JUSTICES' CODE

CHAPTER 1.

TITLE AND APPLICATION OF CODE.

§ 9001. Title. This act shall be known as the justices' code of the state of North Dakota. [R. C. 1905, § 8340; R. C. 1895, § 6618.]

§ 9002. Application of code. The provisions of this code are applicable throughout the state to all justices of the peace now in office or hereafter chosen, and to every police magistrate acting ex-officio as justice of the peace. [R. C. 1905, § 8341; 1881, ch. 129, § 1; 1887, ch. 73, art. 10, § 6; R. C. 1895, § 6619.]

CHAPTER 2.

GENERAL POWERS OF JUSTICES OF THE PEACE.

§ 9003. Office of justice, where. Every justice of the peace shall keep his office and hold his court at a place by him selected, which must be within the county, civil township, city or town as the case may be in which he may have been elected or appointed. [R. C. 1905, § 8342; Jus. C. 1877, § 1; R. C. 1895, § 6620.]

Judicial acts to be performed within town or city where elected. Re Dance, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768.

Place at which justice of the peace may act. 33 L.R.A. 90.

Right of woman to be justice of the peace. 38 L.R.A. 209.

§ 9004. Court always open. Clerk. A justice's court is deemed to be always open and every judicial act of a justice is deemed to be the act of the court. A justice is his own clerk, but when required by law to reduce testimony to writing, he may employ a clerk for that purpose. [R. C. 1905, § 8343; Jus. C. 1877, § 1; R. C. 1895, § 6621.]

§ 9005. Powers of. Subject to the provisions hereinafter contained, each justice of the peace has power and authority to hold a court, maintain order and decorum and take cognizance therein according to law of all actions or other judicial proceedings within his jurisdiction and hear, try and determine the same or make such orders therein as may be prescribed by law and to issue in such action or proceeding all lawful process which may be necessary or proper, and require and enforce obedience thereto. [R. C. 1905, § 8344; Jus. C. 1877, § 97; R. C. 1895, § 6622.]

Right of justice of the peace to hold other judiciary position at same time. 8 L.R.A.(N.S.) 1107.

§ 9006. Jurisdiction. Justices of the peace and their courts have jurisdiction in all civil actions when the amount in controversy exclusive of costs does not exceed two hundred dollars; but in no case do they have jurisdiction when the boundaries of or title to real estate comes in question. Subject to the foregoing restrictions the jurisdiction of each justice of the peace extends to the following actions and proceedings:

1. An action for the recovery of money only when the sum for which judgment is demanded does not exceed two hundred dollars. In applying this subdivision a counterclaim is to be deemed a separate and distinct action.

2. An action to recover possession of personal property or its value, when the value of the property together with the sum if any demanded as damages does not exceed two hundred dollars.

3. An action given by statute to foreclose or enforce a lien upon chattels, or trespassing animals, when the amount of the lien or damages claimed does not exceed two hundred dollars.

4. An action for forcible detainer of real property irrespective of value, when the amount demanded therein for rents and profits or damages does not exceed two hundred dollars.

5. The entry of judgment by confession without action for an amount not exceeding two hundred dollars upon the statement of a defendant authorizing judgment in a justice's court. [R. C. 1905, § 8345; Jus. C. 1877, §§ 2, 33; 1891, ch. 80, § 1; R. C. 1895, § 6623.]

Interposing answer raising title or boundary of property requires justice to certify case to higher court. Murry v. Burris, 6 D. 170, 42 N. W. 25; Grosso v. City of Lead, 9 S. D. 165, 68 N. W. 310.

Interest claimed in summons to be added to principal in determining amount. Plunkett v. Evans, 2 S. D. 434, 50 N. W. 961; Warder, Bushnell & Glessner Co. v. Raymond, 7 S. D. 451, 64 N. W. 525.

One charged with violation of city ordinance is entitled to change of venue on account of prejudice of police justice. Sioux Falls v. Neeb, 20 S. D. 244, 105 N. W. 735.

Personal liability of justice of the peace for exceeding jurisdiction. 14 L.R.A. 138; 27 L.R.A. 92.

Voluntary credits to bring claim within jurisdiction of justice of the peace. 28 L.R.A. 221.

2. Justice of peace had jurisdiction in replevin action, where pleadings showed property to be worth not exceeding one hundred dollars although jury found property to be worth over one hundred dollars. People's Security Bank v. Sanderson, 24 S. D. 443 123 N. W. 873.

§ 9007. Criminal jurisdiction. The jurisdiction and authority of justices of the peace to prevent the commission of public offenses, to institute searches and seizures, to require the arrest and detention of persons charged with crime, to require and accept bail and otherwise act as magistrates in matters of crime is prescribed by the code of criminal procedure. Each justice's court has also jurisdiction and authority coextensive with the county or judicial subdivision to hear, try and determine every criminal action in which the offense charged is punishable by a fine not exceeding one hundred dollars or by imprisonment in the county jail for a period not to exceed thirty days or by both such fine and imprisonment, and every other criminal action in which jurisdiction is specially conferred by law. [R. C. 1905, § 8346; Jus. C. 1877, § 3; R. C. 1895, § 6624.]

§ 9008. Jurisdiction extended. The civil and criminal jurisdiction of justices of the peace in organized counties in any judicial subdivision containing one or more unorganized counties, shall extend over the said unorganized counties in said subdivision; and all summonses, warrants, orders, or other process issued by such justices of the organized counties shall be served or executed by the sheriff or any constable of the said organized county, and the costs in all criminal prosecutions in the district or justices' courts for offenses charged to have been committed in said unorganized counties, shall be audited and paid out of the state treasury; but no such costs shall be audited or paid unless a duplicate itemized account of the same shall be certified to as correct by the judge of the district court for said district, one of which accounts shall be preserved as a public record in the office of the clerk of the district court of said subdivision, and the court shall have full authority to disallow any or all such costs and fees whenever it deems the same illegally or unnecessarily incurred. [R. C. 1905, § 8347; 1903, ch. 65.]

Provision for payment by state of costs of criminal prosecutions in unorganized counties, not abrogated by constitution. Morgan v. State, 11 S. D. 396, 78 N. W. 19; Lyman County v. State, 11 S. D. 391, 78 N. W. 17.

Applies to unorganized counties which were in Sioux reservation. Morgan v. State, 9 S. D. 230, 68 N. W. 538.

Immaterial that county was organized after case arose. Lyman County v. State, 9 S. D. 413, 69 N. W. 601.

§ 9009. Code of civil procedure, how far applicable. The provisions of the code of civil procedure shall govern the proceedings in justices' courts as far as applicable when the mode of procedure is not prescribed by this code, but the powers of justices' courts are only as herein prescribed. [R. C. 1905, § 8348; Jus. C. 1877, § 103; R. C. 1895, § 6625.]

Inapplicable to appeal from justice's court. Richmire v. Andrews & G. Elevator Co., 11 N. D. 453, 92 N. W. 819.

Service of notice of time and place of trial on defendant's attorney in justice's court action is sufficient. McFarland v. Cruickshank, 22 S. D. 189, 116 N. W. 71.

As to N. D. Rev. C., § 7482, being applicable to justice court. Morgridge v. Stoeffer, 14 N. D. 430, 104 N. W. 1112.

§ 9010. Process without blanks. Every summons, execution or other process issued by a justice of the peace except a subpoena must be issued without a blank left to be filled by another, otherwise it is void. [R. C. 1905, § 8349; Jus. C. 1877, § 98; R. C. 1895, § 6626.]

§ 9011. Docket, entries in. Every justice of the peace shall keep a docket in which shall be entered in continuous order with the proper date and at the time when each act is done:

1. The title of each action or proceeding.
2. The object of the action or proceeding.
3. The issuance of process, stating the particular process issued, when returnable, and the return of the officer.
4. The appearance of the parties either with or without process, the manner in which they appear or their nonappearance according to the facts.
5. A brief minute referring to every pleading or other paper, motion filed in writing, and a concise statement of each pleading or motion made orally.
6. Every ruling or decision of the court upon the pleadings or upon the motion or application of a party.
7. Every postponement stating upon whose application and to what time.
8. The demand for trial by jury, by whom made, the agreement of the parties if any respecting the jury, the order for the jury, the issuance of a venire, to whom delivered and the time appointed for the return of the jurors and for trial.
9. The return of the venire and the names of the jurors who are impaneled and sworn.
10. The names of all witnesses sworn and at whose request.
11. The verdict of the jury when received, or if they are discharged for failure to agree, the fact of such discharge.
12. The judgment of the court, separately stating the amount taxed and allowed as costs.
13. The stay of execution if a stay is taken.
14. The giving of an abstract to be filed in the district court.
15. The issuing of execution, when and to whom issued, the renewal thereof if any and the return of the officer.
16. A statement of all moneys received by the justice upon the judgment, from whom received and the disposition made of the same.
17. A minute of the appeal referring to the notice, undertaking and other papers therein.
18. Every other matter or proceeding required to be entered by a special provision of statute. [R. C. 1905, § 8350; Jus. C. 1877, § 83; R. C. 1895, § 6627.]

Requisite docket entries. Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20; Williams v. Rice, 6 S. D. 9, 60 N. W. 153; Froelich v. Aylward, 11 S. D. 635, 80 N. W. 131.

Docketing of judgment by justices of the peace. 40 Am. Dec. 386.

§ 9012. Docket, evidence of. A justice's docket is deemed true and correct as to all matters appearing therein as required by law and cannot be disputed in a collateral proceeding. The docket or a duly certified transcript thereof

is competent evidence of the matters to which it relates. [R. C. 1905, § 8351; R. C. 1895, § 6628.]

Docket entries prima facie evidence of facts stated. State v. Wright, 15 S. D. 628, 91 N. W. 311.

Parol evidence is not admissible to show that summons was in fact issued simultaneously with writ of attachment, where justice's docket was not offered in evidence or its absence accounted for. Taugher v. Northern P. R. Co., 21 N. D. 111, 129 N. W. 747.

§ 9013. Docket to be indexed. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment with a reference to the page of entry. The names of the plaintiffs must be entered in the index in the alphabetical order of the first letter of the family name. [R. C. 1905, § 8352; R. C. 1895, § 6629.]

§ 9014. Docket to be deposited with successor. Every justice of the peace upon the expiration of his term of office must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors or any other which may be in his custody to be kept as public records. [R. C. 1905, § 8353; R. C. 1895, § 6630.]

§ 9015. Docket, where deposited when vacancy occurs. If the office of a justice becomes vacant by his death, removal or otherwise before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township or county to be by him delivered to the successor of such justice. [R. C. 1905, § 8354; R. C. 1895, § 6631.]

§ 9016. Jurisdiction of successor. Any justice with whom the docket of his predecessor or of any other justice is deposited as hereinbefore provided has the same jurisdiction of all actions and proceedings entered in such docket and may exercise the same powers therein as if originally commenced before him. [R. C. 1905, § 8355; Jus. C. 1877, § 88; R. C. 1895, § 6632.]

CHAPTER 3.

PROCEDURE IN CIVIL ACTIONS.

ARTICLE 1.— COMMENCEMENT OF AN ACTION.

§ 9017. Actions, where commenced and tried. The county in which a civil action in justice's court must be commenced and tried is as follows:

1. An action of forcible detainer or for trespass or any other injury to real property, or an action to recover specific personal property, or to foreclose or enforce a lien upon chattels or trespassing animals, must be brought in the county in which the subject of the action or property upon which the lien is claimed is situated.

2. An action to recover a penalty or forfeiture prescribed by statute, or to recover of a public officer, or his deputy, agent or surety for a violation of official duty, or any act done by color of his office, must be brought in the county in which the cause of action arose.

3. Every other action must be tried in the county in which the original defendant, or one of the several defendants, resides, or is served with summons, in a county contiguous to that of his residence, or in which a warrant of attachment is levied on property of the defendant. [R. C. 1905, § 8356; R. C. 1895, § 6633; 1901, ch. 61; 1903, ch. 4; 1905, ch. 91.]

See note to section 9025.

Service must be had, and action tried in county where justice resides. Benedict v. Johnson, 4 S. D. 387, 57 N. W. 66; Searl v. Shanks, 9 N. D. 204, 82 N. W. 734.

When summons is returnable on election day it is void and no jurisdiction is acquired. Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543.

§ 9018. Minor's appearance, how made. The parties to a civil action are the same as in the district court, but when a minor is a party he must prosecute or defend by guardian. If he has no general guardian, a special guardian must be appointed by the court. A special guardian may also be appointed in any case in which it appears to be for the benefit of the minor. If the minor is plaintiff, the appointment must be made before issuing the summons. If the minor is defendant, the appointment shall be made at or before the time for answering. If the minor is not less than fourteen years of age, he may select the person to be appointed, otherwise such selection may be made by a relative or friend or by the court. [R. C. 1905, § 8357; Jus. C. 1877, § 13; R. C. 1895, § 6634.]

§ 9019. Action, how commenced. An action in a justice's court is commenced by the issuance of a summons or by the voluntary appearance and pleading of the parties. An appearance for any purpose except to interpose or maintain an objection to the jurisdiction assumed under the process is a voluntary appearance. [R. C. 1905, § 8358; Jus. C. 1877, § 11; R. C. 1895, § 6635.]

Summons not required for jurisdiction when defendant appears and pleads. Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20; Deering & Co. v. Venne, 7 N. D. 576, 75 N. W. 926.

Summons returnable on election day confers no jurisdiction. Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543.

Jurisdiction not lost by summons and papers being temporarily in hands of plaintiff's attorney. Cowan v. Farrell, 7 N. D. 397, 75 N. W. 771.

Submitted to jurisdiction of court by invoking its aid. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605.

Justice court has jurisdiction where defendant appears and pleads. Jerome v. Rust, 19 S. D. 263, 103 N. W. 26.

Justice of peace acquires no jurisdiction to issue attachment until summons in action is issued, as attachment is provisional remedy which has no existence until commencement of action. Taugher v. Northern P. R. Co., 21 N. D. 111, 129 N. W. 747.

Prescribes what shall constitute voluntary appearance. Heard v. Holbrook, 21 N. D. 348, 131 N. W. 251.

Benefit of special appearance for purpose of objecting to jurisdiction of justice of peace is waived by moving for change of venue, and appearing to defend on merits before justice to whom case is transferred. Heard v. Holbrook, 21 N. D. 348, 131 N. W. 251.

§ 9020. Surety for costs, how given. Nonresidents. The justice shall in all cases, when plaintiff is a nonresident of the state or a corporation, before issuing a summons, require of the plaintiff sufficient surety for costs. The surety must be a resident of the county. His obligation shall be complete by simply indorsing the summons or signing his name on the complaint as security for costs. In all other cases the justice may in his discretion require surety for costs. [R. C. 1905, § 8359; 1881, ch. 89, § 1; R. C. 1895, § 6636.]

Where by consent of parties a nonresident plaintiff deposited an agreed sum of money in lieu of security for costs, defendant not entitled to demand other security upon change of venue. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605.

Filing security for costs by nonresident plaintiff not condition precedent to jurisdiction. Carter Pub. Co. v. Dennett, 11 S. D. 486, 78 N. W. 956.

§ 9021. Summons, what to contain. The style of the summons shall be "The State of North Dakota." It must be addressed to the defendant and be signed by the justice and shall contain:

1. The name of the county and the title of the court in which the action is commenced and the names of the parties thereto.

2. A direction that the defendant appear and answer the complaint of the plaintiff before the justice at his office at a time and place therein specified.

3. A sufficient statement of the cause of action to apprise the defendant of the nature thereof.

4. A notice that unless the defendant shall so appear and answer the plaintiff will take judgment against him for a sum stated or other relief specified in the summons. [R. C. 1905, § 8360; Jus. C. 1877, § 14; R. C. 1895, § 6637.]

Summons sufficient which contains general statement of cause. Berry v. Bingaman, 1 S. D. 525, 47 N. W. 825; Sinkling v. Ry. Co., 10 S. D. 560, 74 N. W. 1029.

Return day must be named; must not be a holiday. Miner v. Francis & Southard, 3 N. D. 549, 88 N. W. 343; Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543.

Amount claimed, including interest, must not be over one hundred dollars. Warder, Bushnell & Glessner Co. v. Raymond, 7 S. D. 451, 64 N. W. 525; Plunket v. Evans, 2 S. D. 434, 50 N. W. 961.

Tort action will not be dismissed because summons fails to state that on failure to appear plaintiff will apply to court for relief. Bradley v. Mueller, 22 S. D. 534, 118 N. W. 1035.

Omission in summons by justice to state location of his office is not jurisdictional. Howard v. Dawson, 23 N. D. 165, 135 N. W. 783.

Summons sufficient which stated that defendant was indebted to plaintiff, in stated sum for threshing grain, and that in default of answer plaintiff would take judgment for amount specified. Brown v. Smith, 24 S. D. 231, 123 N. W. 689.

§ 9022. Attorney's name on summons. If the plaintiff appears by attorney the name of the attorney must be indorsed on the summons. [R. C. 1905, § 8361; Jus. C. 1877, § 14; R. C. 1895, § 6638.]

§ 9023. Time for defendant's appearance. The time specified in the summons for the appearance of the defendant shall be not less than three nor more than fifteen days from the date on which it is issued. [R. C. 1905, § 8362; Jus. C. 1877, §§ 15, 38; 1885, ch. 139, § 1; R. C. 1895, § 6639.]

Judgment on two-day service of summons is irregular. Kerr v. Murphy, 19 S. D. 184, 69 L.R.A. 499, 102 N. W. 687, 8 A. & E. Ann. Cas. 1138.

Copy of summons in justices' court which is defective in giving date of return as year 1906 instead of 1907 when date of issue is 1907, is not fatally defective. Whitmore v. Behm, 22 N. D. 280, 133 N. W. 300.

Time for appearance in courts of justice of peace. 40 Am. Dec. 177.

§ 9024. Summons, how served. Fees for service. The summons may be served any place within the county, by a sheriff, chief of police, policeman, town marshal, village marshal or constable, or any other person not a party to the action, and must be served and returned with proof of service, in the manner prescribed for personal service of summons by the code of civil procedure, unless service is made by publication, as provided in the code. And such officials as are hereinbefore named in this section are entitled to receive the same fees and mileage as are allowed by law to sheriffs for such service, and may be charged as costs in the action. [1913, ch. 195; R. C. 1905, § 8363; Jus. C. 1877, § 17; 1883, Sp. ch. 34, § 1; 1885, ch. 138, § 2; R. C. 1895, § 6640.]

§ 9025. Summons in other counties, how served. In every action triable in the county, as prescribed by the first, second and fourth subdivisions of section 8356 [section 9017 herein], the summons may be served in any county of the state. In other actions the summons cannot be served on a defendant out of the county of the justice by whom it was issued except:

1. When the action is upon the contract or obligation of two or more parties, one of whom resides in the county and is served therein.

2. When an attachment issued in the action is levied on property of the defendant within the county. [R. C. 1905, § 8364; Jus. C. 1877, § 16; R. C. 1895, § 6641.]

This is R. C. § 8364 without change, except by the insertion of section 9017 in brackets. It is to be observed, however, that when the section appeared in R. C. 1895 and R. C. 1899 (section 6641 in both compilations) there was a fourth subdivision in the section to which reference is made, viz., R. C. 1895 and R. C. 1899, § 6633; but the latter as amended in Laws of 1903, ch. 4, and again in Laws 1905, ch. 91, has only the three subdivisions now constituting section 9017 in this compilation. The fourth subdivision in R. C. 1895 and R. C. 1899, § 6633, read as follows: "An action upon a contract stipu-

lating for payment at a particular place may be brought in the county in which such place is situated." It was first amended in Laws 1901, ch. 61, by adding thereto the words "provided, that defendant or defendants referred to in this subdivision shall be construed to mean the original debtor or debtors." By the amendments of 1903 and 1905, above cited, the fourth subdivision was omitted.

§ 9026. Service, how made. Service by delivery of a copy of the summons to the defendant in person within the county must be made at least three days before the time fixed for the appearance of the defendant. Service elsewhere or personal service in any other mode must be made at least seven days before the time fixed for the appearance of the defendant. [R. C. 1905, § 8365; Jus. C. 1877, § 16; R. C. 1895, § 6642.]

Service of summons must be within county; the same in garnishment cases. Searl v. Shanks, 9 N. D. 204, 82 N. W. 734.

Service on guarantor of note within county not authorize service upon maker in another county. Austin, Tomlinson & Webster Mfg. Co. v. Heiser, 6 S. D. 429, 61 N. W. 445.

Service upon joint defendant without county. Brown v. Brown, 12 S. D. 21, 80 N. W. 139; Benedict v. Johnson, 4 S. D. 387, 57 N. W. 66.

§ 9027. Service by publication. In an action to foreclose or enforce a lien upon chattels or trespassing animals, or an action in which an attachment has been levied upon personal property of the defendant within the county, or an action in which a garnishment summons has been issued and served within the county and the garnishee therein has disclosed property or money in his possession or under his control due or belonging to defendant, if the summons is returned not served, the plaintiff may at the time therein specified for answering apply for and receive a second summons directing the defendant to appear and answer at a specified time not less than twenty-five nor more than thirty days from the date thereof. Such application must be made upon a verified complaint alleging the lien or levy or garnishment proceedings relied on and demanding that the property be applied to the satisfaction of his claim, and must be supported by the affidavit, stating that to the best knowledge, information and belief of the person making it, personal service of the summons cannot be made upon the defendant within the state and stating his post office address or the fact that the same is not known. The summons must be substantially in the following form, filling blanks according to the facts:

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

In Justice Court,
Before.....
Justice of the Peace.

C. D., Plaintiff
vs.
E. F., Defendant.

The State of North Dakota to said Defendant:

By this second summons herein you are directed to appear before me at my office in ..... (designating the place) at ..... o'clock ....m., of the ..... day of ....., 19 ..... there to answer the complaint of C. D. against you, alleging (here give a sufficient statement of the cause of action to apprise the defendant of the nature of the plaintiff's claim and the particular property in question), and demanding (here state the demand); and you are notified that unless you so appear and answer the plaintiff will take judgment against you accordingly.

Given this ..... day of ..... 19....

(Official signature of the justice.)

The justice shall indorse on the summons a direction to the effect that it may be served by publication in some newspaper of the county, naming it, or in some newspaper elsewhere in the state if none is published in the county. Service of the summons may be made by publication of the same in one issue of said newspaper each week for three successive weeks, the last publication being at least three days before the time at which the defendant is directed

to appear, and by forthwith mailing a copy of the summons postage paid and directed to the defendant at his post office address, unless it is stated in the affidavit that his address is unknown. But personal service of the summons on the defendant at any place in or out of the state, if made at least ten days before the time at which he is directed to answer, is equivalent to service by publication and mailing. The proof of service must be made by affidavit of some person having knowledge of the facts. [1909, ch. 2; R. C. 1905, § 8366; Jus. C. 1877, § 17; 1883, Sp. ch. 34, § 1; 1885, ch. 138, § 2; R. C. 1895, § 6643.]

ARTICLE 2.—APPEARANCE, POSTPONEMENT AND CHANGE OF VENUE.

§ 9028. Appearance, in person or by attorney. In a justice's court the parties may appear and act in person or by attorney and any person may act as attorney except a practicing attorney, or other person occupying the same room in which the justice has his office, or a person employed in serving the summons or venire. [R. C. 1905, § 8367; Jus. C. 1877, § 12; R. C. 1895, § 6644.]

Continuance of case granted without compliance with above sections ousts justice of jurisdiction. Morrissey v. Blasky, 22 N. D. 430, 134 N. W. 319.

§ 9029. One hour for appearance. The parties are entitled to one hour in which to appear after the time stated in the summons or any time fixed for further proceedings in the action and neither party is bound to wait longer for the other. [R. C. 1905, § 8368; Jus. C. 1877, § 18; R. C. 1899, § 6645.]

Unless parties appear within hour, case should be dismissed. Justice cannot adjourn case on his own motion. Plano Mfg. Co. v. Stokke, 9 N. D. 40, 81 N. W. 70.

§ 9030. Trial, when commenced. If neither party appears within the time limited by the preceding section the action shall be deemed discontinued and there shall be no further proceedings therein unless by the consent of both parties; if both parties appear, the case may be called when they appear, but if only one or more of the parties appear, the case shall not be called until the expiration of the hour and in either case shall be disposed of as hereinafter prescribed. [R. C. 1905, § 8369; Jus. C. 1877, § 44; R. C. 1895, § 6646.]

§ 9031. Other justice called, when. In case of the sickness or other disability or necessary absence of a justice, on a return of a summons or at the time appointed for a trial, another justice of the same township or county may at his request attend in his behalf, and thereupon is vested with the power for the time being of the justice before whom the summons was returnable. In that case the proper entry of the proceedings before the attending justice subscribed by him must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction. [R. C. 1905, § 8370; Jus. C. 1877, § 100; R. C. 1895, § 6647.]

§ 9032. Postponements. The court may of its own motion or on application of a party postpone the hearing or trial:

1. For not exceeding one day if at the time specified in the summons or order of the court, the justice is sick or engaged in the trial of another action.
2. For not exceeding two days, if by amendment of a pleading or allowance of time to plead or amend, a postponement is rendered necessary.
3. For not exceeding three days, when a jury is required for the trial of an issue of fact.
4. For not exceeding thirty days, when a second summons is issued as prescribed by section 9027. [R. C. 1905, § 8371; Jus. C. 1877, § 45; R. C. 1895, § 6648.]

§ 9033. Postponement by consent. The court may, by consent of the parties given in writing or in open court, postpone the trial to a time agreed upon by the parties. [R. C. 1905, § 8372; Jus. C. 1877, § 46; R. C. 1899, § 6649.]

§ 9034. Postponement by application. The trial may be postponed upon the application of either party for a period not exceeding sixty days:

1. The party making the application must prove by his own oath or otherwise, that he cannot for want of material testimony, which he expects to pro-

cure, safely proceed to trial and must show in what respect the testimony expected is material and that he has used due diligence to procure it and has been unable to do so.

2. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice and that the testimony so taken may be read on the trial with the same effect and subject to the same objections as if the witness was produced; but the court may require the party making the application to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given and agrees that it be considered as actually given on the trial or offered and overruled as improper, the trial must not be postponed.

3. If the trial is postponed, the depositions of witnesses residing out of the county or state may be taken either upon commission issued by the justice or upon notice to take depositions in the same manner as is provided by the code of civil procedure; and such depositions shall, when completed, be directed to the justice and be published by the justice in the same manner as depositions are published by the clerk of the district court. [R. C. 1905, § 8373; Jus. C. 1877, § 47; 1885, ch. 86, § 1; R. C. 1895, § 6650.]

Party submits to jurisdiction by invoking aid, if jurisdiction has been lost by reason of insufficiency of affidavit. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605.

When summons is returnable on election day, jurisdiction cannot be acquired by adjourning case to subsequent day. Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543.

Justice may hold case open for twenty-four hours, to consider questions submitted. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605.

Justice of peace authorized to postpone trial after its commencement on good cause shown. Lyman-Eliel Drug Co. v. Cooke, 12 N. D. 88, 94 N. W. 1041.

Practice before justice of the peace for obtaining of continuance for illness of party. 42 L.R.A.(N.S.) 669.

§ 9035. Postponement, time of. No postponement shall be granted as prescribed in the preceding section for more than five days, unless the party applying for the postponement files an undertaking executed by a sufficient surety approved by the justice to the effect that he will pay to the adverse party all costs which he shall recover in the action. If the application is made by the defendant in an action of forcible detainer, the undertaking must be to the effect that the surety will pay to the plaintiff whatever sum he shall recover in the action including all rents and profits that shall accrue to him during the postponement. [R. C. 1905, § 8374; Jus. C. 1877, §§ 38, 48; R. C. 1895, § 6651.]

Verified complaint in forcible entry and detainer action need not be filed before return day. Browne v. Haseltine, 9 S. D. 524, 70 N. W. 648.

Time for appearance in forcible entry and detainer cases not extended by section 14, S. D. Rev. Jus. Code. C. M. & St. P. Ry. Co. v. Nield, 16 S. D. 370, 92 N. W. 1069.

Failure to furnish undertaking for costs must be brought to attention of justice on appeal. Lyman-Eliel Drug Co. v. Cooke, 12 N. D. 88, 94 N. W. 1041.

§ 9036. Change of venue. The court may at any time before the trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending by affidavit of either party that such justice is a material witness for either party.

2. When either party makes and files an affidavit that he believes he cannot have a fair and impartial trial before such justice by reason of the interest, prejudice or bias of the justice.

3. When from any cause the justice is disqualified from acting.

4. When the justice is sick or unable to act. [R. C. 1905, § 8375; Jus. C. 1877, § 5; R. C. 1899, § 6652.]

Word "may" relating to change of venue means "must." Walker v. Maronda, 15 N. D. 63, 106 N. W. 296.

No discretion is vested in court or judge, as mere filing of affidavit requires transfer of case or change of judge. Waterloo Gasolene Engine Co. v. O'Neill, 19 N. D. 784, 124 N. W. 951.

§ 9037. Place of trial. One change. The place of trial cannot be changed on motion of the same party more than once. When the court orders the place of trial to be changed, the action must be transferred for trial to a justice's court the parties may agree upon, and if they do not so agree, then to the next nearest justice's court in the same county. [R. C. 1905, § 8376; Jus. C. 1877, § 6; 1881, ch. 88, § 1; R. C. 1899, § 6653.]

§ 9038. Proceedings on change of trial. Jurisdiction. From the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court. After an order has been made transferring the action for trial to another court the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of one dollar for the transcript, all the papers in the action together with a certified transcript from his docket of the proceedings therein.

2. Upon the receipt by him of such papers the justice of the court to which the case is transferred must issue a notice stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial, unless such notice is waived by consent of the parties entered on the docket. [R. C. 1905, § 8377; Jus. C. 1877, § 9; 1879, ch. 42, § 1; R. C. 1899, § 6654.]

Case received on change of venue cannot be dismissed ex parte without notice. McCormick Co. v. Halvorson, 11 S. D. 427, 78 N. W. 1000, 74 Am. St. Rep. 820.

Service of notice of time and place of trial on defendant's attorney in justice's court action is sufficient. McFarland v. Cruickshank, 22 S. D. 189, 116 N. W. 71.

Article 3.— Pleadings and Issues.

§ 9039. Pleadings, what constitute. A pleading in a justice's court is not required to be in any particular form, but must be so expressed as to enable a person of common understanding to know what is intended. The pleadings may be oral or written and need not be verified unless otherwise specially prescribed. [R. C. 1905, § 8378; Jus. C. 1877, § 19; R. C. 1895, § 6655.]

Oral complaint construed with written answer in determining sufficiency of pleadings. Sinkling v. Ry. Co., 10 S. D. 560, 74 N. W. 1029.

Pleadings in justice court in action for injury to land need not be in writing in order to give court jurisdiction. Whitney v. Ritz, 24 N. D. 576, 140 N. W. 676.

§ 9040. Pleadings, order of. The pleadings are as follows:

1. The complaint of the plaintiff.
2. The demurrer of the defendant to the complaint.
3. The answer of the defendant to the complaint.
4. The demurrer of the plaintiff to the answer.
5. The reply of the plaintiff.
6. The demurrer of the defendant to the reply. [R. C. 1905, § 8379; Jus. C. 1877, § 20; R. C. 1895, § 6656.]

§ 9041. Issues, how classified. An issue arises upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other. Issues are of two kinds:

1. Of law; and,
2. Of fact. [R. C. 1905, § 8380; Jus. C. 1877, § 49; R. C. 1895, § 6657.]

§ 9042. Issues of law. An issue of law arises upon a demurrer to the complaint, answer or reply or to some part thereof. [R. C. 1905, § 8381; Jus. C. 1877, § 50; R. C. 1895, § 6658.]

§ 9043. Issues of law determined by court. Issues of law must be determined by the court and be disposed of in the order in which they are presented before the trial of an issue of fact. [R. C. 1905, § 8382; Jus. C. 1877, § 52; R. C. 1895, § 6659.]

§ 9044. Complaint. The complaint is a concise statement of the facts constituting the plaintiff's cause of action with a demand for judgment, specifying

the sum of money or the relief claimed. [R. C. 1905, § 8383; Jus. C. 1877, § 21; R. C. 1895, § 6660.]

§ 9045. Demurrer, when. The defendant may before answering demur to the complaint or to any cause of action therein alleged upon one or more of the grounds enumerated in section 7442 of the code of civil procedure. When any of the matters therein enumerated do not appear upon the face of the complaint, the objection may be taken by answer. [R. C. 1905, § 8384; Jus. C. 1877, § 22; R. C. 1895, § 6661.]

§ 9046. Proceedings after demurrer. If a demurrer to the complaint or to any cause of action therein is sustained, the plaintiff may amend within such time not exceeding two days as the court allows. If the demurrer is overruled, the defendant must answer forthwith. [R. C. 1905, § 8385; Jus. C. 1877, § 25; R. C. 1895, § 6662.]

On right to amend after demurrer sustained in justice's court. Walker v. Maronda, 15 N. D. 63, 106 N. W. 296.

On right to take issue on facts after demurrer overruled in justice's court. Walker v. Maronda, 15 N. D. 63, 106 N. W. 206.

§ 9047. Answer. The answer may contain a general denial of each allegation of the complaint or any distinct cause of action therein, or a specific denial of one or more of the material allegations thereof. It may also state in a plain and direct manner new matter constituting one or more defenses or counterclaims cognizable in a justice's court. [R. C. 1905, § 8386; Jus. C. 1877, § 23; R. C. 1899, § 6663.]

§ 9048. Demurrer to answer. The plaintiff may demur to the answer, or to the new matter alleged therein because it does not state facts sufficient to constitute a defense or counterclaim, as the case may be. [R. C. 1905, § 8387; Jus. C. 1877, § 24; R. C. 1895, § 6664.]

§ 9049. Proceedings after demurrer. If the demurrer is sustained, the defendant may amend his answer within such time not exceeding two days as the court allows. If the demurrer is overruled the plaintiff may reply forthwith, but no reply is necessary except to a counterclaim. [R. C. 1905, § 8388; Jus. C. 1877, § 25; R. C. 1895, § 6665.]

§ 9050. Amendments, when allowed. Either party may be allowed to amend his pleading at any time before the conclusion of the trial or on appeal, if substantial justice will be promoted thereby, but when an amendment is offered after issue joined and it appears to the satisfaction of the court that a postponement will become necessary to the adverse party in consequence of such amendment, the court shall allow the amendment only upon payment of costs to the adverse party in such sum as may be deemed just. [R. C. 1905, § 8389; Jus. C. 1877, § 26; R. C. 1895, § 6666.]

"Costs" include attorney's fee mentioned in S. D. Rev. Jus. Code, § 113; N. D. Rev. Codes, 6716: Erpenbach v. Ry. Co, 8 S. D. 575, 67 N. W. 606.

On a proper showing judgment taken by default may be set aside. Perrott v. Owen, 7 S. D. 454, 64 N. W. 526.

Justice of peace authorized to postpone trial after its commencement on good cause shown. Lyman-Eliel Drug Co. v. Cooke, 12 N. D. 88, 94 N. W. 1041.

As to allowing amendment to pleading in justice court. Rae v. Chicago, M. & St. P. R. Co., 14 N. D. 507, 105 N. W. 721.

Power to amend pleadings is not created or conferred. Morgridge v. Stoeffer, 14 N. D. 430, 104 N. W. 1112.

§ 9051. Demurrer to amended pleading. When a pleading is amended the adverse party may demur, answer or reply forthwith, or within such time, not exceeding two days, as the court allows. [R. C. 1905, § 8390; Jus. C. 1877, § 27; R. C. 1895, § 6667.]

§ 9052. Genuineness of exhibits, how admitted. If the plaintiff annexes to his complaint or files with the justice at the time of issuing the summons the original or a copy of the promissory note, bill of exchange or other written obligation for the payment of money upon which the action is brought, the defendant is deemed to admit the genuineness of the signature of the makers, indorsers, guarantors, acceptors or assignors thereof, unless he specifically

denies the same in his answer and verifies the answer by his oath. [R. C. 1905, § 8391; Jus. C. 1877, § 61; R. C. 1895, § 6668.]

§ 9053. Affidavit of amount due prima facie evidence. In all actions hereafter brought before justices of the peace in this state upon an open account or upon an account stated, if the plaintiff or some one in his behalf shall make affidavit of the amount due, over and above all legal set-offs and annex thereto a copy of said account, and cause a copy of said affidavit and account to be served upon the defendant with a copy of the summons in such action, such affidavit shall be prima facie evidence of such indebtedness, unless the defendant in his answer shall, by himself or some one in his behalf, specifically deny the same and verifies the said answer by his oath. [1907, ch. 81.]

§ 9054. Pleadings in writing and verified. The pleadings must be in writing, and be verified, in an action of forcible detainer, or an action to recover damages for an injury to real property. No issue arises upon an allegation of title or boundary in a complaint in such action unless such allegation is specifically denied in the answer. [R. C. 1905, § 8392; 1897, ch. 48; R. C. 1899, § 6669.]

By failure to object to oral pleading in action for injury to land, in justice's court defendant waives rights under statute. Whitney v. Ritz, 24 N. D. 576, 140 N. W. 676.

§ 9055. Title to real estate. A question of title to, or boundary of, real property cannot be determined in a justice's court, and when such question arises upon a material issue joined as prescribed in the preceding section, or when such question arises by controversy in the evidence as to a fact material to the determination of the issues in the action, the justice must discontinue the trial and forthwith certify and transmit to the district court of his county all the pleadings and papers filed with him in such action; for which transcript the justice shall receive one dollar, to be paid by the plaintiff. [R. C. 1905, § 8393; R. C. 1895, § 6670; 1901, ch. 201, § 1.]

Title to real estate cannot be tried by justice. Murry v. Burris, 6 D. 170, 42 N. W. 25; Grosso v. City of Lead, 9 S. D. 165, 68 N. W. 310; Hegar v. DeGroat, 3 N. D. 354, 56 N. W. 150.

Justice will not lose jurisdiction where title to real property is not involved, although pleaded. Chicago, M. & St. P. R. Co. v. Nield, 16 S. D. 370, 92 N. W. 1069.

Justice of peace does not lose complete jurisdiction because question of title or boundary to real property arises in case. Johnson v. Erickson, 14 N. D. 414, 105 N. W. 1104.

Action did not involve title to realty and was within justice's jurisdiction, where sole issue was right to possession under oral lease. McManus v. Maloy, 30 S. D. 373, 138 N. W. 963.

§ 9056. Filing of transcript. Such transcript shall be filed in the district court at the cost of plaintiff; and thereupon the district court shall have the same jurisdiction over such action as if it had been originally commenced therein. [R. C. 1905, § 8394; R. C. 1895, § 6671; 1901, ch. 201, § 1.]

§ 9057. Tried in district court. Such action shall be forthwith entered on the calendar of the district court, and shall, unless continued for cause, stand for trial at the next regular term of said court; provided, however, that [where] the transcript is filed in the district court during a term thereof such action shall, unless continued for cause, stand for trial at such current term. No notice of trial or note of issue shall be required of either party. [R. C. 1905, § 8395; 1901, ch. 201, § 2.]

Article 4.— Provisional Remedies.

§ 9058. **Attachment, writ of, when issued.** In a case mentioned in section 7537 of the code of civil procedure, a writ to attach the personal property of the defendant may be issued by the justice at the time of or after issuing the summons and before answer on receiving an affidavit by or on behalf of the plaintiff, stating the same facts as are required to be stated by the affidavit specified in section 7541 of the code of civil procedure. [R. C. 1905, § 8396; Jus. C. 1877, § 28; R. C. 1895, § 6672.]

Justice of peace acquires no jurisdiction to issue attachment until summons is issued, as attachment is provisional remedy which has no existence until commencement of action. Taugher v. Northern P. R. Co., 21 N. D. 111, 129 N. W. 747.

§ 9059. Undertaking for attachment. Before issuing the writ the justice must require a written undertaking on the part of the plaintiff with two or more sufficient sureties, in a sum not less than fifty nor more than three hundred dollars to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment not exceeding the sum specified in the undertaking. [R. C. 1905, § 8397; Jus. C. 1877, § 29; R. C. 1895, § 6673.]

§ 9060. Requisites of the writ. The writ may be directed to the sheriff or any constable of the county and must require him to attach and safely keep all the personal property of the defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand. the amount of which must be stated in conformity with the complaint, unless the defendant gives him security by the undertaking of two sufficient sureties in an amount sufficient to satisfy such demand besides costs, in which case to take such undertaking. [R. C. 1905, § 8398; Jus. C. 1877, § 30; R. C. 1895, § 6674.]

§ 9061. Service and return of writ. The writ may be served by the sheriff or any constable of the county in which it is issued and returned in the same manner as warrants of attachment are served and returned in actions in the district court and with the same force and effect. [R. C. 1905, § 8399; Jus. C. 1877, § 31; R. C. 1899, § 6675.]

§ 9062. Claim and delivery, proceedings in. In an action to recover possession of personal property the plaintiff may, at the time of issuing the summons or at any time thereafter before answer, claim the delivery of such property to him; and article 2 of chapter 9 of the code of civil procedure is applicable to such claim when made in justice's court, the powers therein given and duties imposed on sheriffs being extended to constables and the word "justice" substituted for "judge." [R. C. 1905, § 8400; R. C. 1895, § 6676.]

Article 5.—Garnishment and Mode of Procedure.

§ 9063. Procedure. When any creditor shall be entitled to proceed by garnishment, as prescribed by sections 7567 and 7587 inclusive, such proceedings may be had in any justice's court properly having jurisdiction of the subject matter and the mode of procedure therein, and the law applicable thereto, when not otherwise prescribed or provided, shall conform as nearly as practicable to the provisions of said sections, the justice, unless otherwise prohibited by law, having the powers in said section conferred upon the "judge" and "clerk of the court," and the powers and duties of sheriffs being extended to constables; provided, that in a justice's court no real property shall be subject to garnishment, and no garnishment proceedings can be had when the amount for which judgment is demanded of the defendant is less than ten dollars, exclusive of costs, and no judgment shall be rendered against a garnishee where the judgment against the defendant is less than ten dollars, exclusive of costs, nor where the indebtedness of the garnishee to the defendant, or the value of the property of the defendant in his hands or under his control is less than ten dollars, and no garnishee shall be held liable to a plaintiff in a greater sum than two hundred dollars, exclusive of costs. [R. C. 1905, § 8401; 1897, ch. 82, § 1; R. C. 1899, § 6676a.]

Does not modify rule as to service within county where summons issued. Searl v. Shanks, 9 N. D. 204, 82 N. W. 734.

Of money in hands of loan agent. Wallace v. Singer Mfg. Co., 12 S. D. 168, 80 N. W. 188.

Claim for exemption in garnishment proceeding in justice court must, in order to serve as defense, have been preceded by filing schedule of debtor's personal property. Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243.

§ 9064. Form of summons. The garnishee summons shall be issued by the justice upon like affidavit as in district court, and shall be substantially in the following form:

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

In Justice's Court,
Before.....
Justice of the Peace.

A. B., Plaintiff, vs.
C. D., Defendant, and
E. F., Garnishee.

The state of North Dakota to said garnishee:

You are hereby summoned pursuant to the annexed affidavit, as a garnishee of the defendant C. D., and required to appear before me at ..... in the ..... of ..... on the ..... day of ..... A. D., 19...., at ..... o'clock in the ..... noon of said day and answer upon oath according to law whether you are indebted to or have in your possession or under your control any personal property belonging to such defendant, or in lieu of so appearing before me on said day you may at any time prior thereto file with me your sufficient affidavit as provided in sections 7574 and 7575, and in case of your failure to so appear or to file such affidavit you will be liable to further proceedings according to law; of which the said defendant will also take notice.

.....
Justice of the Peace.

To be served not later than.....
.....J. P.

[R. C. 1905, § 8402; 1897, ch. 82, § 2; R. C. 1899, § 6676b.]

§ 9065. How summons shall be served. The garnishment summons and annexed affidavit shall be served as provided in sections 7570 and 7571, except that the service upon the garnishee must be made not less than seven nor more than fifteen days before the time specified in the garnishment summons for his appearance before the justice, and the service upon the defendant or his attorney must be made within four days after service upon the garnishee; provided, that when a second summons is issued and served by publication or personally outside of the state, it shall not be necessary to serve the garnishment summons or affidavit upon the defendant or his attorney. It shall not be necessary for the plaintiff to serve upon the garnishee any copy of the complaint in the action. When the garnishment summons is served upon the garnishee he may demand his traveling fees and fees for one day's attendance, and if the same be not paid or tendered to him he shall not be obliged to appear and answer or file any affidavit or be otherwise liable as a garnishee in the action. Such fees shall be the same as witness' fees in justice's court. [1909, ch. 132; R. C. 1905, § 8403; 1897, ch. 82, § 3; R. C. 1899, § 6676c.]

§ 9066. Filing of affidavit. If at the time specified in the garnishee summons the garnishee shall appear before the justice in person he shall be examined upon oath concerning his indebtedness or liability to the defendant substantially as outlined in section 7575, except that no disclosure of real property need be made, and the substance of his examination, taken down in writing by the justice and subscribed by the garnishee upon oath, shall be equivalent to and have the same effect as the affidavit provided for in section 7574 or 7576, as the case may be. If the garnishee before the time fixed in the summons for him to appear and answer shall make and file with the justice his affidavit substantially as provided for in section 7574 or 7576, as the case may be, such affidavit shall be in lieu of and equivalent to an appearance and shall have the same effect as provided in such last named sections. [R. C. 1905, § 8404; 1897, ch. 82, § 4; R. C. 1899, § 6676d.]

§ 9067. Garnishment proceedings transferred. Duty of justice. Whenever a change of venue is obtained in any civil action, pending in any justice's court in this state, in which action the plaintiff has proceeded by garnishment and has caused a garnishee summons to be issued, the garnishee proceedings in such action shall be transferred with such original action and such change of venue shall carry with it all proceedings already had therein and any disclosure of the garnishee made therein; and the justice of the peace ordering the transfer shall immediately transmit to the justice of the court to which such action is transferred, all the papers relating to such garnishment proceedings together with a certified transcript from his docket of the proceedings had in such garnishment proceedings; and if at the time such change of venue is obtained, the disclosure of the garnishee in such action has not been fully made, the justice of the court to which the action is transferred, shall upon receipt by him of the papers in the case, serve upon all the parties to the action, including the garnishee, or upon the respective agents or attorneys of said parties for them, a written notice of such transfer specifying the court to which such action has been transferred and the time when such garnishee shall appear and disclose or complete the disclosure in such action; and such notice must be served upon the parties and the garnishee in the manner hereinbefore provided, at least one day before the time fixed for hearing or completing the disclosure of such garnishee. [1907, ch. 83.]

§ 9068. When court may render judgment. If any garnishee having been duly summoned, unless he shall have demanded his witness fees and the same shall not have been tendered, shall fail to appear and answer or to file his affidavit as required by the garnishee summons, the court may render judgment against him as provided in section 7576; provided, however, that a plaintiff electing to take issue upon the affidavit of the garnishee must at the time fixed for appearance and answer, file with the justice a written notice to that effect, whereupon said justice shall, unless the parties to said issue agree to at once go to trial thereon, adjourn said garnishee action for not less than three nor more than ten days, and issue a notice to said garnishee of the time and place to which said action is adjourned, and that said issue will then and there be tried, which said notice shall be served upon said garnishee in the same manner as required for service of summons in justice court, at which adjourned time proceedings may be as provided in section 7578. If a defendant desire to defend the garnishment proceedings upon the ground that the indebtedness or property involved is exempt from execution, or any other ground contemplated in section 7580, such defense may be interposed at the time fixed for the garnishee's appearance; provided, that if said defense is on the ground that such property or indebtedness is exempt from execution, said defendant shall at or before the time fixed for appearance or answer in the garnishee summons, file or cause to be filed in the justice court in which said action is pending a schedule of his personal property made and sworn to as provided in section 7733. The justice may also order an interpleader as provided in section 7582, and adjourn said action for hearing thereof to a date not less than three nor more than ten days after the date fixed for appearance and answer in said garnishee action and issue notice to the claimant described in said section 7582, of the time and place of said adjournment, and that he shall then and there defend his claim, if any, to the money or property held in garnishment, which said notice shall be served upon said claimant in the same manner as required for the service of summons in justice court. [1913, ch. 196; 1909, ch. 131; R. C. 1905, § 8405; 1897, ch. 82, §§ 5, 6, 7; R. C. 1899, § 6676e; 1901, ch. 59.]

Claim for exemptions in garnishment proceeding in justice court must, in order to serve as defense, have been preceded by filing schedule of debtor's personal property. Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243.

ARTICLE 6.— FORCIBLE DETAINER.

§ 9069. Forcible detainer, when maintainable. When a party has by force, intimidation, fraud or stealth entered upon the prior actual possession of real property of another and detains the same.

2. When a party after entering peaceably upon real property turns out by force, threats or menacing conduct the party in possession; or

3. When he by force, or by menaces and threats of violence unlawfully holds and keeps the possession of any real property whether the same was acquired peaceably or otherwise; or

4. When a lessee in person or by subtenant holds over after the termination of his lease or expiration of his term, or fails to pay his rent for three days after the same shall be due; or

5. When a party continues in possession after a sale of the real property under mortgage, execution, order or any judicial process, and after the expiration of the time fixed by law for redemption, or after the execution and delivery of a deed, or after the cancellation and termination of any contract for deed, bond for deed or other instrument for the future conveyance of real estate or equity therein.

6. When a party continues wrongfully in possession after a judgment in partition or after a sale under an order or degree of a county court. [1911, ch. 83: R. C. 1905, § 8406; Jus. C. 1877, § 34; R. C. 1899, § 6677.]

Reply to counterclaim; waiver of objections. Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593.

Three days' notice to quit should be served, and filed with justice, and become part of record. N. W. Loan & Banking Co. v. Jonasen, 12 S. D. 618, 82 N. W. 94.

Lease need not contain clause of re-entry to authorize action for nonpayment of rent. Dakota Hot Springs Co. v. Young, 9 S. D. 577, 70 N. W. 842.

Entry upon the prior actual possession by fraud and stealth. Torrey v. Berke, 11 S. D. 155, 76 N. W. 302; Murry v. Burris, 6 D. 170, 42 N. W. 25.

Failure to pay rent for three days after it becomes due gives right to action for possession under forcible detainer. McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243.

Action of forcible entry and detainer may be maintained by lessor or his assignee or grantee. McManus v. Maloy, 30 S. D. 373, 138 N. W. 963.

On forcible entry and detainer as exclusive remedy for acquiring possession of land where relation of landlord and tenant exists. Ward v. Brown, 28 S. D. 375, 133 N. W. 699.

§ 9070. Notice to quit. In all cases arising under subdivisions 4, 5 and 6 of the preceding section, three days' written notice to quit must be given to the lessee, subtenant or party in possession before proceedings can be instituted, and may be served and returned in like manner as a summons is served and returned. [R. C. 1905, § 8407; Jus. C. 1877, § 35; R. C. 1899, § 6678.]

§ 9071. Legal representative may bring action. The legal representative of a person who might have been plaintiff if alive may bring this action after his death. [R. C. 1905, § 8408; Jus. C. 1877, § 36; R. C. 1899, § 6679.]

§ 9072. No joinder of action. Counterclaim. An action under the provisions of this article cannot be brought in connection with any other except for rents and profits accrued or damages arising by reason of the defendant's possession. No counterclaim can be interposed except as a set-off to a demand made for damages or rents and profits. [R. C. 1905, § 8409; 1881, ch. 87, § 2; R. C. 1895, § 6680.]

No counterclaim can be pleaded, except as provided by statute. Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593.

Rent may be recovered in action of forcible detainer. McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243.

Allegations of wrongful possession of land do not set forth cause of action for forcible entry and detainer. Ottow v. Friese, 20 N. D. 86, 126 N. W. 503.

ARTICLE 7.— TRIAL OF ISSUES OF FACT.

§ 9073. Issues of fact. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; or,

2. Upon new matter in the answer not admitted in the reply; or,

3. Upon new matter in the reply. [R. C. 1905, § 8410; Jus. C. 1877, § 51; R. C. 1895, § 6681.]

§ 9074. Issue of fact, how tried. Issues of fact must be tried by jury, unless a jury is waived. When a jury is waived, the court must try the issues, hear the allegations and proofs of the respective parties and render judgment thereon. [R. C. 1905, § 8411; Jus. C. 1877, § 53; R. C. 1895, § 6682.]

§ 9075. Trial, commences when. Subject to the provisions of article 2 of this chapter the trial must commence as soon as the issues are joined or as soon as the jury is impaneled, and continue until concluded without an intermission for more than twenty-four hours at any one time; if either party fails to appear at the time fixed for the trial, it may proceed at the request of the adverse party. [R. C. 1905, § 8412; Jus. C. 1877, § 55; R. C. 1895, § 6683.]

When summons is returnable on election day, jurisdiction cannot be acquired by adjourning case to subsequent day. Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543.

Justice may hold case open for twenty-four hours, to consider questions submitted. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605.

Justice of peace authorized to postpone trial after its commencement on good cause shown. Lyman-Eliel Drug Co. v. Cooke, 12 N. D. 88, 94 N. W. 1041.

§ 9076. Jury, how waived. A jury is waived:

1. If neither party before the commencement of the trial demands a jury as prescribed in the next section.

2. If either party fails to appear at the time fixed for the trial. [R. C. 1905, § 8413; Jus. C. 1877, § 54; R. C. 1895, § 6684.]

§ 9077. Jury, deposit for. When an issue of fact is joined, either party may demand a trial by jury on depositing with the justice a sum sufficient to pay the jurors their fees for one day's attendance. [R. C. 1905, § 8414; Jus. C. 1877, § 56; 1879, ch. 33, § 1; R. C. 1895, § 6685.]

§ 9078. Jury, how composed. The jury shall be composed of six residents of the county having the qualifications of jurors or of any number less than six if the parties so agree, who shall be selected, summoned and impaneled as hereinafter prescribed. [R. C. 1905, § 8415; Jus. C. 1877, § 56; 1879, ch. 33, § 1; R. C. 1895, § 6686.]

§ 9079. Jury, how drawn. Unless the persons to be summoned are named in the agreement of the parties, the justice shall write down the names of eighteen residents of the county competent to sit as jurors, and from the list so prepared, the parties alternately, beginning with the party demanding the jury, shall strike out one name each until there remains only the number required to constitute the jury. If either party refuses to strike out a name the justice shall act for him. The justice shall thereupon issue his venire to the sheriff or any constable of the county commanding him to summon the persons so selected or agreed upon, as the case may be, to appear forthwith or at a fixed time and place stated therein, to serve as jurors in the trial of the action. [R. C. 1905, § 8416; Jus. C. 1877, § 56; 1879, ch. 33, § 1; R. C. 1895, § 6687.]

§ 9080. Jury, venire how served. The officer shall, without unnecessary delay, serve the venire upon each of the persons therein named by reading the same to him and shall state in his return the name of each person served and the name of each person who cannot be found. A person disobeying a venire may be compelled to appear or be punished for a failure to appear in the same manner as a witness who disobeys a subpoena. [R. C. 1905, § 8417; R. C. 1895, § 6688.]

§ 9081. Talesmen. If the persons so summoned do not all appear at the proper time, the justice must require the absentees to be brought in or cause others to be substituted or if any person appearing as a juror is excused for legal cause before the jurors are sworn to try the issue, others must be substituted until the required number of jurors is obtained. The persons so required must be selected and summoned forthwith as hereinbefore prescribed

from a list containing three times as many names as there are jurors to be substituted. [R. C. 1905, § 8418; Jus. C. 1877, § 57; R. C. 1895, § 6689.]

§ 9082. Jurors, examination of. Upon the appearance of a sufficient number, the jurors must at the request of either party be first sworn to answer truly all questions that may be propounded to them by the court or by the parties as to their qualifications to sit as jurors in the trial of the action and may thereupon be examined accordingly. [R. C. 1905, § 8419; Jus. C. 1877, § 57; R. C. 1895, § 6690.]

§ 9083. Challenges, how tried. Challenges to individual jurors are allowed for the same causes as in a civil action in the district court, but must be taken before the jurors are sworn to try the issue, and every challenge must be tried in a summary manner by the justice on the examination of the juror or other witnesses under oath. [R. C. 1905, § 8420; Jus. C. 1877, § 57; R. C. 1895, § 6691.]

§ 9084. Oath of jury. As soon as a sufficient number are selected and accepted, the justice shall administer to the jurors the following oath: "You, and each of you, do solemnly swear (or affirm as the case may be) that you will well and truly try the matters in issue between the plaintiff and defendant and a true verdict render according to the evidence." [R. C. 1905, § 8421; Jus. C. 1877, § 59; R. C. 1895, § 6692.]

§ 9085. Duty of jury. After the jurors are sworn to try the issue, they must sit together and hear the allegations and proofs of the parties, which must be delivered in public in the presence of the justice and as nearly as may be in accordance with the practice in the district court. [R. C. 1905, § 8422; Jus. C. 1877, § 119; R. C. 1895, § 6693.]

§ 9086. Jury, when discharged. The jury cannot be discharged after they are sworn until they have agreed upon and returned their verdict, unless for good cause the court sooner discharges them. [R. C. 1905, § 8423; Jus. C. 1877, § 124; R. C. 1895, § 6694.]

§ 9087. Questions of law, how decided. The justice must decide all questions of law arising in the progress of the trial, but must not instruct the jury upon the law of the case, nor express an opinion as to any matters of fact in controversy therein. [R. C. 1905, § 8424; Jus. C. 1877, § 120; R. C. 1895, § 6695.]

§ 9088. Oath to officer. After hearing the proofs and allegations, the jury may decide in court or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect:

You do swear that you will keep this jury together in some quiet and convenient place; that you will not permit any person to speak to them nor speak to them yourself unless by order of the court, or except to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed or when ordered by the court. [R. C. 1905, § 8425; Jus. C. 1877, § 121; R. C. 1895, § 6696.]

§ 9089. Verdict of jury. The verdict of the jury must be in writing, and be signed by all the jurors or by one of them as foreman. When they have agreed upon their verdict they must render it publicly to the justice and it must be entered in the docket immediately, but if the verdict is not in proper form, the justice may inform the jury accordingly and require them to correct the same. [R. C. 1905, § 8426; Jus. C. 1877, § 122; R. C. 1895, § 6697.]

"Immediately" is construed to mean within reasonable time. Peterson v. Hansen, 15 N. D. 198, 107 N. W. 528.

§ 9090. Verdict, form of. The verdict shall be as follows:

1. In an action to recover possession of personal property, to the effect that the jury find the plaintiff or defendant entitled to possession or if not in possession, to a delivery of the property therein described, specifying its value article by article and to damages, if claimed for its detention, in a sum therein stated as assessed by the jury. If the finding is in favor of the plaintiff as

to part of the property, the verdict shall contain a like finding in favor of the defendant as to the residue.

2. In an action of forcible detainer when in favor of the plaintiff, to the effect that he is entitled to a delivery of possession and to rents, profits and damages if claimed, in a sum assessed by the jury. If in favor of the defendant a finding to that effect is sufficient.

3. In other actions, when in favor of the plaintiff or plaintiffs to the effect that the jury find for him or them and assess the amount of the recovery at a sum therein stated in dollars and cents; or if there are several defendants, to the effect that the jury find for the plaintiff and assess his recovery at a sum stated as against all or against one or more of the defendants by name as the case requires. When in favor of the defendant or one of several defendants, to the effect that the jury find for him or them designating each by name if necessary, and assessing the amount of his recovery, if determined in his favor, upon a counterclaim.

4. When the plaintiff is entitled to satisfaction of the amount expressed in the verdict out of personal property of the defendant by virtue of a mortgage or other lien, the verdict shall contain a further finding to that effect with a particular description of the property. [R. C. 1905, § 8427; R. C. 1895, § 6698.]

As to sufficiency of verdict in action in claim and delivery. Johnson Bros. v. Glaspey, 16 N. D. 335, 113 N. W. 602.

§ 9091. Proceedings when jury disagree. If the jurors are discharged without rendering a verdict or because they cannot agree, the court shall proceed again to trial as in the first instance until a verdict is rendered. [R. C. 1905, § 8428; Jus. C. 1877, § 125; R. C. 1895, § 6699.]

Justice may set case for retrial where jury's verdict fails to find on all material issues. Johnson Bros. v. Glaspey, 16 N. D. 335, 113 N. W. 602.

§ 9092. Motion in arrest of judgment not entertained. No motion in arrest of judgment or to set aside a verdict can be entertained in a justice's court. [R. C. 1905, § 8429; R. C. 1895, § 6700.]

Article 8.—Judgment and Costs.

§ 9093. Judgment by confession. Judgments upon confession may be entered in any justice's court specified in the confession. [R. C. 1905, § 8430; Jus. C. 1877, § 62; R. C. 1899, § 6701.]

§ 9094. Judgment by default. When the defendant fails to appear and answer or demur at the time specified in the summons or within one hour thereafter, then upon proof of service of the summons the following proceedings must be had:

1. If the action is based upon a contract and is for the recovery of money or damages only, the court must render judgment in favor of plaintiff for the sum specified in the summons.

2. In all other actions the court must hear the evidence offered by the plaintiff and must render judgment in his favor for such a sum not exceeding the amount stated in the summons, as appears by such evidence to be just. [R. C. 1905, § 8431; Jus. C. 1877, § 42; R. C. 1899, § 6702.]

Appeal may be taken from default judgment. Harris v. Watkins, 5 D. 374, 40 N. W. 536.

§ 9095. Judgment in certain cases. In the following cases judgment must be rendered in favor of the plaintiff in like manner as upon failure of the defendant to answer or demur:

1. When the complaint has been amended and the defendant fails to answer it as amended within the time allowed by the court.

2. When a demurrer to the complaint has been overruled and the defendant fails to answer forthwith.

3. When a demurrer to the answer has been sustained and the defendant fails to amend the answer within the time allowed by the court. [R. C. 1905, § 8432; Jus. C. 1877, § 43; R. C. 1895, § 6703.]

§ 9096. Judgment affecting personal property. When service of the summons has been made under the provisions of section 9027 of this code and the defendant has not appeared, no money judgment shall be rendered, but the court shall find the amount due and the particular property liable therefor and render judgment for the satisfaction of said amount out of said property by execution. [R. C. 1905, § 8433; R. C. 1895, § 6704.]

§ 9097. Judgment of dismissal. Judgment that the action be dismissed without prejudice to another action may be entered with costs to the defendant in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted

2. When he fails to appear at the time specified in the summons or to which the action has been postponed or within one hour thereafter.

3. When a demurrer to the complaint has been sustained and the plaintiff fails to amend within the time allowed by the court.

4. When it appears at the trial that the action is brought in the wrong county. [R. C. 1905, § 8434; Jus. C. 1877, § 63; R. C. 1895, § 6705.]

A complaint of intervention dismissable on intervenor's application. Schaetzel v. City of Huron, 6 S. D. 134, 60 N. W. 741.

Action to be dismissed on motion on failure of plaintiff to appear. Plano Mfg. Co. v. Stokke, 9 N. D. 40, 81 N. W. 70: Dewey v. Feiler, 11 S. D. 632, 80 N. W. 130; Connor v. Knott, 10 S. D. 384, 73 N. W. 264.

§ 9098. Judgment, how set aside. The court may relieve either party from a judgment taken against him by reason of his failure to appear or plead or amend. Application for such relief must be made within thirty days after the entry of such judgment upon affidavit showing good cause therefor and after three days' notice to the opposite party. If the application is granted, the court shall set aside the judgment and fix a new day for further proceedings in the action and cause notice thereof to be given to the other party if he is not present at the hearing, which notice may be served either personally or by mail. The court may in its discretion before setting aside the judgment require the applicant to pay the costs of the action which have already accrued. [R. C. 1905, § 8435; R. C. 1895, § 6706.]

On a proper showing, judgment taken by default may be set aside. Perritt v. Owen, 7 S. D. 454, 64 N. W. 526.

§ 9099. Judgment, when entered. When a trial by jury has been had, judgment must be entered by the justice at once in conformity with the verdict. [R. C. 1905, § 8436; Jus. C. 1877, § 64; R. C. 1899, § 6707.]

Judgment to be entered at once on return of verdict of jury. Re Dance, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768; Sluga v. Walker, 9 N. D. 103, 81 N. W. 282.

Appeal will lie without formal entry of judgment. Porter v. Parker, 4 D. 397, 33 N. W. 70.

Justices of peace have reasonable time within which to enter judgment on receipt of verdict. Peterson v. Hansen, 15 N. D. 198, 107 N. W. 528.

§ 9100. Judgment by court, when entered. When the trial is by the court, judgment must be entered at the close of the trial. [R. C. 1905, § 8437; Jus. C. 1877, § 65; R. C. 1899, § 6708.]

§ 9101. Excess of judgment remitted. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess and judgment may be rendered for the residue. [R. C. 1905, § 8438; Jus. C. 1877, § 67; R. C. 1899, § 6709.]

§ 9102. Judgment in claim and delivery. In actions to recover the possession of personal property the judgment must be entered substantially in the form required by section 7682, code of civil procedure. [R. C. 1905, § 8439; Jus. C. 1877, § 66; R. C. 1899, § 6710.]

§ 9103. Judgment in attachment. The judgment in an action, in which specific personal property is held liable to the plaintiff's demand by reason of a lien or the levy of an attachment thereon, shall state what particular prop-

erty is liable, and why, and the judgment operates as a lien on the property so designated. [R. C. 1905, § 8440; R. C. 1895, § 6711.]

§ 9104. Judgment in forcible detainer. A judgment in favor of the plaintiff in an action of forcible detainer shall be for delivery of possession to the plaintiff and for the amount of rents and profits and damages found in his favor when claimed by the complaint. [R. C. 1905, § 8441; Jus. C. 1877, § 39; 1881, ch. 87, § 1; R. C. 1895, § 6712.]

§ 9105. Offer of judgment. Costs. If the defendant at any time before the trial offers in writing to allow judgment to be taken against him for a specific sum, the plaintiff may upon producing and filing such offer with the justice immediately have judgment therefor with the costs then accrued, but if he does not accept such offer before the trial and fails to recover in the action a sum greater than the offer, he cannot recover costs, but costs must be adjudged against him and if he recovers, be deducted from his recovery. The offer and failure to accept it cannot be given in evidence nor affect the recovery otherwise than as to costs. [R. C. 1905, § 8442; Jus. C. 1877, § 68; R. C. 1895, § 6713.]

§ 9106. Costs taxed. The justice must tax and include in the judgment the costs allowed by law to the prevailing party. [R. C. 1905, § 8443; Jus. C. 1877, § 69; R. C. 1899, § 6714.]

As to including costs in judgment. Haag v. Burns, 22 S. D. 51, 115 N. W. 104.

§ 9107. Costs, when not allowed. A party cannot recover as costs any expenses by him incurred for the service of summons or other process by any person not an officer. The party demanding a jury cannot recover any costs thereby incurred:

1. In an action for the recovery of specific personal property when the value of the property which he recovers is less than twenty-five dollars.

2. In any other action if he is the plaintiff and recovers judgment for less than twenty-five dollars exclusive of costs, or if he is the defendant and the sum which he recovers if any exclusive of costs, together with the sum demanded by the plaintiff is less than twenty-five dollars. But this subdivision does not apply to an action of forcible detainer. [R. C. 1905, § 8444; R. C. 1895, § 6715.]

§ 9108. Attorney's fees. When the party entitled to costs has appeared in the action by an attorney duly authorized to practice in the courts of this state, but not otherwise, there shall be allowed for his reimbursement and included in the costs a sum to be ascertained as follows:

1. In an action of forcible detainer, to either party recovering judgment, ten dollars.

2. In any other action, to the plaintiff if he recovers twenty-five dollars or less, a sum equal to twenty per cent of the judgment exclusive of costs; if he recovers more than twenty-five dollars and not more than fifty dollars, five dollars; if he recovers more than fifty dollars, a sum equal to ten per cent of the judgment exclusive of costs; or,

3. The defendant recovering judgment, a sum determined in like manner upon the judgment demanded by the plaintiff.

4. In an action for the recovery of personal property the value of the property as determined in the action shall be deemed part of the judgment recovered or demanded for the purposes of this section. [R. C. 1905, § 8445; 1881, ch. 18, § 1; R. C. 1895, § 6716.]

Attorney's fee within "costs," which must be paid when justice sets aside judgment by default. Erpenbach v. Ry. Co., 8 S. D. 575, 67 N. W. 606.

§ 9109. Abstract of judgment. Form. Fee. The justice, on demand of a party recovering judgment and payment of a fee of one dollar, must deliver to him a certified abstract of the judgment to be filed in the district court, if there is outstanding no execution issued thereon. A minute of the delivery of the abstract must be entered in the docket and thereafter no execution

shall be issued by the justice. Such abstract may be in the following form, filling blanks according to the facts:

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

In Justice Court,

C. D., plaintiff,
vs.
E. F., defendant.

Before ....., J. P.

Judgment entered (giving date thereof) in favor of plaintiff (or defendant) and against defendant (or plaintiff) for ..... dollars, and costs taxed at ..... dollars, of which ..... dollars remains unsatisfied. I certify that the foregoing is a true and correct abstract of the judgment in said action (as appears upon the docket of said justice now in my custody).

(Date of certificate and official signature of justice.)

[R. C. 1905, § 8446; Jus. C. 1877, § 70; R. C. 1895, § 6717.]

Filing transcript in district court does not make it a judgment of that court to extent that jurisdiction of justice is presumed. Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292.

As to form of abstract of justice's judgment. Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390.

Issuance of transcript to district court as terminating power of justice to issue execution. Holton v. Schmarback, 15 N. D. 38, 106 N. W. 36.

Article 9.—Stay of Execution.

§ 9110. Stay of execution. Execution upon a judgment for money only may be stayed in the manner hereinafter provided for a period of time from and after the date of the judgment, determined as follows:

1. For two months if the amount of the judgment including costs, does not exceed fifty dollars.
2. For four months if the amount of the judgment including costs, exceeds fifty and does not exceed one hundred dollars.
3. For six months if the amount of the judgment including costs, exceeds one hundred dollars.

But no stay is allowed under the provisions of this section without the consent of the owner and holder of the judgment when it is rendered for wages of a mechanic or laborer or for moneys received in a fiduciary capacity or for breach of any official duty or against a corporation or awards execution against specific personal property. [R. C. 1905, § 8447; R. C. 1895, § 6718.]

§ 9111. Stay, how effected. The stay is effected by an undertaking on the part of the judgment defendant entered on the docket of the justice and signed by one or more sufficient sureties of the county having the qualifications of bail in civil actions and justifying thereto to the effect that in consideration of the stay allowed by law, each acknowledges himself indebted to the plaintiff by virtue of the judgment for the amount of the same including costs, and undertakes that payment thereof will be made at or before the expiration of such stay. Such stay operates to suspend the execution of the judgment if executed within ten days after the rendition thereof, but not otherwise. [R. C. 1905, § 8448; R. C. 1895, § 6719.]

§ 9112. Stay recalls execution. When a stay is effected, if execution has been issued, the justice must deliver to the judgment debtor an order directing the officer holding the execution to stay all proceedings on the same. On presentation of the order and payment of his fees accrued on the execution the officer must suspend proceedings accordingly, and deliver or relinquish to the debtor all property levied on or money collected under or by virtue thereof; but if his fees are not paid, he may retain so much of the property or money as may be necessary to satisfy the same. [R. C. 1905, § 8449; R. C. 1895, § 6720.]

§ 9113. Execution after stay. If the judgment is not satisfied in full at the expiration of the stay, execution shall issue against the judgment debtor

and the surety in said undertaking, describing him as such, with the same effect as though the judgment was against all. The officer receiving the execution shall certify in his return the amount if any collected or received from the surety; and thereupon after five days' notice to the principal debtor the surety may, on motion, have judgment entered by the justice in his favor for the amount so certified against said debtor, unless he files an affidavit stating that he has a valid defense or counterclaim against the surety making the application, but no judgment shall be so entered after the expiration of three months from the return of the execution. [R. C. 1905, § 8450; R. C. 1895, § 6721.]

§ 9114. No appeal, when. A party cannot appeal after taking a stay of execution as herein provided. [R. C. 1905, § 8451; R. C. 1895, § 6722.]

Article 10.— Execution.

§ 9115. Execution, when issued. The judgment of a justice's court is enforced by process of execution. When the process is not stayed or suspended by any provision of this code, execution may issue at any time within five years after entry of judgment, but not afterwards, on application of the party in whose favor it was rendered or his legal representative to the justice who entered the same or his successor in office, or other justice who has custody of the docket. [R. C. 1905, § 8452; Jus. C. 1877, § 71; R. C. 1895, § 6723.]

Transcripting of judgment entered in justice court is not prohibited after five years and within ten years. Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390.

Transcript must be filed in circuit court within five years and filing does not extend time for issuing execution. Phillips v. Norton, 18 S. D. 530, 101 N. W. 727.

Life of justice's court judgment is not limited to five years. Holton v. Schmarback, 15 N. D. 38, 106 N. W. 36.

§ 9116. Execution for money. No execution shall be issued upon a judgment for the recovery of money until after the expiration of ten days from the time of the entry of judgment, unless there is filed with the justice before the issuance of the execution an affidavit made by the judgment creditor, his agent or attorney, stating that unless an execution is issued before the expiration of such ten days the judgment creditor is in danger of losing the amount of his claim. [R. C. 1905, § 8453; R. C. 1895, § 6724.]

§ 9117. Execution, requisites of. The execution must be directed to the sheriff or any constable within the county and must be subscribed by the justice and bear the date of its delivery to the officer. It must intelligibly refer to the judgment, stating the names of the parties thereto, in whose favor, against whom, the time when, the county where and the name of the justice before whom the judgment was rendered; and it must be made returnable to the justice within thirty days after its date. [R. C. 1905, § 8454; Jus. C. 1877, § 72; R. C. 1899, § 6725.]

§ 9118. Execution, contents of. An execution issued upon a judgment for a sum of money must state in the body thereof the sum actually due on the judgment and must substantially require the officer to satisfy the same, together with interest and costs out of the personal property of the debtor, and bring the money before the justice by the return day of the execution. [R. C. 1905, § 8455; Jus. C. 1877, § 73; R. C. 1895, § 6726.]

§ 9119. Execution against exempt property. When judgment is rendered for any cause appearing therein upon which the exemptions allowed by law are expressly restricted or prohibited, the execution shall state the facts accordingly; and when the judgment designates personal property specifically liable thereto, the execution shall contain a description of such property. [R. C. 1905, § 8456; R. C. 1895, § 6727.]

§ 9120. Execution for personal property. An execution issued upon a judgment for the delivery of the possession of personal property shall substantially require the officer to deliver the possession of the same, particularly

describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs or damages recovered by the judgment out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein, if a delivery cannot be had. [R. C. 1905, § 8457; Jus. C. 1877, § 74; R. C. 1895, § 6728.]

§ 9121. Execution in forcible detainer. An execution issued upon a judgment in favor of the plaintiff in an action of forcible detainer shall substantially require the officer to deliver possession of the premises, particularly describing them, to the plaintiff, and may at the same time require the officer to satisfy the money judgment and costs as in other cases. The process must be executed as respects the delivery of possession only in the day time. [R. C. 1905, § 8458; Jus. C. 1877, § 75; R. C. 1895, § 6729.]

§ 9122. Execution for specific property. An execution, which describes the specific personal property liable for the satisfaction of the judgment, may be levied on other property of the debtor not exempt, when for any cause it appears that full satisfaction cannot be obtained from the property so described. [R. C. 1905, § 8459; R. C. 1895, § 6730.]

§ 9123. Sale of personal property under execution. The provisions of chapter 12 of the code of civil procedure, relating to the levy and sale or delivery of personal property so far as the same are applicable and not inconsistent with the provisions of this chapter, apply to and govern the levy, sale and delivery of personal property under an execution issued by a justice of the peace. And the constable when the execution is directed to him is vested for that purpose with all the powers of the sheriff; provided, that notice shall not be published in a newspaper but shall be given by posting for ten days in five public places within the county, one of which shall be at the office of the justice issuing the execution. [R. C. 1905, § 8460; Jus. C. 1877, § 77; R. C. 1899, § 6731.]

Execution defendant authorizing debtor to pay amount due him to officer is estopped from afterwards claiming money so paid. Bedford v. Kissick, 8 S. D. 586, 67 N. W. 609.

Proviso as to posting notices applies equally to a sheriff when acting under execution from justice court. Fodness v. Juelfs, 13 S. D. 145, 82 N. W. 396.

§ 9124. Renewal of execution. An execution may at the request of the judgment creditor be renewed before the expiration of the time fixed for its return by the word "renewed" written thereon, with the date thereof and subscribed by the justice. Such renewal has the effect of an original issue and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterwards issued. [R. C. 1905, § 8461; Jus. C. 1877, § 76; R. C. 1899, § 6732.]

§ 9125. Justice receives money collected. A justice of the peace must receive all moneys collected by the sheriff, constable or other officer upon any process or order issued from his court and must pay the same over to the parties or persons entitled thereto without delay. [R. C. 1905, § 8462; R. C. 1895, § 6733.]

CHAPTER 4.

CONTEMPTS IN JUSTICES' COURTS.

§ 9126. Contempts, acts constituting. A justice may punish as for contempt, persons guilty of the following acts and no other:

1. Disorderly, contemptuous or insolent behavior toward the justice while holding the court tending to interrupt the due course of a trial or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance in the presence of the justice or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding.

3. Disobedience or resistance to the execution of a lawful order or process made or issued by him.

4. Disobedience to a subpoena duly served or refusing to be sworn or to answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him. [R. C. 1905, § 8463; Jus. C. 1877, § 78; R. C. 1899, § 6734.]

Specific statutory authority of magistrate to punish witness for contempt. 1 L.R.A.(N.S.) 1138.

§ 9127. Trial for contempt. When the act or omission is not committed in the immediate view and presence of the justice, an affidavit alleging the facts may be filed and a warrant of arrest may thereupon issue on which the person accused may be arrested and brought before the justice immediately, when he must be given a reasonable opportunity to employ counsel and excuse or defend against the alleged contempt and after hearing the allegations and proofs the justice may discharge him or adjudge him guilty and direct that he be punished accordingly. [R. C. 1905, § 8464; Jus. C. 1877, § 80; R. C. 1895, § 6735.]

§ 9128. Punishment for contempt. A justice may punish for contempts by fine or imprisonment or both; such fine not to exceed in any case one hundred dollars, and such imprisonment, one day. [R. C. 1905, § 8465; Jus. C. 1877, § 81; R. C. 1899, § 6736.]

§ 9129. Conviction entered on docket. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket. [R. C. 1905, § 8466; Jus. C. 1877, § 82; R. C. 1895, § 6737.]

CHAPTER 5.

PROCEDURE IN CRIMINAL ACTIONS.

§ 9130. Criminal action, how prosecuted. A criminal action, which a justice's court is empowered to hear, try and determine, may be prosecuted in pursuance of the provisions of this chapter upon a complaint entered before any justice of the peace of the county in which the offense is laid. [R. C. 1905, § 8467; Jus. C. 1877, § 104; R. C. 1895, § 6738.]

§ 9131. Proceedings entered on docket. All proceedings in the action must be entered by the justice in his docket as nearly as may be in the manner and form prescribed in a civil action with the modifications prescribed by this chapter. [R. C. 1905, § 8468; Jus. C. 1877, § 109; R. C. 1895, § 6739.]

§ 9132. Complaint. The complaint must be in writing and must state the facts constituting the offense in ordinary and concise language with sufficient certainty and with such particulars of time, place, person and property as will enable a person of common understanding to know what is intended and authorize the court to pronounce judgment. [R. C. 1905, § 8469; Jus. C. 1877, § 106; R. C. 1895, § 6740.]

Sworn complaint is jurisdictional in all stages of prosecution. State v. Walker, 9 S. D. 438, 69 N. W. 586; State v. Wright, 15 S. D. 628, 91 N. W. 311.

§ 9133. Complaint sworn to. The complaint must be sworn to before the justice, who may, if he deems proper, examine the complainant or other persons under oath concerning the grounds of the accusation; and if the justice is satisfied that sufficient grounds exist for the prosecution, he shall issue a warrant for the arrest of the defendant. [R. C. 1905, § 8470; Jus. C. 1877, § 107; R. C. 1895, § 6741.]

§ 9134. Complaint, form of. A complaint may be substantially in the following form: State of North Dakota, county of (naming it), in justice court, before (name of justice). The state of North Dakota against (name of accused). Complaint. (Name of complainant), being first duly sworn, says that on the (time of offense), at said county, the above named defendant did

(here state the offense), against the peace and dignity of the state of North Dakota. Wherefore complainant prays that said defendant may be arrested and dealt with according to law. (Signature of complainant.) Subscribed and sworn to before me (giving date). (Official signature of the justice.) [R. C. 1905, § 8471; R. C. 1895, § 6742.]

§ 9135. Warrant, form of. A warrant may be substantially in the following form, filling blanks according to the facts: The state of North Dakota to the sheriff or any constable of ..... county. Complaint upon oath having been made before me (name of justice), a justice of the peace of said county, by (name of complainant), accusing (name of defendant) of the commission of a public offense, to wit: (Here designate the offense by name or general description); you are therefore commanded to arrest said (name of defendant) forthwith, and bring him before me at (stating the place), there to be dealt with according to law. Witness my hand this ..... day of ....., 19... (Official signature of the justice.) [R. C. 1905, § 8472; Jus. C. 1877, § 107; R. C. 1895, § 6743.]

§ 9136. Duty of officer. An officer who receives a warrant must execute the same with diligence by taking the defendant into his custody and bringing him without unnecessary delay before the justice who issued the same. [R. C. 1905, § 8473; R. C. 1895, § 6744.]

§ 9137. Warrant, how served. The warrant may be served in any other county in the manner prescribed by articles 5 and 6 of chapter 6 of the code of criminal procedure. [R. C. 1905, § 8474; Jus. C. 1877, § 108; R. C. 1895, § 6745.]

§ 9138. Counsel for defendant. When the defendant is brought before the justice, he must be allowed a reasonable time and opportunity to procure counsel. [R. C. 1905, § 8475; R. C. 1895, § 6746.]

§ 9139. Postponement of trial. A reasonable postponement of the hearing or trial may also be ordered at any time to enable the complainant or defendant to procure the attendance or testimony of a witness or for any other good cause. [R. C. 1905, § 8476; Jus. C. 1877, § 114; R. C. 1895, § 6747.]

§ 9140. Bail. The defendant at any time before conviction may be admitted to bail by giving an undertaking with sufficient surety in an amount to be fixed by the justice for his appearance before the justice to answer the complaint. [R. C. 1905, § 8477; Jus. C. 1877, § 134; R. C. 1895, § 6748.]

§ 9141. Change of venue. When the defendant or his attorney, or the state, by the state's attorney, or any other attorney acting for the state, before the trial commences files an affidavit in writing stating that he has reason to believe and does believe that a fair and impartial trial of the action cannot be had before the justice about to try the same by reason of the bias or prejudice of said justice, the action must be transferred to a justice of the county agreed upon by or in behalf of the parties, or if there is no such agreement, to the next nearest justice within the county and an order must be made transferring the same accordingly. But the place of trial cannot be changed more than once by each party under the provisions of this section. [1909, ch. 180; R. C. 1905, § 8478; 1887, ch. 82, § 1; 1891, ch. 81, § 1; R. C. 1895, § 6749.]

Statute is mandatory; upon filing of proper affidavit justice must transfer action to another justice. State v. Weltner, 7 N. D. 522, 75 N. W. 779.

Failure of transcript transmitting case to second justice to show that parties had not otherwise agreed on justice, will not affect proceedings. State v. Carlisle, 22 S. D. 529, 118 N. W. 1033.

One charged with violation of city ordinance is entitled to change of venue on account of prejudice of police justice. Sioux Falls v. Neeb, 20 S. D. 244, 105 N. W. 735.

§ 9142. Duty of justice when venue changed. When a change of the place of trial is ordered, the justice must forthwith attach to the original papers a certified copy of his docket entries in the action and deliver the same to an officer, who must execute the order without delay by taking the defendant

before the justice named and delivering to him the papers so received. [R. C. 1905, § 8479; Jus. C. 1877, § 113; R. C. 1895, § 6750.]

§ 9143. Jurisdiction of justice. The justice to whom the action is transferred as provided in the last section, must proceed with the trial in the same manner as in an action originally commenced before him. [R. C. 1905, § 8480; Jus. C. 1877, § 113; R. C. 1895, § 6751.]

§ 9144. Complaint to be read. Before the trial commences the complaint must be distinctly read to the defendant and he must be asked if he is designated therein by his right name and be required to plead. [R. C. 1905, § 8481; R. C. 1895, § 6752.]

§ 9145. Name of defendant. If the defendant objects that he is wrongly named in the complaint and gives his right name, the proceedings shall be amended accordingly. If he does not give his right name, he is thereafter precluded from making any objection on the ground that he is not designated by his right name. [R. C. 1905, § 8482; R. C. 1895, § 6753.]

§ 9146. Plea, oral and entered on docket. The defendant may make the same pleas as to an information or indictment. His plea may be oral and must be entered in the docket. If he refuses to plead, a plea of "not guilty" must be entered. [R. C. 1905, § 8483; Jus. C. 1877, § 110; R. C. 1895, § 6754.]

§ 9147. Plea of guilty. Duty of justice. If the defendant pleads guilty, the court before accepting the plea may examine witnesses to ascertain the gravity of the offense; and if it appears from the testimony that the offense committed is of a higher grade than that charged in the complaint, the court may refuse to accept the plea and direct a complaint to be filed charging the offense accordingly and proceed with a preliminary examination of the defendant as prescribed in the code of criminal procedure. [R. C. 1905, § 8484; Jus. C. 1877, § 110; R. C. 1895, § 6755.]

§ 9148. Issue, when tried. When the defendant makes any plea other than a plea of guilty, the issue shall be tried by the court unless a jury is demanded; but if either party demands a jury before the court hears any testimony, the issue must be tried by a jury of twelve persons. [R. C. 1905, § 8485; Jus. C. 1877, § 111; R. C. 1895, § 6756.]

§ 9149. Jury, how formed. The provisions of article 7 of chapter 3 of this code apply to the formation of the jury and the conduct of the trial except as otherwise prescribed by this chapter. [R. C. 1905, § 8486; Jus. C. 1877, § 116; R. C. 1895, § 6757.]

§ 9150. Challenges. Challenges may be taken by either party to individual jurors for the same causes as on a trial in the district court for a criminal offense. [R. C. 1905, § 8487; Jus. C. 1877, § 117; R. C. 1895, § 6758.]

§ 9151. Oath to jury. The court must administer to the jury the following oath: You do swear (or affirm) that you will well and truly try this issue between the state of North Dakota and A. B., the defendant, and a true verdict render according to the evidence. So help you God. [R. C. 1905, § 8488; Jus. C. 1877, § 118; R. C. 1895, § 6759.]

§ 9152. Defendant present. The defendant must be personally present during the progress of the trial. [R. C. 1905, § 8489; Jus. C. 1877, § 115; R. C. 1899, § 6760.]

§ 9153. Verdict of jury. The verdict of the jury on a plea of not guilty must be to the effect that the jury find the defendant "guilty," or "not guilty," as the case may be. On any other plea the verdict must be "for the state," or "for the defendant." [R. C. 1905, § 8490; Jus. C. 1877, § 122; R. C. 1895, § 6761.]

§ 9154. Verdict, when several defendants. When several defendants are tried together, 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. [R. C. 1905, § 8491; Jus. C. 1877, § 123; R. C. 1895, § 6762.]

§ 9155. Verdict entered. When the verdict is received the court must immediately render judgment thereon and enter the same in the docket. [R. C. 1905, § 8492; Jus. C. 1877, § 129; R. C. 1895, § 6763.]

§ 9156. Defendant discharged. When the defendant is acquitted by the court or by a verdict of " not guilty " or, " for the defendant," a judgment of acquittal must be rendered and if the defendant is not detained on legal process for any other cause, he must be immediately discharged. [R. C. 1905, § 8493; Jus. C. 1877, §§ 128, 130; R. C. 1895, § 6764.]

§ 9157. Conviction of defendant. Judgment. When the defendant is convicted by the court or by a verdict of " guilty " or a verdict " for the state " which does not also find the defendant not guilty, the court shall render judgment that he be punished by a fine or by imprisonment in the county jail or by both fine and imprisonment, specifying the amount of the fine or time of imprisonment. A judgment of fine only may also direct that the defendant be imprisoned until the same is satisfied. In a case in which the court has a discretion as to the extent of the punishment, it may, upon the suggestion of either party before rendering judgment, hear testimony as to circumstances proper to be considered in aggravation or mitigation of punishment. [R. C. 1905, § 8494; Jus. C. 1877, § 126; R. C. 1899, § 6765.]

§ 9158. Right of appeal. If the defendant is convicted, the justice when he renders judgment must inform him of his right to appeal and prescribe the amount in which he may give bail for his appearance in the district court in case of an appeal. [R. C. 1905, § 8495; R. C. 1895, § 6766.]

§ 9159. Judgment, how enforced. A judgment, which imposes a fine without directing that the defendant be imprisoned until the same is satisfied, may be enforced in the same manner as a judgment in a civil action and execution shall issue accordingly at the request of the state's attorney. [R. C. 1905, § 8496; Jus. C. 1877, § 127; R. C. 1895, § 6767.]

Defendant cannot be imprisoned for costs. Re Lackery, 6 S. D. 526, 62 N. W. 134.

§ 9160. Judgment of imprisonment. A judgment of imprisonment must be executed by delivering the defendant into the custody of the sheriff or other officer in charge of the county jail, who shall safely keep him therein until the expiration of the time specified in the judgment. A judgment of fine which directs that the defendant be imprisoned until the fine is paid must be executed in like manner except that the time of imprisonment shall be at the rate of one day for each two dollars of the fine and the defendant must be discharged on payment of the fine. [R. C. 1905, § 8497; Jus. C. 1877, § 132; R. C. 1895, § 6768.]

§ 9161. Certified copy of judgment. A copy of the judgment duly certified by the justice is a sufficient warrant for the doing of every act necessary or proper in the due execution thereof as prescribed in the preceding section by an officer receiving the same. The officer shall upon discharging the defendant return such copy to the justice with an account of his doings indorsed thereon and must at the same time pay over to the justice all money which he may have received from the defendant in payment of the fine. [R. C. 1905, § 8498; Jus. C. 1877, § 131; R. C. 1895, § 6769.]

§ 9162. Fines paid. Duty of justice. When the fine is paid, the justice must apply the money in payment of the legal costs and expenses of the prosecution and pay over the residue if any to the county treasurer. [R. C 1905, § 8499; Jus. C. 1877, § 133; 1885, ch. 111, § 2; R. C. 1895, § 6770.]

CHAPTER 6.

APPEALS.

ARTICLE 1.— APPEALS IN CIVIL ACTIONS.

§ 9163. Appeals to district court. Any party dissatisfied with a judgment rendered in a civil action in a justice's court, whether the same was rendered on default or after a trial, may appeal therefrom to the district court of the county or subdivision at any time within thirty days after the rendition of the judgment. The appeal is taken by serving the notice of appeal on the adverse party or his attorney and by filing the notice of appeal together with the undertaking required by law with the clerk of the district court of the county in which the appeal was taken; provided, however, that if at the time the service of the notice of appeal and undertaking as provided for in this chapter, the party is not within the state, or cannot conveniently be found and such fact appears by the return of the sheriff filed with the justice, and has not appeared by attorney, the service of such notice of appeal and undertaking may be made upon the justice rendering the judgment. [R. C. 1905, § 8500; R. C. 1895, § 6771; 1905, ch. 81.]

Notice of appeal and service of same. Houser v. Nolting, 11 S. D. 483, 78 N. W. 955; Sorenson v. Donahoe, 11 S. D. 603, 79 N. W. 998; Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31; Rudolph v. Herman, 2 S. D. 399, 50 N. W. 833; Purcell v. Booth, 6 D. 17, 50 N. W. 196; Karr v. Ry. Co., 6 D. 14, 50 N. W. 125.

Appeal may be taken from default judgment. Wimsey v. McAdams, 12 S. D. 509, 81 N. W. 884; Perrott v. Owen, 7 S. D. 454, 64 N. W. 526.

Papers may be served on adverse party instead of his attorney on appeal from justice's court. Richmire v. Andrews & G. Elevator Co., 11 N. D. 453, 92 N. W. 819.

As to thirty days being period for taking appeal from justice's court. Lough v. White, 14 N. D. 353, 104 N. W. 518.

Filing of undertaking within thirty days after justice court judgment is prerequisite to transfer jurisdiction on appeal. Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616.

Undertaking on appeal need not be approved and filed before service on appellee, nor before clerk's approval of undertaking is served. Eldridge v. Knight, 11 N. D. 552, 93 N. W. 860.

Use of word "appealed" instead of "appeals" in notice of appeal will not affect court's jurisdiction. Haag v. Burns, 22 S. D. 51, 115 N. W. 104.

Appellant must serve undertaking with pleading, in order to transfer jurisdiction to district court, from default judgment in justice's court. Aetna Mercantile Co. v. Groseth, 20 N. D. 137, 127 N. W. 718.

Order of justice of peace, dismissing action and taxing costs against plaintiff, is "final judgment" from which appeal may be taken. Jackson v. Berndt, 24 S. D. 14, 123 N. W. 76.

Record cannot be amended by affidavits, but may be returned to justice for correction. Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967.

Only such questions as are raised by record can be considered on appeal. Tschetter v. Heiser, 9 S. D. 285, 68 N. W. 744; City of Chamberlain v. Putnam, 10 S. D. 360, 73 N. W. 201.

Where record does not affirmatively show service, presumption is there is none. Minn. Thresh. Machine Co. v. Skau, 10 S. D. 636, 75 N. W. 199.

Justice may refuse to transmit transcript because fee is not paid. Fargo v. Graves, 12 S. D. 293, 81 N. W. 291.

Appeal may be taken from default judgment. Wimsey v. McAdams, 12 S. D. 509, 81 N. W. 884; Perrott v. Owen, 7 S. D. 454, 64 N. W. 526.

Failure of justice to transmit record in time not fatal. McLaughlin v. Michel, 14 S. D. 189, 84 N. W. 777.

§ 9164. Appeals on questions of law. A party desiring to appeal from the judgment of a justice of the peace on questions of law alone may do so by specifying in his notice of appeal the errors in law complained of. A specification which intelligibly refers to any ruling or proceeding of the justice appearing on his docket is sufficient without stating the reason for the objec-

tion, and no other form of exception is necessary. After such appeal is perfected it may be brought to a hearing by either party in the same manner and upon like notice as an issue of law in other cases. If not so disposed of, it shall be entered on the calendar for hearing and determination at the next term of the district court convening not less than ten days after the same is taken. The district court shall review and determine only such errors in law as are specified with reasonable certainty in the notice of appeal, and may order a dismissal of the appeal if the same has not been duly perfected, or the record of the justice has not been transmitted and no application is made by the appellant for an order requiring the justice to certify and transmit the proceedings, otherwise the court may affirm or reverse or modify the judgment of the justice and may direct the same to be entered as the judgment of the district court or direct the entry of such judgment therein as the justice ought to have rendered, according to the right of the matter. When the decision of the district court reopens the case for the trial of an issue of fact, the decision shall direct that the action be retained and placed on the calendar of the court for trial accordingly as in other cases, and thereupon the parties may be allowed to serve and file any pleading that may be necessary or proper within such time as the court deems reasonable. [R. C. 1905, § 8501; 1897, ch. 7; R. C. 1899, § 6771a.]

Notice of appeal upon questions of law and fact, which shows that no statement of case was prepared or demand for new trial in appellate court made, is defective. Aldrich v. Ramoe, 21 S. D. 52, 109 N. W. 641.

Demand in notice for new trial is an appeal to hear and determine cause on merits. Lyons v. Miller, 2 N. D. 1, 48 N. W. 514; Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967; Wimsey v. McAdams, 12 S. D. 509, 81 N. W. 884.

Proper remedy to correct error of law is appeal not certiorari. Lewis v. Gallup, 5 N. D. 384, 67 N. W. 137; Perrott v. Owen, 7 S. D. 454, 64 N. W. 526.

Appeal on questions of law. Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278.

Statement filed with and adopted by justice after notice to adverse party is jurisdictional as to questions to be considered. City of Chamberlain v. Putnam, 10 S. D. 360, 73 N. W. 201; Tschetter v. Heiser, 9 S. D. 285, 68 N. W. 744.

Necessity of specifying errors in notice of appeal from a justice to have rulings reviewed. Rae v. Chicago, M. & St. P. R. Co., 14 N. D. 507, 105 N. W. 721.

Sufficiency of specifications in notice of appeal. Lyman-Eliel Drug Co. v. Cooke, 12 N. D. 88, 94 N. W. 1041.

Retrial authorized in district court on reversal of justice's judgment dismissing action. Olson v. Shirley, 12 N. D. 106, 96 N. W. 297.

One appealing on questions of law alone must specify errors relied upon. Halvorsen v. Myren, 23 S. D. 263, 121 N. W. 782.

One appealing to district court upon questions of law alone is not entitled to trial upon facts after being defeated. Hanson v. Gronlie, 17 N. D. 191, 115 N. W. 666.

Waiver of failure to serve, or defects in service of, process, by appeal from justice's court to court where trial must be de novo. 34 L.R.A.(N.S.) 661.

§ 9165. Undertaking on appeal. To render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by sufficient surety to the effect that the appellant will pay all costs which may be awarded against him on the appeal not exceeding one hundred dollars, which undertaking shall be approved by and filed in the office of the clerk of the district court of the county to which the appeal is taken. [R. C. 1905, § 8502; R. C. 1895, § 6772.]

Mandatory as to filing undertaking. Re Peterson, 22 N. D. 480, 134 N. W. 751.

Appellant must serve undertaking with pleading, in order to transfer jurisdiction to district court, from default judgment in justice's court. Aetna Mercantile Co. v. Groseth, 20 N. D. 137, 127 N. W. 718.

Exception to sureties limited to their pecuniary responsibility. Towle v. Bradley, 2 S. D. 472, 50 N. W. 1057.

When sureties are excepted to, they or other sureties must justify within time required. Barber v. Johnson, 4 S. D. 528, 57 N. W. 225; McDonald v. Paris, 9 S. D. 310, 68 N. W. 737; Judson v. Bulen, 6 D. 70, 50 N. W. 484.

Filing of undertaking is necessary to confer jurisdiction. Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31.

Undertaking for staying proceedings under judgments in actions of forcible entry and detainer differs from that required as security for costs. Rudolph v. Herman, 2 S. D. 399, 50 N. W. 833.

Amendment of appeal bond in circuit court. Rudolph v. Herman, 4 S. D. 203, 56 N. W. 122; Towle v. Bradley, 2 S. D. 472, 50 N. W. 1057.

Undertaking for costs in sum of one hundred dollars must in all cases be given. Smith v. Coffin, 9 S. D. 502, 70 N. W. 636; Brown v. Brown, 12 S. D. 380, 81 N. W. 627; Brown v. Ry. Co., 10 S. D. 633, 75 N. W. 198, 65 Am. St. Rep. 730; Erpenbach v. Ry. Co., 11 S. D. 201, 76 N. W. 923; Smith v. Gale, 13 S. D. 162, 82 N. W. 385.

Combining a cost and stay bond will be held sufficient as a cost bond. Aultman, Miller & Co. v. Nelson, 11 S. D. 338, 77 N. W. 584.

When bond is insufficient, no jurisdiction is required. Doering v. Jensen, 16 S. D. 58, 91 N. W. 343.

As to notice of appeal and undertaking being filed with clerk of district court on appeal from justice's judgment. Lough v. White, 14 N. D. 353, 104 N. W. 518.

Appeal bond containing no stipulation for payment of costs on appeal is ineffectual. Doering v. Jensen, 16 S. D. 58, 91 N. W. 343.

Leave to file undertaking will be granted on appeal from justice's judgment, where currency was deposited as cash bond. Todenhoft v. De Roos, 21 S. D. 234, 111 N. W. 550.

As to undertaking under N. D. Rev. C., § 9166, for "all costs" including costs on appeal. Johnson Bros. v. Glaspey, 16 N. D. 335, 113 N. W. 602.

§ 9166. Stay of execution on appeal. If the appellant desires a stay of execution an undertaking must be executed on his part by sufficient surety to the effect, that if the appeal is dismissed, the appellant will pay the amount of the judgment appealed from and all costs, or if judgment is rendered against him in the appellate court, that he will pay the amount of such judgment and all costs not exceeding a sum specified in the undertaking, which must be at least one hundred dollars and not less than twice the amount of the judgment appealed from; or, if the judgment appealed from is for the recovery of specific personal property, an undertaking must be executed on the part of the appellant by sufficient surety to the effect that if the appeal is dismissed or if judgment is rendered against the appellant in the appellate court, the appellant will deliver the property described in the judgment and pay the damages awarded for the taking or detention thereof and all costs or pay the sum fixed by the judgment as the value of the property together with the damages awarded for the taking or detention thereof and all costs. Such undertaking shall be approved and filed as provided in the last section. [R. C. 1905, § 8503; R. C. 1895, § 6773.]

Undertaking allowing defendant to retain possession, separate from cost bond. Rudolph v. Herman, 2 S. D. 399, 50 N. W. 833.

Undertaking under statute for "all costs" includes costs on appeal. Johnson Bros. v. Glaspey, 16 N. D. 335, 113 N. W. 602.

As to right of plaintiff in action for possession of property and rent, to recover for rent up to disposition of appeal. McLain v. Nurnberg, 16 N. D. 138, 112 N. W. 245.

§ 9167. Stay in forcible detainer. In judgments for the delivery of possession in actions of forcible detainer the execution of the same shall not be stayed, unless a written undertaking is executed on the part of the appellant with sufficient surety to the effect that during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon and that if the appeal is dismissed or judgment is rendered against the appellant in the appellate court, he will pay all rents for the use and occupation of the property and all damages from the time of the appeal until the delivery of the possession thereof. Such undertaking is in addition to the undertaking provided for in the last section and shall be approved and filed in the manner provided in section 9165. [R. C. 1905, § 8504; R. C. 1895, § 6774.]

§ 9168. Money in lieu of undertaking. When the appellant is required under any provision of this article to give an undertaking, he may in lieu thereof deposit with the clerk of the district court in whose office the notice of appeal is required to be filed, who shall give a receipt therefor, a sum of money equal to the amount for which such undertaking is required to be given and in lieu of the service of such undertaking serve a notice of the making of such deposit. Such deposit and notice shall have the same effect as the service of the required undertaking and be held to answer the event

of the appeal upon the terms prescribed for the undertaking in lieu of which the same is deposited. [R. C. 1905, § 8505; R. C. 1895, § 6775.]

§ 9169. Sufficiency of sureties excepted to. The undertaking for appeal must be served with the notice; also appellant's pleading when the judgment appealed from was taken by default. The adverse party may except to the sufficiency of the surety on such undertaking within five days after its service, by giving notice of exception specifying whether the justification must be made before the clerk of the district court or the justice by whom the judgment was rendered. Thereupon the surety must justify before the officer specified upon like notice and in like manner as in an arrest and bail proceeding or a new undertaking must be given with new surety, which shall be subject to exception in the same manner and with like effect as the original. Unless such surety justifies or a new undertaking with a new surety is given when so required, the appeal must be dismissed on motion of the respondent, but the liability of the surety on any undertaking so given shall not be released thereby. [R. C. 1905, § 8506; 1897, ch. 6; R. C. 1899, § 6776.]

Appellant must serve undertaking with pleading, in order to transfer jurisdiction to district court, from default judgment in justice's court. Aetna Mercantile Co. v. Groseth, 20 N. D. 137, 127 N. W. 718.

§ 9170. Appeal filed with clerk. Proceedings on. Upon the filing of the notice of appeal and undertaking, or the making of the deposit prescribed in section 9168 in the office of the clerk of the district court, such clerk shall immediately mail to the justice of the court in which the judgment appealed from was rendered a written notice thereof, specifying the court in which the judgment was rendered, the names of the parties, the date and amount of the judgment appealed from and stating whether the undertaking filed or deposit made entitles the appellant to a stay of execution and requiring such justice to transmit to such clerk the record required by law. Such justice must within ten days after the receipt of such notice transmit to the clerk of the district court a record which shall contain a certified copy of the justice's docket, the pleadings, and all notices, motions and other papers filed in the cause. The justice may be compelled by the district court by order entered upon motion to transmit such record and may be fined for neglect or refusal so to do. A certified copy of such order may be served on the justice by the party or his attorney. [R. C. 1905, § 8507; R. C. 1895, § 6777.]

Notice given by clerk to justice to transmit record on appeal to district court is presumptive evidence that clerk approved of undertaking. Schulz v. Dahl, 21 N. D. 302, 130 N. W. 937.

Circuit court acquires no jurisdiction whatever, unless appeal undertaking is given. Aldrich v. Public Opinion Pub. Co., 27 S. D. 589, 132 N. W. 278.

Only such questions as are raised by record can be considered. Tschetter v. Heiser, 9 S. D. 285, 68 N. W. 744; City of Chamberlain v. Putnam, 10 S. D. 360, 73 N. W. 201.

Refusal of justice to transmit transcript because fee is not paid. Fargo v. Graves, 12 S. D. 293, 81 N. W. 291.

Where record does not affirmatively show service, presumption of none. Minn. Thresh. Machine Co. v. Skau, 10 S. D. 636, 75 N. W. 199.

Record cannot be amended by affidavits, but may be returned to justice for correction. Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967.

Failure of justice to transmit record in time not fatal. McLaughlin v. Michel, 14 S. D. 189, 84 N. W. 777.

§ 9171. Execution stayed by appeal. If an execution has been issued, the justice must, if the written notice received from the clerk states that the undertaking filed or deposit made entitles the appellant to a stay of execution, by order direct a stay of all proceedings on the same. The officer in whose hands such execution may be must upon payment of his fees for services rendered upon the execution relinquish all property levied upon and deliver the same to the judgment debtor together with all moneys collected from sales or otherwise. If his fees are not paid the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same. [R. C. 1905, § 8508; R. C. 1895, § 6778.]

§ 9172. Action tried in district court. The action shall be tried anew in the district court in the same manner as actions originally commenced therein. No notice of trial and note of issue shall be required to be served or filed in order to bring the case upon the trial calendar in the district court, but the record of such appeal shall be filed by the clerk of the district court and the action entered upon the calendar. [R. C. 1905, § 8509; R. C. 1895, § 6779.]

Where schedule is not first filed with justice as prescribed by section 9068, and default judgment taken, property garnished may not afterwards be claimed as exempt in district court on appeal. Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243.

§ 9173. Appeal dismissed. Proceedings. When an appeal to the district court is dismissed and no appeal is taken to the supreme court from the judgment for costs rendered in the district court upon the dismissal thereof, a certified copy of the order dismissing the same shall be filed in the justice's court in which the judgment was rendered and thereafter the judgment appealed from shall have the same force and validity, and may be enforced in the same manner as if no appeal had been taken. In case an appeal is taken to the supreme court after a certified copy of the order aforesaid is filed in the justice's court, the judgment therein shall be suspended until the further order of the district court. [R. C. 1905, § 8510; R. C. 1895, § 6780.]

Appeal cannot be dismissed except upon notice. Keehl v. Schaller, 1 S. D. 290, 46 N. W. 934.

Judgment on appeal is that of appellate court. Winton v. Knott, 7 S. D. 179, 63 N. W. 783.

Motion to strike appeal from trial calendar of term during which filed will be denied. Chandler v. Hill, 13 S. D. 176, 82 N. W. 397.

District court acquires no jurisdiction on appeal if justice had none. Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593.

Issues of fact for jury. Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278.

Pleadings may be amended in appellate court. Butler v. Ash, 9 S. D. 611, 70 N. W. 833.

Dismissal of appeal for failure to transmit record within time. Haukland v. Ry. Co., 11 S. D. 493, 78 N. W. 958; Edminster v. Rathbun, 3 S. D. 129, 52 N. W. 263; F. B. Fargo & Co. v. Graves, 12 S. D. 293, 81 N. W. 291; McLaughlin v. Michel, 14 S. D. 189, 84 N. W. 777; Harris v. Watkins, 5 D. 374, 40 N. W. 536.

Appeal may cure jurisdiction for want of service of summons. Deering & Co. v. Venne, 7 N. D. 576, 75 N. W. 926.

Error, after affirming judgment to enter an original judgment for amount with costs. Lindskog v. Schouweiler, 12 S. D. 176, 80 N. W. 190.

Remanding case to justice court for new trial. Coughran v. Wilson, 7 S. D. 155, 63 N. W. 774.

Supplemental answer may be filed after appeal to district court. Erickson v. Elliott, 17 N. D. 389, 117 N. W. 361.

Court has authority to dismiss appeal for nonprosecution by appellant, because of his defaults in appearance throughout term, and at the time so set for final disposition of case. Saunders v. Harris, 24 N. D. 236, 139 N. W. 325.

Article 2.— Appeals in Criminal Actions.

§ 9174. Appeal. Time. Bond. A defendant in a criminal action may appeal from the judgment of a justice of the peace at any time within thirty days by giving notice of the appeal and giving bail for his appearance in the district court as prescribed in this article. [R. C. 1905, § 8511; Jus. C. 1877, § 136; R. C. 1895, § 6781.]

One convicted by jury of violating ordinance against keeping house of ill-fame may appeal. Mannie v. Hatfield, 22 S. D. 475, 118 N. W. 817.

Oral notice of appeal from judgment of police justice in proceedings for violation of ordinance is sufficient. Centerville v. Olson, 16 S. D. 526, 94 N. W. 414.

§ 9175. Appeals as in civil actions. The notice may be given by stating orally to the justice at the time of rendering judgment that the defendant appeals, or by filing with the justice a written notice of appeal and serving a copy thereof on the state's attorney of the county within the prescribed time. [R. C. 1905, § 8512; Jus. C. 1877, § 137; R. C. 1895, § 6782.]

§ 9176. Bond required. Bail must be given in the sum fixed by the justice to the effect that the defendant shall appear in the district court on the

first day of the next term convening within the county there to answer the complaint and abide the further orders of the court. Such bail may be given by the written undertaking of one or more sufficient sureties approved by the justice or by a deposit of money in lieu of sureties. [R. C. 1905, § 8513; Jus. C. 1877, § 138; R. C. 1895, § 6783.]

§ 9177. Approval of bond. If the justice refuses to approve the undertaking, it may be approved by the clerk of the district court and filed with the justice with the same effect as if approved by him. [R. C. 1905, § 8514; Jus. C. 1877, § 139; R. C. 1895, § 6784.]

§ 9178. Witnesses placed under bond. When an appeal is taken, the justice must, if application is made by the state's attorney, cause all material witnesses on behalf of the prosecution to enter into an undertaking in like manner as in a case when a defendant is held to answer on a preliminary examination. [R. C. 1905, § 8515; Jus. C. 1877, § 140; R. C. 1895, § 6785.]

§ 9179. Justice transmits appeal. The justice must within five days after an appeal is taken transmit to the clerk of the district court a certified copy of his docket and all papers relating to the case as on appeal in a civil action, and may be compelled to do so or make a further return in like manner. If money has been deposited in lieu of bail it must accompany the return. [R. C. 1905, § 8516; Jus. C. 1877, § 141; R. C. 1895, § 6786.]

Sworn complaint is jurisdictional in all stages of prosecution. State v. Walker, 9 S. D. 438, 69 N. W. 586; State v. Wright, 15 S. D. 628, 91 N. W. 311.

§ 9180. Appeal. New trials. Proceedings. An appeal duly perfected transfers the action to the district court for trial anew regardless of any ruling or decision of the justice. But the defendant may move to dismiss the complaint on the ground that the justice did not have jurisdiction of the offense. He may also demur to the complaint because more than one offense is charged therein or because the facts stated do not constitute a public offense. If he does not object to the complaint for the causes above specified or if his objections are overruled he must be required to plead as to an indictment or information without regard to any plea entered before the justice. In other respects the proceedings shall be the same as in criminal actions originally commenced in the district court and judgment shall be rendered and carried into effect accordingly. [R. C. 1905, § 8517; R. C. 1895, § 6787.]

§ 9181. Appeal not dismissed. No appeal from the judgment of a justice of the peace in a criminal action shall be dismissed. But if the appeal was not taken in time or if the defendant fails to appear in the district court when his presence is required, the judgment of the justice shall be summarily affirmed and entered as the judgment of the district court and carried into effect as such. [R. C. 1905, § 8518; Jus. C. 1877, § 142; R. C. 1895, § 6788.]

CHAPTER 7.

ACCOUNTING BY JUSTICES OF THE PEACE.

§ 9182. Quarterly reports by justice. Every justice of the peace shall, on the first Monday of January, April, July and October in each year, make to the county commissioners of his county a full report under oath of all his doings in actions or proceedings in which the county or state is a party or is in any manner interested. [R. C. 1905, § 8519; Jus. C. 1877, ch. 3, § 1; R. C. 1895, § 6789.]

County is liable for payment of justices' fees in criminal actions. Barrett v. Stuttsman County, 4 N. D. 175, 59 N. W. 964.

§ 9183. Contents of report. Such report shall contain the names of the parties to each action or proceeding and a statement of the final order or judgment of the justice therein and of all orders relating to costs, an itemized statement of all fees taxed or allowed as costs in each action or proceeding

and the names of the persons or officers entitled thereto, including all costs of the prosecution or defense in a criminal proceeding which are payable by the county, also a statement of each payment made on such judgment and the disposition thereof made by the justice. [R. C. 1905, § 8520; Jus. C. 1877, ch. 3, § 2; R. C. 1895, § 6790.]

§ 9184. Pay moneys to county treasurer. Each justice of the peace shall at the time of making his report pay over to the county treasurer of his county all fines or other moneys collected or received by him in behalf of the county or state and remaining in his hands, but whenever the amount of money so collected and received exceeds one hundred dollars, he must pay the same over to the treasurer forthwith. [R. C. 1905, § 8521; Jus. C. 1877, ch. 3, § 3; R. C. 1895, § 6791.]

§ 9185. Penalty for failure. Any justice of the peace violating any of the provisions of this article shall be liable to a fine of not less than ten nor more than one hundred dollars to be recovered in a civil action by the county. [R. C. 1905, § 8522; Jus. C. 1877, ch. 3, § 4; R. C. 1895, § 6792.]

§ 9186. Violation a crime. If any justice of the peace shall neglect or refuse to make such report or neglect or refuse to pay over the aforesaid moneys collected by him, or shall refuse to allow the county commissioners or any of them to examine the records in regard to such matters, he shall be deemed guilty of willful and corrupt misconduct in office. [R. C. 1905, § 8523; Jus. C. 1877, ch. 3, § 5; R. C. 1895, § 6793.]

CHAPTER 8.

BOARDS OF CONCILIATION.

§ 9187. Election of commissioners. There shall be elected at the same time and in the same manner as the justices of the peace in each town, incorporated village and city by the qualified voters thereof four commissioners of conciliation whose term of office shall be two years and until their successors are duly elected and qualified. [R. C. 1905, § 8524; 1895, ch. 22, § 1; R. C. 1899, § 6794.]

§ 9188. Term of office. The time of commencement of their term of office shall be the same as that prescribed for justices of the peace. [R. C. 1905, § 8525; 1895, ch. 22, § 1; R. C. 1899, § 6795.]

§ 9189. Proceedings before commissioners. At the time of issuing the summons in any civil action begun before a justice of the peace or at any time afterwards before the return day of such summons and only on the request of either party and by the consent of both parties in said action, the justice shall issue a subpoena summoning two of the commissioners of conciliation elected for the town, village or city where the action is brought and the defendant or the plaintiff as the case may require, to appear before him at some time prior to the hour designated in the summons, which subpoena shall be served in the same manner as a summons is required to be served in actions in the district court and may be served by the party obtaining it issued and at any time before its return day. If either party fails to appear at the time designated in the subpoena it shall be so certified to the justice of the peace by the commissioners before the return hour of the summons in said action. If both parties appear they shall then go before the two commissioners summoned, as aforesaid, and state their differences, which statements or so much thereof as is necessary to show the issue between the parties, shall be reduced to writing and shall constitute the pleadings in the case. The parties may then introduce evidence in the order and under the restrictions prescribed by the commissioners and it shall be discretionary with the commissioners whether or not the witness shall be sworn before testifying, and if so required, one of the commissioners may administer the oath. After

hearing all the evidence offered it shall be the duty of the commissioners to the best of their ability to persuade the parties to agree to an amicable settlement of their differences on such terms as to them appear just and equitable. If an agreement is reached it shall be reduced to writing, signed by the parties, certified to the justice, by him entered on his docket of the case and shall then be a judgment of the court of said justice therein. [R. C. 1905, § 8526; 1895, ch. 22, § 2; R. C. 1899, § 6796.]

§ 9190. Agreement. Parties. Attorneys. No agreement shall be entered unless it can be put in the form of a judgment now authorized by law to be entered by justices of the peace. At the hearing before the commissioners each party must appear in person except in the case of nonresident parties or for cause, when a party may appear by an agent duly authorized in writing. No attorney except as such agent, nor the justice of the peace before whom the action is pending shall be allowed to appear or in any way act in the hearing before the commissioners. If at such hearing the parties fail to agree, it shall be so certified to the justice before the return hour of the summons, who may then proceed to trial and judgment as though no such hearing had been had therein and the parties may be allowed to file amended pleadings. [R. C. 1905, § 8527; 1895, ch. 22, § 2; R. C. 1899, § 6797.]

§ 9191. Compensation of commissioners. The commissioners shall receive the same mileage and per diem as jurors in justices' courts. All fees and costs shall be included in the settlement and paid by the party designated therein, but in cases when the parties thereto fail to agree the costs shall be paid jointly by both parties unless otherwise agreed to. If a commissioner disobeys the subpoena of the justice, he shall be proceeded against in the same manner as a juror who fails to appear when summoned by him. [R. C. 1905, § 8528; 1895, ch. 22, § 3; R. C. 1899, § 6798.]

§ 9192. Proceedings not evidence at subsequent trial. No part of the proceedings had before the commissioners shall be admitted as evidence or considered at the trial of the case before the justice, nor shall any of the commissioners who took part in such hearing before them be allowed to testify therein. [R. C. 1905, § 8529; 1895, ch. 22, § 4; R. C. 1899, § 6799.]