auditor, which shall be done by the board of trustees of said penitentiary at the earliest practicable date. [1899, ch. 163, § 5; R. C. 1899, § 8566.]

§ 10381. Product of the plant, how disposed of. The product of said twine and cordage plant shall be disposed of by the board of trustees of said penitentiary, under regulations to be prescribed by them, subject only to the following restrictions, viz: The board of trustees of said penitentiary, at its regular meeting held in the month of February in each year, shall fix prices at which the product of the plant shall be sold during that season, such prices to be based on the cost of the product and the demand for it; prices for carload lots may, in their discretion, be fixed at not more than one-half cent per pound under prices for smaller lots; the product shall be sold only to those living in the state and intending and agreeing to use it or sell it for use in the state; the price of the product of the plant so established at the February meeting of the board of trustees shall continue to be the price for the season, unless it shall become evident to the board that the price so established is such that it will prevent the sale of the product, or such that the state will not receive a fair price, based on the market value of like product, in which cases a change in price can be made at any regular meeting of said board thereafter held. [1899, ch. 163, § 6; R. C. 1899, § 8567; 1901, ch. 198.]

§ 10382. Duty of accounting officer. It shall be the duty of the accounting officer of said state penitentiary whenever the amount received by him for the product of said plant and deposited with the institution treasurer of said penitentiary shall exceed the sum of ten thousand dollars to draw his order for the amount so deposited on the said institution treasurer in favor of the state treasurer, and deliver same to the said state treasurer, at the same time furnishing the state auditor with a statement showing the amount of same and the source from which it came and all sums so placed in the hands of the state treasurer, arising from sales of the product of said plant, shall be placed to the credit of the "operating fund" hereinbefore mentioned and referred to. [1899, ch. 163, § 7; R. C. 1899, § 8568.]

§ 10383. Providing funds. The governor, auditor and treasurer of the state of North Dakota, are hereby authorized and instructed to issue and dispose of certificates of indebtedness, in denominations such as may seem to them advisable, to provide funds in an amount not to exceed one hundred and fifty thousand dollars, and at such discount as will allow a reasonable rate of interest, the proceeds thereof to be placed in the hands of the state treasurer; the same, or so much thereof as may be necessary to be used, is hereby appropriated for the purpose and to cover the expense of establishing and operating a "twine and cordage plant" at the state penitentiary, and is

to be paid out by said state treasurer in the manner which is now or may hereafter be prescribed by law; such indebtedness to become due and payable, one-half on or before November 1, 1902, and the remaining half on or before November 1, 1904. [1899, ch. 189; R. C. 1899, § 8569.]

§ **10384. Bonds, issue of by twine plant.** The board of trustees of the state penitentiary are hereby authorized, empowered and directed to issue bonds for the sum of two hundred and ten thousand dollars for the purposes hereinafter stated. Said bonds shall be in denominations of one thousand dollars each, be payable one-half in ten and the other half in twenty years from the date thereof, and shall bear interest at a rate not exceeding five per cent per annum, payable semi-annually on the first days of January and July in each year, with coupons attached for each interest payment, which may be made payable anywhere in the United States; said bonds shall be executed by the president and secretary of said board, under the seal of said penitentiary, and when executed shall be delivered to the state treasurer. [1901, ch. 199, § 1.]

§ **10385. Bonds, sale of. Proceeds, how applied.** The state treasurer shall sell such bonds at the earliest date practicable after the receipt thereof, except those, the proceeds of which are to be used in paying off the certificates of indebtedness hereinafter referred to, which shall not be sold until the said certificates of indebtedness are due or can be paid before maturity, and dispose of the proceeds of such sales as follows: Seventy-five thousand dollars, or such part thereof as may be necessary, in paying at their maturity, or sooner if possible, the certificates of indebtedness provided for and issued under the authority contained in chapter 189, laws 1899, which become due and payable on or before the first day of November, 1902, and the balance of said proceeds shall be placed to the credit of the "operating fund," created in chapter 163, laws 1899, to be paid out as in this article provided, and the moneys mentioned and referred to are hereby appropriated for the purposes above set forth. [1901, ch. 199, § 2.]

§ **10386. Bonds, what security for.** The twine and cordage factory at the state penitentiary, with all machinery therein and everything appurtenant thereto, and all moneys, credits, materials and manufactured product of every name and nature, is hereby pledged as a security for the payment of the said bonds, and the same are hereby created a lien thereon. [1901, ch. 199, § 3.]

§ **10387. Fiscal year.** The fiscal year for all purposes connected with the said twine and cordage factory shall begin and end the same as the calendar year, and the state board of audit shall at the end of each fiscal year make, or cause to be made, an inventory and appraisement in triplicate, of all moneys, credits, materials, manufactured product and all other articles which are properly a credit to the "operating fund" above referred to, one copy of which shall be filed in the office of the governor, one copy in the office of the state treasurer and the other in the office of the warden of the penitentiary, and whenever such inventory and appraisement shall show an excess over the sum of two hundred and ten thousand dollars the state treasurer shall take from said "operating fund" an amount equal to such excess and place the same in a sinking fund which is hereby created for the payment of such bonds at maturity and the interest on the same as it shall become due. [1901, ch. 199, § 4.]

§ **10388. Bonds, interest on. How paid.** The interest on the said bonds as it shall become due shall be paid by the state treasurer out of the sinking fund provided for in the last section; provided, however, that whenever there shall not be moneys available in said fund to pay the accrued interest on said bonds, it shall be the duty of the state treasurer to pay the interest out of the bond interest fund, and there is hereby appropriated out of such fund a sum sufficient to pay the same. [1901, ch. 199, § 5.]

§ 10389. **Binding twine, state a preferred creditor in sale of.** The state of North Dakota is hereby made a preferred creditor in all cases of the sale on credit of the products of the twine and cordage plant at the penitentiary, and is also hereby made a preferred creditor in all cases of payments due to the state on any and all other contracts. [1901, ch. 200, § 1.]

ARTICLE 11.–EMPLOYMENT OF INMATES OF PENITENTIARY UPON PUBLIC BUILDINGS AND ROADS.

§ 10390. **Employment of inmates of the penitentiary.** The board of trustees of the penitentiary of this state is hereby authorized and empowered to employ the convict labor of the state, or so much thereof as cannot be preferably otherwise employed, in the manufacture of brick, with which they are to make needed repairs, additions or improvements on the public buildings of the state. [1895, ch. 86, § 1; R. C. 1899, § 8571.]

§ 10391. **Trustees may purchase tools and machinery.** For the purpose of enabling the carrying out of the provisions of this article, said trustees are hereby authorized to purchase such tools and machinery as they may deem necessary. [1895, ch. 86, § 2; R. C. 1899, § 8572.]

§ 10392. **May be employed in improving roads and streets.** Such trustees are authorized and empowered to employ so much of said labor as they may deem necessary in macadamizing or otherwise improving the roads and streets used as approaches to the penitentiary, state capitol or other public institutions within the state, and in making such improvements such board is authorized to contract indebtedness not exceeding one thousand dollars in any one year, which shall be paid out of any money that may be received from any contract now existing or that may hereafter be made for the employment of such labor. [1895, ch. 86, § 3; R. C. 1899, § 8573.]

§ 10393. **Sale of products. Board therefor. Use of receipts.** Such board of trustees shall dispose of said brick manufactured as in this article provided, as they may be directed by the governor, state auditor and secretary of state, who are hereby created a board with authority to dispose of any brick manufactured by convict labor, according to their best judgment, and for the interests of the state, at such prices as said board may provide. The receipts of such sales shall be turned over to the trustees aforesaid and used in payment of the expenses incurred in connection with the manufacture of brick or building, or improving roads and streets as hereinbefore provided. [1895, ch. 86, § 4; R. C. 1899, § 8574.]

§ 10394. **Labor of convicts.** No person in any prison, penitentiary or other place of confinement of offenders in this state, shall be required or allowed to work while under sentence thereto, at any trade, industry or occupation wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted and given, or sold to any person, firm, association or corporation; but this section shall not be so construed as to prevent the product of the labor of convicts from being disposed of to the state, or any political division thereof, or to any public institution owned or managed by the state or any political division thereof for their own use; provided, that nothing in this section shall prohibit the use of convict labor by the state in carrying on any farming operations or in the manufacture of brick, twine or cordage, or prohibits the state from disposing of the proceeds of such enterprises. [1899, ch. 103; R. C. 1899, § 8574a.]

ARTICLE 12.—THE SUPERINTENDENT AND OFFICERS OF THE REFORM SCHOOL AND THEIR DUTIES.

§ 10395. **Officers of the reform school.** The officers of the reform school shall be: one superintendent, who shall be its general superintendent and secretary of the board of trustees; and one matron, and such teachers and assistants as may be deemed necessary. [1890, ch. 164, § 5; R. C. 1895, § 8575.]

§ 10396. Appointment of superintendent. Other officers. The board of trustees shall appoint the superintendent and may remove him at any time. The term of office of the superintendent, unless sooner removed by the board of trustees, shall be two years, and until his successor is appointed and qualified. All other officers and employes shall be appointed by the superintendent, subject to the approval of the board of trustees, and shall hold office during the pleasure of the superintendent. [1890, ch. 164, § 5; R. C. 1895, § 8576.]

§ 10397. Superintendent, how to qualify. Subordinates. The superintendent shall before entering upon the duties of his appointment, execute a bond, jointly and severally, with two or more sureties, to be approved by the board of trustees, in the penal sum of ten thousand dollars, to the state of North Dakota, and conditioned to the effect that he will faithfully and impartially perform the duties imposed upon him by such appointment and according to law, and that he will at all times, faithfully account for all moneys and property that shall come to his hands or under his control by virtue of his office or under color thereof, and shall also take and subscribe an oath, to be indorsed upon said bond or appended thereto, that he will support the constitution of the United States, the constitution of the state of North Dakota, and faithfully and impartially discharge the duties of his appointment according to law and to the best of his ability, and such bond and oath shall be filed and retained in the office of the state treasurer. And each of the other officers, teachers and employes shall, before entering upon the duties of his appointment, take and subscribe an oath of like import and such oath shall be filed with and retained by the superintendent. The board of trustees may require the superintendent to execute and file a new and additional bond, with other and satisfactory sureties, in a larger sum than that specified above whenever in its judgment it may be deemed necessary. [1890, ch. 164, § 9; R. C. 1895, § 8577.]

§ 10398. Salary of superintendent. Employes. The superintendent shall receive a salary to be fixed by the board of trustees, but not to exceed two thousand dollars per annum, and all other officers and employes such amounts as the board of trustees may from time to time determine and establish. [R. C. 1895, § 8578.]

§ 10399. Duties of superintendent. Records. The superintendent shall, under the direction of the board of trustees, have the charge, custody and control of such reform school and the persons committed thereto or detained thereat together with all the lands, buildings, furniture and tools, implements, stock and provisions and every other species of property pertaining thereto or within the precincts thereof, and shall superintend and be responsible for the police of such reform school and the government, discipline, instruction and control of the inmates; he shall keep and preserve accurate records of all the meetings of the board of trustees; he may make such rules and regulations for the admission of visitors, including a gate fee for their admission, as may be deemed necessary, subject to the approval of the board of trustees, and may designate days for the admission of visitors and limit them to not less than two in each week. Such superintendent shall be his own clerk and keep a correct record of all transactions of his office and a correct account of all his doings; he shall keep a daily journal of the proceedings of the school in which he shall note all infractions of the rules and regulations thereof by any officer, teacher or employe and shall enter in such journal a memorandum of every complaint made by an inmate, of cruel and unjust treatment by any officer or other person, or a want of proper clothing or food, and also any infraction of the rules and regulations of the school by any of the inmates, naming him, and specifying the offense and the punishment, if any, inflicted therefor, and said journal and memorandum shall be

laid before the board of trustees at every meeting. [1890, ch. 164, § 9; R. C. 1895, § 8579.]

§ 10400. Duties of subordinates. Teachers. All officers, teachers and persons employed about the reform school shall perform such duties in the oversight and charge thereof, the use and care of the property belonging thereto, and the custody, government, instruction, discipline and employment of the inmates as shall be required of them by the superintendent in conformity to law and the rules and regulations of the school. [1890, ch. 164, § 5; R. C. 1895, § 8580.]

ARTICLE 13.—COMMITMENTS TO THE REFORM SCHOOL.

§ 10401. Who may be sent to reform school. District court. Procedure. Whenever any person under the age of eighteen years shall, in any district court of this state, be found guilty of a crime or public offense other than murder, such court may, if in its judgment the accused is a proper subject therefor, instead of entering judgment against such person, direct by an order to be entered in the minutes of the court, that such person be committed to the state reform school for the remainder of such person's minority. [1890, ch. 164, § 10; R. C. 1895, § 8581.]

§ 10402. When convicted before inferior court. Procedure. Whenever any person under the age of eighteen years shall be convicted of any crime or public offense before a justice of the peace or court other than a district court of the state, or of being a disorderly person, such justice of the peace or other court, must forthwith send such person together with all the papers relating to the charge on file in his office, and a certified transcript of his docket entries in the action, under the charge of some peace officer, to the judge of the district court of the county. The judge shall thereupon issue an order to the parent or guardian of the accused, or to such person as may have had him in charge, or with whom he last resided, or to some person nearly related to him, if known, or if there is no such person known, then to some person to be designated in the order to act as guardian for the accused for the time being, requiring such parent or other person to appear at a time and place stated in such order and show cause why the accused should not be committed to the reform school. Such order shall be served forthwith by the sheriff or other officer by delivering to and leaving with the person therein designated to be served, personally, a true copy of the same, or by leaving such copy with some person of full age at the residence or place of business of such person, and the original order immediately returned to the judge issuing it with the officer's doings indorsed thereon showing the time and manner of service. At the time and place mentioned in such order, or at such other time and place as the judge may direct, if the person designated in the order appears, in his presence, or if such person does not appear, in the presence of some other suitable person to be then appointed by the judge to act on behalf of the accused, the judge must proceed to hear such evidence regarding the question as may be produced or deemed necessary, including any voluntary statement of the accused, and if from such evidence and hearing such judge becomes satisfied that the accused ought to be committed to the reform school he may so order and issue his warrant accordingly. [1890, ch. 164, § 11; R. C. 1895, § 8582.]

§ 10403. Incorrigible child. Complaint. Procedure. Whenever a parent or guardian of any person under the age of eighteen years, makes a written complaint, verified by his affidavit, to the judge of the district court of the county, particularly setting forth the facts and showing that his child or ward under eighteen years of age is habitually vagrant, disorderly or incorrigible, such judge must issue an order to any peace officer of the county commanding such officer forthwith to bring such child or ward before him at such time and place as may be specified in such order, and such officer shall forthwith

execute and return such order accordingly. Upon the return of such order the judge shall examine into the charge and hear such testimony in regard thereto as he may deem necessary, including the voluntary statement of the accused, and if in his judgment the accused is a proper subject to be committed to the reform school, he shall so order and make an entry thereof upon such complaint and thereupon with the consent of such parent or guardian indorsed thereon, issue his warrant accordingly; provided, that such judge may in his discretion, require such parent or guardian to give security by an undertaking with or without sureties in the penal sum of one thousand dollars, to the state of North Dakota, for the payment of the expenses incurred upon the complaint and the commitment and maintenance of such child or ward at such reform school, but not exceeding two dollars per week. [1890, ch. 164, § 16; R. C. 1895, § 8583.]

§ **10404. Contents of order of commitment.** Every order of commitment to the reform school made under any of the provisions of this article shall specify the date as near as may be at which the accused will attain majority, to be ascertained by the court or judge, and the date so ascertained and specified shall be conclusive for all purposes connected with such reform school. The judge shall cause to be transmitted to the superintendent with each person committed to the reform school, a statement of the nature of the complaint or charges together with such other particulars concerning the accused as he may be able to ascertain and deem necessary. [1890, ch. 164, § 14; R. C. 1895, § 8584.]

§ **10405. Execution of order. Return. Fees.** A copy of the order entered in the minutes of the court as provided in section 10401, and certified by the clerk of the court under the seal of the court, or, the warrant provided for in section 10402 or 10403, shall be sufficient to authorize the officer executing it to commit the person therein named to the superintendent of the reform school within the same, and a copy of either attested by such officer and left with and retained by such superintendent shall be sufficient to authorize such superintendent to retain, control and employ such person within such reform school, its grounds and precincts until the expiration of the time specified therein. It shall be the duty of the officer executing any such order or warrant to deliver the person named therein to such superintendent at such school together with a copy of the order or warrant under which he is acting and to take such superintendent's receipt for such person, indorsed on the original order or warrant and to return such order or warrant with his doings indorsed thereon to the clerk of the court of the county in which the order was made or warrant issued, and such clerk shall file and retain the same in his office with the other papers in the case. The fees of any officer performing any service under the provisions of this article shall in all respects be the same as for like services in criminal actions. [R. C. 1895, § 8585.]

§ **10406. Papers, where filed. Return to magistrate.** In the cases provided for in section 10402 if the accused is committed to the reform school, and in all cases provided for in section 10403, all the papers shall be filed with the clerk of the court of the proper county, but in the cases provided for in section 10402, if the accused is not committed to the reform school, or if the accused appeals from the judgment of conviction, such accused, with all the papers in the case must be remanded to the custody of the officer to be returned to the magistrate before whom the conviction was had to be dealt with according to law. [1890, ch. 164, § 15; R. C. 1895, § 8586.]

§ **10407. Discharge for good conduct. Refractory inmates.** The board of trustees of the reform school may at any time after one year's detention of any person therein, upon satisfactory evidence of reformation and as a reward for good conduct and diligence in study, discharge any inmate therefrom,

but if such inmate has no parent, guardian or other person to whom to return, such board shall first arrange for and procure some suitable person to receive, employ and care for the person so discharged, without charge to the state. If any person convicted of a felony and committed to such school shall be or become incorrigible and manifestly and persistently dangerous to the good order, government and welfare of such school or the inmates thereof, the board of trustees must order such person returned and delivered to the parent or guardian or to the jailer of the county from which committed, as the case may be, and the proceedings against such person shall thereafter be resumed and continued as though no order or warrant of commitment to the reform school had been made. [1890, ch. 164, § 18; R. C. 1895, § 8587.]

§ 10408. **Aiding inmates to escape. Penalty.** Every person who unlawfully aids or assists any person committed to the state reform school in escaping or attempting to escape therefrom or from any officer thereof or knowingly conceals such person after so escaping, is guilty of a misdemeanor. [1890, ch. 164, § 19; R. C. 1895, § 8588.]

§ 10409. **Pay of trustees suspended. No commitments until proclamation.** Until such time as the legislative assembly shall, by law, make provision for the purchase or other acquisition of sufficient ground for the state reform school and the erection of buildings thereon for the use of such school, neither the board of trustees provided therefor in this chapter, or any trustee, nor any other person on account of said school shall receive or be paid for any services rendered or material or other thing furnished in regard thereto; nor shall any person be by order or warrant, or otherwise, committed thereto by any court or judge of this state, until the governor by public proclamation declares such school open therefor, but, until the governor makes such proclamation such juvenile offenders against the laws of this state as may be convicted of any crime or public offense in a district court of this state, may be committed to and confined in the reform school at Plankinton, South Dakota, or a reform school in any other state with which this state may contract, in the manner provided in the law governing said school. [1890, ch. 164, § 21; R. C. 1895, § 8589.]

Article 14.—Insane Inmates.

§ 10410. **Insane inmate of penitentiary or reform school.** Whenever it shall appear to the satisfaction of the governor by the representations of the warden of the penitentiary or the superintendent of the reform school and the board of trustees of the institution under its charge, that any person confined therein has become insane during such confinement, and is still insane, it shall be the duty of the governor to make inquiry in regard thereto, and if he shall determine that such person has become and is insane, he shall order and direct that such person be taken from such institution and confined and treated in the state hospital for the insane, and that upon his recovery from such insanity, if before the expiration of the term for which he is committed, he be returned to such institution; and it shall be the duty of the warden or superintendent, as the case may be, to deliver such insane person to the superintendent of such hospital within the same, and said superintendent to receive such person into such hospital upon the presentation of the order of the governor therefor and in obedience thereto, and the expense of so transferring any person to the state hospital for the insane and his return shall be audited by the state auditor and paid, upon his warrant, out of the state treasury. [1883, Sp. ch. 30, § 50; R. C. 1895, § 8590.]

§ 10411. **Transfer to hospital for the insane. Return.** It shall be the duty of the warden or superintendent to deliver to the superintendent of the state hospital for the insane, with the person so ordered transferred as herein provided, a correct copy of the order of the governor directing such transfer and of the superintendent of such hospital to deliver to the warden or

superintendent a certificate acknowledging the receipt of such person and said copy. The original order of the governor and said certificate shall be retained by the warden or superintendent and filed in his office at the institution in his charge. It shall be the duty of the superintendent of such hospital to notify the warden or superintendent of the recovery of any person transferred as herein provided, and of the warden or superintendent thereupon, if the term of sentence of such person has not expired, to return him to the proper custody. If the term of commitment of any person so transferred has expired at the time of his recovery, the warden or superintendent may direct that he be released from further custody, by the superintendent of said hospital; provided, that it shall be the duty of the warden or superintendent to provide any person so released with the same allowance of clothing, money and transportation to which other persons discharged from the penitentiary or reform school, are entitled. [1883, Sp. ch. 30, § 50; R. C. 1895, § 8591.]

Article 15.—Decease of Inmates.

§ **10412. Death of inmate of penitentiary or reform school. Inquest.** In case of the death of any person confined in the penitentiary, or state reform school, it shall be the duty of the warden or superintendent immediately to notify the coroner of Burleigh or Morton county, as the case may be, or when there is no coroner or in case of his absence or inability to act, some justice of the peace of the county, and it shall be the duty of such coroner or justice of the peace so notified, as the case may be, immediately to take possession of the body of said deceased and remove the same from the penitentiary or reform school and said body retain for at least twenty-four hours, and to hold an inquest thereon and inquire carefully into the cause of said deceased's death, in the manner provided by law in cases of persons supposed to have died by unlawful means; but no officer or employe of the penitentiary or reform school shall be placed or permitted to serve on the jury at said inquest. [R. C. 1895, § 8592.]

§ **10413. Inquest open to all persons.** The inquest herein provided for shall be open to all persons who may wish to attend the same, under such rules and regulations as the officer holding the same may establish for the orderly conduct of the business. All persons may be excluded from the presence of the body of the deceased whenever there is danger of contracting or spreading a contagious disease and all spectators may be excluded from the room where said inquest is being held while any officer, employe or inmate of the institution is being examined. [R. C. 1895, § 8593.]

§ **10414. Who may be required to testify. Procedure.** The officer holding such inquest may require any inmate of the penitentiary or reform school to testify at said inquest, and it shall be the duty of the warden or superintendent to produce before such inquest any inmate of the penitentiary or reform school so required to testify, upon the written request of the officer holding said inquest. Any such inmate shall be accompanied by such officer or officers as the warden or superintendent may designate, and as may be necessary to prevent his escape, and when no longer required before said inquest, must be immediately returned. The testimony of each witness taken at said inquest shall be reduced to writing under the order of the officer holding such inquest, and subscribed by the witness. The proceedings of the jury shall be as provided in other cases of inquest held by the coroner. [R. C. 1895, § 8594.]

§ **10415. Return of inquest. Burial of body.** The officer holding such inquest shall, within ten days after its conclusion, return the inquisition of the jury, the written testimony of the witnesses, and a list of the witnesses who testified to material matter at such inquest, to the clerk of the district court of said Burleigh or Morton county, as the case may be, and it shall be the

duty of said clerk to file and retain the same in his office as a public record. It shall be the duty of the officer holding such inquest to cause the body of the deceased to be decently buried, or delivered to the relatives or friends of such deceased, if by them demanded, within twenty-four hours after the receipt of such body by him, or at any time before its burial. [R. C. 1895, § 8595.]

§ **10416. Expenses. Duty of state auditor. Payment.** The officer holding such inquest shall make an itemized statement and report in detail of the expenses of such inquest specifying to whom, and for what fees, services or supplies payable and the same verify by his oath, but in no case shall the expense of the burial of said body, exclusive of the fees allowed by law to officers, jurors, physicians and witnesses, exceed the sum of forty dollars; and the state auditor shall audit all claims for any such inquest when presented as herein provided, and draw his separate warrants upon the state treasurer for the amount allowed to each person named in such statement and report, and said warrants shall be paid out of the state treasury. The fees of the officer holding said inquest and of the jurors, physicians and witnesses, shall be the same as in other cases of inquests; provided, that no officer of the penitentiary or of the reform school nor inmate thereof, shall be entitled to fees or other allowance on account of any services rendered at said inquest. [R. C. 1895, § 8596.]

§ **10417. Effects of deceased. Sale. Money received.** It shall be the duty of the warden or superintendent within ten days after the decease of any person confined in the penitentiary or reform school, to report in writing to the state treasurer the money and effects in his hands belonging to the deceased, and with said report to transmit to the state treasurer any such money. The state treasurer shall receive such report and money and execute and give to the warden or superintendent a receipt therefor. The state treasurer may require the warden or superintendent to sell the effects of the deceased in his hands and direct the manner of said sale or, in his discretion, that the warden or superintendent deliver said effects to the legal representatives of the deceased, and it shall be the duty of such officer to carry out the requirements and directions of the state treasurer in that regard. If said effects are sold, all moneys received therefor shall be delivered to the state treasurer as herein provided for the money of the deceased. The state treasurer shall place all money received on account of any such deceased person, to the credit of the state. If said money is claimed within six years by the legal representatives of the deceased, the state treasurer must pay it to them after deducting the expenses of the inquest upon and the burial of the body of the deceased. [R. C. 1895, § 8597.]

CHAPTER 18.

COUNTY JAILS.

§ **10418. Judges of district courts shall prescribe rules for jails.** The judges of the district courts of the several judicial districts of this state 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 inmates.
2. The classification of the inmates in regard to sex, age and crime, and also persons insane, idiots and lunatics.
3. Beds and bedding.
4. Warming, lighting and ventilation of the jail.
5. The employment of medical and surgical aid when necessary.

6. Employment, temperance and instruction of the inmates.
7. The supplying of each inmate with a bible.
8. The intercourse between inmates and their counsel and other persons.
9. The punishment of inmates for violation of the rules of the jail.
10. Such other regulations as said judges may deem necessary to promote the welfare of said inmates; provided, that such rules shall not be contrary to the laws of the state. [C. Cr. P. 1877, § 612; R. C. 1899, § 8598.]

§ **10419. Rules printed. How disposed of.** The said judges shall as soon as practicable, 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 commissioners 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 forward a copy of said rules to the secretary of state, who may file away and preserve the same. [C. Cr. P. 1877, § 613; R. C. 1895, § 8599.]

§ **10420. Sheriff to post rules.** The sheriff shall on receipt of said rules, cause a copy thereof to be posted and continued in some conspicuous place in each and every room or cell of said jail. [C. Cr. P. 1877, § 614; R. C. 1899, § 8600.]

§ **10421. 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 shall be printed and disposed of by said commissioners and sheriff in the same manner as is directed by sections 10419 and 10420 of this chapter. [C. Cr. P. 1877, § 615; R. C. 1899, § 8601.]

§ **10422. Sheriff to have charge of the 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. [C. Cr. P. 1877, § 616; R. C. 1899, § 8602.]

§ **10423. Sheriff shall keep jail register. Contents.** The sheriff or other officers performing the duties of sheriff of each county of this state, shall 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, age, sex, abode and nativity of each person committed to the jail, with the date and cause of his commitment.
2. By what authority committed, and if committed for a criminal offense, a description of his person.
3. The date and manner of his discharge and by what authority, and if any inmate escapes, particularly, the time and manner of such escape.
4. What sickness or disease has occurred, if any, in the jail during the year, and, if known, what were the causes thereof.
5. Whether any, or what labor has been performed by the inmates and the value thereof.
6. The practice observed during the year of whitewashing and cleansing the occupied cells or apartments, and the time or seasons of so doing.
7. The habits of the inmates as to personal cleanliness, diet and order.
8. The means furnished or permitted to inmates for literary, moral and religious instruction, and for labor.
9. All other matters required by the rules, or in the discretion of the sheriff deemed proper.

The said sheriff or other officers performing the duties of sheriff, shall carefully keep and preserve such jail register, in the office of the jailer of his proper county, and at the expiration of his term of office shall deliver the same to his successor in office. [C. Cr. P. 1877, § 617; R. C. 1895, § 8603.]

§ 10424. Sheriff shall 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 the jail register, a jail report in triplicate, one copy of which report he shall forthwith file in the office of the clerk of the district court of his county, one copy with the county auditor of his county, for the use of the commissioners thereof, and one copy of such report he shall transmit to the governor of the state, and it shall be the duty of the governor to communicate the reports of the several sheriffs of this state to the legislative assembly, on or before the tenth day of each of its sessions. [C. Cr. P. 1877, § 618; R. C. 1895, § 8604.]

§ 10425. Charge to grand jury regarding jails. It shall be the duty of the district court to give this chapter in charge of the grand jury at each term of said court at which a grand jury is impaneled and bring before them all rules, plans or regulations established by the district judge relating to the jail of the county and prison discipline which shall then be in force. [C. Cr. P. 1877, § 619; R. C. 1895, § 8605.]

§ 10426. Duty of grand jury to visit jail and report. The grand jury of each county in this state 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 chapter have been violated. It shall also be the duty of the county commissioners of each county in this state to visit the jail of their county once during each of their regular meetings of each year. [C. Cr. P. 1877, § 620; R. C. 1899, § 8606.]

§ 10427. Duty of county board regarding 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 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 reasonable 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 commissioners, district judge or grand jury. [C. Cr. P. 1877, § 621; R. C. 1899, § 8607.]

§ 10428. Sheriff to provide board and necessaries. It shall be the duty of the sheriff of each county to provide 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 rules shall designate for all persons confined by law, and he shall be allowed such reasonable compensation for services required by the provisions of this chapter, as may be prescribed by the county commissioners of their respective counties; provided, that the county commissioners at the expense of their county may arrange for the detention of any prisoner of their county in the jail of some other county, whenever in their judgment such detention would be less expensive than his detention in their county. [C. Cr. P. 1877, § 622; R. C. 1895, § 8608.]

§ 10429. Duty of sheriff to visit jail monthly. 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. [C. Cr. P. 1877, § 623; R. C. 1899, § 8609.]

§ 10430. Jailer must be deputy sheriff. The jailer or keeper of the jail shall, unless the sheriff elects 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. [C. Cr. P. 1877, § 624; R. C. 1899, § 8610.]

§ **10431. Sheriff. Jailer. Neglect of duty.** If the sheriff or jailer having in charge any county jail, shall neglect or refuse to conform to the rules and regulations established by the judge, or to any other duty required of him by this chapter, he shall on conviction thereof in a criminal action prosecuted under the provisions of this code as other criminal actions, for each case of such failure or neglect of duty as aforesaid, be punished by a fine of not less than ten nor more than one hundred dollars. [C. Cr. P. 1877, § 625; R. C. 1895, § 8611.]

CHAPTER 19.

PRISONS AND IMPRISONMENT FOR OFFENSES.

§ **10432. Common jails established as prisons.** The common jails now erected or which shall hereafter be erected in the several counties in this state 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 penitentiary, until a suitable prison shall be provided. [C. Cr. P. 1877, § 627; R. C. 1895, § 8612.]

§ **10433. Commitment 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 deilver such person to the jail of any adjoining county; 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. [C. Cr. P. 1877, § 628; R. C. 1895, § 8613.]

§ **10434. County commissioners are jail inspectors.** The county commissioners of the respective counties of this state shall be inspectors of the jails in their several counties and shall visit them at least once in each year, and shall examine fully into the condition of such jail, as to health, cleanliness and discipline; and the keeper thereof shall lay before them the jail register required to be kept by the provisions of section 10423; and if it shall appear to such inspectors that any of the provisions of law have been violated or neglected, they shall forthwith give notice to the state's attorney of the county and to the judge of the district court. [C. Cr. P. 1877, § 630; R. C. 1895, § 8614.]

§ **10435. No liquor shall be allowed prisoners.** No sheriff, jailer or keeper of any jail, shall, under any pretense, give, sell or deliver to any person confined therein 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 certifies in writing that the health of such person 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,

cell or apartment, male and female inmates together. [C. Cr. P. 1877, § 631; R. C. 1895, § 8615.]

§ **10436. Penalty. Sheriff violating last section.** If any sheriff, jailer or keeper of any prison, shall sell or deliver to any prisoner in his custody, or shall willfully or negligently suffer any such prisoner to have any liquor, prohibited in section 10435, or shall place or keep together prisoners of different sexes contrary to the provisions of said section 10435 he shall in each case forfeit and pay for the first offense the sum of twenty-five dollars, and such officer shall, on the 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. [C. Cr. P. 1877, § 632; R. C. 1899, § 8616.]

§ **10437. Penalty. Other person violating said section.** 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. [C. Cr. P. 1877, § 633; R. C. 1899, § 8617.]

§ **10438. Jailer's duty to keep jail clean.** 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 to 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. [C. Cr. P. 1877, § 634; R. C. 1899, § 8618.]

§ **10439. Bible shall be furnished each inmate.** 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. [C. Cr. P. 1877, § 635; R. C. 1899, § 8619.]

§ **10440. Sheriff shall furnish court with copy of jail register.** At the opening of each term of the district court within his county, the sheriff shall return a copy of the entries in his jail register made since the last preceding term 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 hundred dollars. [C. Cr. P. 1877, § 637; R. C. 1895, § 8620.]

§ **10441. How jails shall be constructed.** In the jails erected or which shall be hereafter erected in this state, 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. [C. Cr. P. 1877, § 638; R. C. 1899, § 8621.]

§ **10442. 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 so to employ said convict either in work on public streets or highways or otherwise, and in so doing he shall take all necessary precautions 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 nonpayment of a fine he may be employed by said sheriff as provided in this chapter; and in case any convict employed outside of the jail yard shall escape, he shall be deemed to have escaped from the jail proper. [C. Cr. P. 1877, § 640; 1879, ch. 36, § 1; R. C. 1895, § 8622.]

§ **10443. Court may sentence to hard labor.** Any court, justice of the peace, police court or police magistrate, in cases when such courts have jurisdiction under the laws of this state, or as provided by the ordinances or charter of any incorporated town or city in the state, shall have full power and authority to sentence such convict to hard labor as provided in this chapter. [1879, ch. 36, § 2; R. C. 1899, § 8623.]

§ **10444. 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 or other officer acting as such 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 shall be entitled to the earnings of its convicts. [1879, ch. 36, § 3; R. C. 1899, § 8624.]

§ **10445. For what officer may punish convict.** 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 attempts to escape either while going from or returning to the jail, or while at labor or at any time, or if he refuses 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 10449; provided, such punishment for refusal to work shall all be inflicted within the jail or jail inclosure, and shall not be considered as any part of the time for which the prisoner is sentenced. [1879, ch. 36, § 4; R. C. 1899, § 8625.]

§ **10446. Credit for each day's labor.** For every day's labor performed by any convict under the provisions of this chapter, there shall be credited on any judgment for fine and costs against him the sum of two dollars. [1879, ch. 36, § 5; R. C. 1899, § 8626.]

§ **10447. Cruel treatment by officer. Penalty.** If any officer or other person treats any prisoner in a cruel or inhuman manner, he shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding twelve months, or by both such fine and imprisonment. [1879, ch. 36, § 6; R. C. 1899, § 8627.]

§ **10448. Annoyance prohibited. Penalty.** The officer having such prisoner in charge shall protect him from insult and annoyance and communication with others while at labor and in going to and returning from the same, and he may use such means as are necessary and proper therefor; and any person persisting in insulting and annoying or communicating with any prisoner after being first commanded by such officer to desist, shall be punished by a fine not exceeding ten dollars, or by imprisonment not exceeding three days. [1879, ch. 36, § 7; R. C. 1899, § 8628.]

§ **10449. Punishment 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 destroys or injures 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. [1879, ch. 36, § 8; R. C. 1899, § 8629.]

§ **10450. Escaping from penitentiary. Punishment.** Any person committed to the penitentiary who shall escape from or break said penitentiary with intent to escape therefrom, or who shall attempt by force or violence or in any other manner to escape from said prison, whether such escape is effected or not, shall, upon conviction thereof, be punished by imprisonment in said prison for a term not exceeding double the term for which he or she was so sentenced, to commence from and after the expiration of his or her former sentence. [1883, ch. 89, § 1; R. C. 1895, § 8630.]

§ **10451. Escaping from jail. Punishment.** If any person who is 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. [C. Cr. P. 1877, § 644; R. C. 1895, § 8631.]

§ **10452. Same. Committed for capital offense.** If any person who is 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 penitentiary for the term of two years. [C. Cr. P. 1877, § 645; R. C. 1895, § 8632.]

§ **10453. 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. [C. Cr. P. 1877, § 646; R. C. 1899, § 8633.]

§ **10454. Indigent person held for fine and costs.** When any poor convict shall have been confined in any prison for the space of six months, for the nonpayment of fine 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 that the convict has not had since his conviction any estate, real or personal, with which he could have paid the sum for the nonpayment 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. [C. Cr. P. 1877, § 647; R. C. 1899, § 8634.]

§ **10455. Sheriff to receive and hold United States prisoners.** All sheriffs, jailers, prison keepers, and their and each and every of all their deputies, within this state, 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 are 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 state. [C. Cr. P. 1877, § 648; R. C. 1899, § 8635.]

§ **10456. United States liable for expenses.** 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 state. [C. Cr. P. 1877, § 649; R. C. 1899, § 8636.]

§ **10457. Jailers must report to United States courts.** Before every stated term of the United States court to be held within this state, 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 state, for allowance and payment, their account, if any, against the United States, for the support and keeping of such prisoners. [C. Cr. P. 1877, § 650; R. C. 1895, § 8637.]

§ **10458. Prison established in every county.** 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. [C. Cr. P. 1877, § 651; R. C. 1899, § 8638.]

§ **10459. Grand jury shall examine county jails.** At each term of the district court at which a grand jury is impaneled, said jury shall make a personal inspection of the condition of the county jail, as to the sufficiency of the same for the safe keeping of persons confined therein, their convenient accommodation and health, and shall inquire into the manner in which the same has been kept since the last previous inspection; 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. [C. Cr. P. 1877, § 652; R. C. 1895, § 8639.]

§ **10460. Sheriff or his deputy shall keep the 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 when they are lawfully married; he shall provide proper meat, drink and fuel for prisoners. [C. Cr. P. 1877, § 653; R. C. 1899, § 8640.]

§ **10461. County board to allow charges for keeping prisoners.** Whenever a prisoner is committed for crime or in any suit in behalf of the state, the county board shall allow the sheriff his reasonable charge for supplying such prisoner. [C. Cr. P. 1877, § 654; R. C. 1899, § 8641.]

§ **10462. Commitment. Authority of sheriff.** When a prisoner is confined by virtue of any process directed to the sheriff and which shall be required 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. [C. Cr. P. 1877, § 655; R. C. 1899, § 8642.]

§ **10463. Commitments to be indorsed and filed.** 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. [C. Cr. P. 1877, § 656; R. C. 1899, § 8643.]

§ **10464. Same to be delivered to successor.** Such box with its contents shall be delivered to the successor of the officer having charge of the prison. [C. Cr. P. 1877, § 657; R. C. 1899, § 8644.]

§ **10465. Prisoner sent to 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. [C. Cr. P. 1877, § 658; R. C. 1899, § 8645.]

§ **10466. Fugitives may be kept in any county jail.** Any county jail may be used for the safe keeping of any fugitive from justice or labor in this state, in accordance with the provisions of any act of congress, and the jailer shall, in such case, be entitled to reasonable compensation for the support and custody of such fugitive from the officer having him in custody. [C. Cr. P. 1877, § 659; R. C. 1899, § 8646.]

§ **10467. 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. [C. Cr. P. 1877, § 660; R. C. 1899, § 8647.]

CHAPTER 20.

HABEAS CORPUS.

§ **10468. Persons restrained may prosecute the writ.** Every person imprisoned or restrained of his liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint and thereby (except in the cases specified in the next section), obtain relief from such imprisonment or restraint if it is unlawful. [C. Cr. P. 1877, § 671; R. C. 1895, § 8648.]

Court or a judge may order release. Winton v. Knott, 7 S. D. 179, 63 N. W. 783.

§ **10469. Who not entitled to relief.** The person in whose behalf the application is made is not entitled to relief from imprisonment or restraint under a writ of habeas corpus, if the time during which such person may be legally detained in custody has not expired, whenever it appears:

1. That he is detained in custody by virtue of process issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction; or,

2. Except as provided in section 10482, that he is detained in custody by virtue of the final order or judgment of any competent court of criminal jurisdiction or of any process issued upon such order or judgment. [R. C. 1895, § 8649.]

§ **10470. Application for writ. Contents. Verification.** Application for the writ must be made by petition signed either by the person for whose relief it is intended or by some person in his behalf, and must specify:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties if they are known, or describing them if they are not known.

2. The cause or pretense of such confinement or restraint according to the knowledge or belief of the party verifying the petition.

3. If the confinement or restraint is by virtue of any warrant, order or process, a copy thereof shall be annexed, or it shall be averred that by reason of such person being removed or concealed before application, a demand of such copy could not be made, or that such demand was made and the legal fees therefor tendered to the officer or person having such person in custody, and that such copy was refused.

4. If the imprisonment is alleged to be illegal, the petition shall state in what the illegality consists.

5. The petition must be verified by the oath or affirmation of the person making the application. [C. Cr. P. 1877, § 672; R. C. 1895, § 8650.]

§ **10471. By what court application granted.** The writ of habeas corpus must be granted, issued, and made returnable as hereinafter stated:

1. The writ must be granted by the supreme court or any judge thereof upon petition by or on behalf of any person restrained of his liberty within this state. When granted by the court it shall in all cases be issued out of and under the seal of the supreme court, and may be made returnable, either before the supreme court, or before the district court or any judge of the district court.

2. The writ may be granted, issued, and determined by the district courts and the judges thereof upon petition by or on behalf of any person restrained of his liberty in their respective districts.

When application is made to the supreme court, or to a judge thereof, proof by the oath of the person applying or other sufficient evidence shall be required that the judge of the district court having jurisdiction by the provisions of subdivision 2 of this section is absent from his district or has refused to grant such writ, or for some cause to be specially set forth is incapable of acting, and if such proof is not produced the application shall be denied. [1897, ch. 85; R. C. 1899, § 8651.]

Supreme court may issue in first instance; however, application should, in most cases, first be made to lower court. Carruth v. Taylor, 8 N. D. 166, 77 N. W. 617; In re Hammill, 9 S. D. 390, 69 N. W. 577.

§ **10472. When court must grant the writ.** The court or judge authorized to grant the writ to whom a petition therefor is presented, must, if it appears that the writ ought to issue, grant the same without delay, and the writ shall not be denied for any informality in the petition or for any want of matters of substance if the same can be supplied, and the court or judge to whom application is made, must point out the matters wanting and direct the manner of supplying the same. [R. C. 1895, § 8652.]

§ **10473. Direction and form of writ.** The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court or judge before whom the writ is returnable, immediately, at a place therein specified or at some specified time, regard being had to the circumstances and the distance to be traveled.

Every writ of habeas corpus issued under the provisions of this chapter shall be substantially in the following form:

State of North Dakota, }
County of ..... } ss.

The state of North Dakota to the sheriff of.....etc., (or to.....):

You are hereby commanded to have the body of.....by you imprisoned and detained, as is alleged, together with the time and cause of such imprisonment and detention, by whatever name the said..... shall be called or charged, before....., judge of the district court, (or before the district or supreme court, as the case may be), at..... (naming the place), on.....(naming the date), (or immediately upon receipt of this writ), to do and receive what shall then and there be considered concerning the said....., and have you then and there this writ.

Witness, etc.

Such writ must be indorsed "By the Habeas Corpus Act," and if issued by the court, it shall be under the seal of the court; if by the judge it shall be under his hand. [1897, ch. 85; R. C. 1899, § 8653.]

§ **10474. Manner of serving the writ.** Whenever the writ is directed to the sheriff or other ministerial officer of the court out of which it is issued, it must be delivered by the clerk or by such person as it may be intrusted to, without delay, as other writs are delivered to such sheriff or other officer for service, or it may be left with the jailer, keeper or other person under such sheriff or other officer in charge of and at the jail or place where the person seeking the writ may be imprisoned or restrained. If it is directed to any other person it may be delivered to the sheriff or his deputy and be by him served upon such person by delivering the same to him without delay. If the person to whom the writ is directed cannot be found or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside either of his dwelling house or of the place where the party is confined or under restraint. In any case the court or judge thereof issuing the writ, may at his discretion authorize any person to serve and deliver it by an entry signed by him thereon to the following effect: "I hereby authorize.....to serve the within writ," and service made by such person in the manner designated in this section shall be due and lawful service. [R. C. 1895, § 8654.]

§ **10475. Penalty if officer refuses to execute and return writ.** If the person to whom the writ is directed refuses after service, to obey the same, the court or judge, upon affidavit stating such facts, must issue an attachment against such person, directed to the sheriff or coroner, commanding him forthwith to arrest such person and bring him immediately before such court or judge; and upon being so brought he must be committed to the jail of the county until he makes due return to such writ or is otherwise legally discharged. The person disobeying such writ shall also forfeit to the person imprisoned or restrained a sum not exceeding five hundred dollars, and if an officer he shall be incapable of holding or executing his said office. [C. Cr. P. 1877, § 681; R. C. 1895, § 8655.]

§ **10476. What the return must set forth.** The person upon whom the writ is served must state in his return, plainly and unequivocally:

1. Whether he has or has not the party in his custody or under his power or restraint.

2. If he has the party in his custody or power or under his restraint, he must state the authority and cause of such imprisonment or restraint.

3. If the party is detained by virtue of any writ, warrant or other written authority, a copy thereof must be annexed to the return and the original produced and exhibited to the court or judge on the hearing of such return.

4. If the person upon whom the writ is served had the party in his custody or power or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority, such transfer took place.

5. The return must be signed by the person making the same, and, except when such person is a sworn public officer and makes such return in his official capacity, it must be verified by his oath or affirmation. [R. C. 1895, § 8656.]

§ **10477. Party restrained must be brought. Exception.** The person to whom the writ is directed if it is served, must bring the body of the party in custody or under his restraint, according to the command of the writ, except in cases specified in the next section. [R. C. 1895, § 8657.]

§ **10478. When party need not be brought.** When from sickness or infirmity of the person directed to be produced he cannot without danger be brought before the court or judge, the person in whose power or custody he is, may state that fact in his return to the writ, verifying the same by

affidavit. If the court or judge is satisfied of the truth of such return and the return to the writ is otherwise sufficient, the court or judge may proceed to decide on such return and to dispose of the matter as if such party had been produced on the writ, or the hearing thereof may be adjourned until such party can be produced. [R. C. 1895, § 8658.]

§ **10479. When hearing must be had.** The court or judge before whom the writ is returned must, immediately after the return or within five days thereafter, proceed to hear and examine the return, and such other matters as may be properly submitted to his consideration. [R. C. 1895, § 8659.]

§ **10480. Return may be controverted. Proofs.** The party brought before the court or judge on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof or allege any fact to show either that the imprisonment or detention is unlawful or that he is entitled to his discharge. The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and has full power and authority to require and compel the attendance of witnesses, by process of subpena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case. The court or judge may allow the return to be amended according to the facts of the case, whenever it may be deemed necessary. [R. C. 1895, § 8660.]

§ **10481. When person restrained must be discharged.** If no legal cause is shown for the imprisonment or restraint or for the continuation thereof, such court or judge must discharge such party from the custody or restraint under which he is held. [R. C. 1895, § 8661.]

§ **10482. Causes for discharge of person restrained.** If it appears on the return of the writ that the party is in custody by virtue of process from any court of this state or judge or officer thereof, such person may be discharged in any of the following cases, subject to the restrictions of section 10469:

1. When the jurisdiction of such court or officer has been exceeded.
2. When the imprisonment was at first lawful, but by some act, omission or event which has taken place afterward, the party has become entitled to a discharge.
3. When the process is defective in some matter of substance required by law rendering such process void.
4. When the process though regular in form has been issued in a case not allowed by law.
5. When the person having the custody of the party is not the person allowed by law to detain him.
6. When the process is not authorized by any order or judgment of any court nor by any provisions of law.
7. When a party has been committed on a criminal charge without reasonable or probable cause.
8. When the process appears to have been obtained by false pretense or bribery. [C. Cr. P. 1877, § 673; R. C. 1895, § 8662.]

Writ granted when court has exceeded its jurisdiction. In re Taylor, 7 S. D. 382, 64 N. W. 253; In re McCain, 9 S. D. 57, 68 N. W. 163.

Inquiry limited to grounds enumerated in this section. Richards v. Matteson, 8 S. D. 77, 65 N. W. 428.

Court is not confined to judgment alone, but may look into whole record. Griffith v. Hubbard, 9 S. D. 15, 67 N. W. 850.

§ **10483. Informal commitment from justice of the peace.** If the person is committed to prison, or is in custody of an officer on a criminal charge, by virtue of a warrant of commitment of a justice of the peace, such person

must not be discharged on the ground of any mere defect of form in the warrant of commitment. [C. Cr. P. 1877, § 673; R. C. 1895, § 8663.]

§ **10484. Procedure when person appears to be guilty.** If it appears to the court or judge, by affidavit or otherwise or upon inspection of the process or warrant of commitment, and proceedings as may be shown to the court or judge, that the party is guilty of a criminal offense or ought not to be discharged, such court or judge, although the charge is defectively or not substantially set forth in such process or warrant of commitment, must cause the complainant or other necessary witness to be subpenaed to attend at such time as ordered, to testify before the court or judge, and upon the examination he may discharge such party, admit him to bail if the offense is bailable, or recommit him to custody, as may be just and legal. [R. C. 1895, § 8664.]

§ **10485. Habeas corpus to give bail.** Whenever a person is imprisoned or detained in custody on a criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined. Any judge in or out of the court in which he is authorized to act may take an undertaking of bail from any person who has been committed on a criminal charge, when brought before him on a writ of habeas corpus, as in other cases if the offense is bailable, and file the undertaking in the proper court. [R. C. 1895, § 8665.]

§ **10486. Procedure when person not entitled to discharge.** If a party brought before the court or judge on the return of the writ is not entitled to his discharge, and is not admitted to or bailed when allowable, the court or judge must remand him to custody, or place him under the restraint from which he was taken, if the person under whose custody or restraint he was, is legally entitled thereto. [C. Cr. P. 1877, § 675; R. C. 1895, § 8666.]

§ **10487. Prisoner may be ordered to custody of proper officer.** In cases where any party is held under illegal restraint or custody, or any other person entitled to the custody or restraint of such party, the court or judge may order such party to be committed to the custody or restraint of such person as is by law entitled thereto. [R. C. 1895, § 8667.]

§ **10488. How person disposed of before judgment.** Until judgment is given on the return, the court or judge before whom any party may be brought on such writ, may commit him to the sheriff of the county or place him in such care or under such custody as his age or circumstances may require. [R. C. 1895, § 8668.]

§ **10489. When notice of hearing must be given state's attorney.** When it appears that the person in whose behalf a writ of habeas corpus is issued, is held upon a criminal charge of any kind, notice of the time and place of the hearing upon the return must be given to the state's attorney of the county where the offense arose if he is within his county; in other cases, like notice shall be given to any person interested in continuing the custody or restraint of the party asking aid of such writ. [R. C. 1895, § 8669.]

§ **10490. Person taken out of county. Expenses.** Whenever the officer or person to whom a writ of habeas corpus is directed and delivered, is required thereby to make return and take the person in whose behalf the writ is issued into a county other than the county in which such person is imprisoned or restrained, the court or judge awarding the writ may, at his discretion, ascertain and by an entry thereon specifying the amount, but not exceeding fifteen cents per mile, require the payment or tender, at the time of delivering the writ, of the charges of obeying the same; but in no case when such entry is not made can the payment or tender of such charges be demanded before the return of the writ in accordance with its direction. [C. Cr. P. 1877, § 671; R. C. 1895, § 8670.]

§ **10491. Writ must not be disobeyed.** No writ of habeas corpus can be disobeyed for defect of form, if it sufficiently appears therefrom in whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the court or judge before whom he is to be brought. [R. C. 1895, § 8671.]

§ **10492. When person discharged may be again arrested.** No person who has been discharged by the order of the court or judge upon habeas corpus can be again imprisoned or kept in custody for the same cause, except in the following cases:

1. If he has been discharged from custody on a criminal charge and is afterwards committed for the same offense, by legal order or process.

2. If, after a discharge for defect of proof, or for any defect of the process, warrant or commitment in a criminal action, the accused is again arrested on sufficient proof and committed by legal process for the same offense.

3. If in a civil action the party has been discharged for any illegality in the order, judgment or process and is afterward imprisoned by legal process for the same cause of action. [C. Cr. P. 1877, § 677; R. C. 1895, § 8672.]

§ **10493. How obedience to order of discharge enforced.** Obedience to an order for the discharge of any person, granted pursuant to the provisions of this chapter, may be enforced by the court, or judge issuing such writ, or granting such order, by attachment, in the same manner as hereinbefore provided for a neglect to make a return to a writ of habeas corpus; and the person guilty of such disobedience shall forfeit to the party aggrieved five hundred dollars, in addition to any special damages such party may have sustained. [R. C. 1895, § 8673.]

§ **10494. Person restrained in danger of being taken out of jurisdiction. Warrant.** When it appears to any court or judge authorized by law to issue the writ of habeas corpus, that any one is illegally held in custody, confinement or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, such court or judge may cause a warrant to be issued, reciting the facts and directed to the sheriff, coroner or a constable of the county, commanding such officer to take such person thus held in custody, confinement or restraint, and forthwith bring him before such court or judge to be dealt with according to law. The court or judge may also insert in such warrant a command for the arrest of the person charged with such illegal detention and restraint. [R. C. 1895, § 8674.]

§ **10495. Execution of warrant.** The officer to whom such warrant is delivered must execute it by bringing the person therein named before the court or judge who directed the issuing of such warrant, but if such warrant is issued by the supreme court or a judge thereof, upon the return of the warrant, the hearing and decision of the matter may be ordered by such court or judge to be had before the district court of the proper county or the judge thereof. [R. C. 1895, § 8675.]

§ **10496. Return of warrant. Procedure.** The person alleged to have such party under illegal confinement or restraint may make return to such warrant, as in case of a writ of habeas corpus, and the same may be denied, and like allegations, proofs and trial may thereupon be had as upon a return to a writ of habeas corpus. [R. C. 1895, § 8676.]

§ **10497. When person must be discharged.** If such party is held under illegal custody or restraint he must be discharged, or if not, he must be restored to the care and custody of the person entitled thereto. [R. C. 1895, § 8677.]

§ **10498. When writ may be served.** Any writ or process authorized by this chapter may be issued and served on any day or at any time. [R. C. 1895, § 8678.]

§ **10499. Accused liberated for want of prosecution.** 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 set 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 due exertions have been made to procure the evidence for and on behalf of the state, and that there are reasonable grounds to believe that such evidence may be procured at the third term, it shall have power to continue such case till the third term; if any such prisoner shall have been admitted 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 state are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material. [C. Cr. P. 1877, § 678; R. C. 1895, § 8679.]

§ **10500. Writ not allowed 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 chapter out of the county in which he 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 into the county where the offense with which he stands charged is properly cognizable. [C. Cr. P. 1877, § 679; R. C. 1899, § 8680.]

§ **10501. Prisoners shall not be removed from one prison to another. Exceptions.** Any person being committed to any prison, or in custody of any officer, sheriff, jailer, keeper or other person, or his underofficer 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 legal writ; or when 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 procure his discharge or trial in due course of law; or in a case of sudden fire, infection or other necessity, or when 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 chapters concerning jails and jailers; or when 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. [C. Cr. P. 1877, § 680; R. C. 1895, § 8681.]

§ **10502. Penalty if judge refuses or delays 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 when 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. [C. Cr. P. 1877, § 681; R. C. 1899, § 8682.]

§ **10503. Removing or concealing prisoner to avoid writ.** Anyone 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 under the control of another, or shall conceal him or change the place of his confine-

ment with intent to avoid the operation of such writ, or with intent to remove him out of this state, shall forfeit for every such offense, one thousand dollars, and be imprisoned in the penitentiary 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 is proved that the acts therein forbidden were done with the intent to avoid the operation of such writ. [C. Cr. P. 1877, § 683; R. C. 1899, § 8683.]

§ **10504. Officer refusing prisoner copy of commitment. Penalty.** 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 anyone on his behalf, shall forfeit five hundred dollars. [C. Cr. P. 1877, § 684; R. C. 1899, § 8684.]

§ **10505. Penalty for rearresting on same charge.** 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 chapter, 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. [C. Cr. P. 1877, § 685; R. C. 1899, § 8685.]

§ **10506. All penalties inure to use of party aggrieved.** All the pecuniary forfeitures under this chapter 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 state, by every person aggrieved. [C. Cr. P. 1877, § 686; R. C. 1899, § 8686.]

§ **10507. Recovery of penalties no bar to civil action.** The recovery of the said penalties shall be no bar to a civil suit for damages. [C. Cr. P. 1877, § 688; R. C. 1899, § 8687.]

§ **10508. Writ may issue for witness. Discharge of bail.** The supreme and district courts within this state, 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 state out of the county in which such principal or witness is required to be surrendered, or removed to any county in this state, 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. [C. Cr. P. 1877, § 689; R. C. 1899, § 8688.]

CHAPTER 21.

GENERAL PROVISIONS.

§ 10509. **Code construed as continuation of statutes.** The provisons of this code so far as they are the same as existing statutes, must be construed as continuations thereof and not as new enactments. [R. C. 1895, § 8689.]

§ 10510. **When this code governs.** The provisions of this code so far as they relate to procedure, or alleviate the punishment to be imposed upon conviction in any case, shall govern in all criminal actions in any way prosecuted or tried after the date upon which it takes effect whether the offense was committed before or after such date. [R. C. 1895, § 8690.]