SEC. 4. Corporations having complied with all the provisions of this act shall have the same rights and privileges and be subject to the same rules and regulations as corporations created under and by virtue of the laws of this territory: *Provided, however*, That no rights or franchises shall be acquired under this act except the right of ownership to real or personal property, which may not be affected by the amendment or repeal of this act. Rights of foreign corporations, proviso.

SEC. 5. This act shall take effect and be in force from and after its passage and approval. When to take effect.

Approved, January 15, 1875.

CRIMINAL PROCEDURE.

CHAPTER XXXV.

A CODE OF CRIMINAL PROCEDURE.

AN ACT to establish a code of criminal procedure for Dakota Territory.

Be it enacted by the Legislative Assembly of the Territory of Dakota:

PRELIMINARY PROVISIONS.

SECTION 1. This act shall be known as the code of criminal procedure of the territory of Dakota. Title of act.

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

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

Punishments of crime.

SEC. 3. Crimes or public offenses are divided into:

1. Felonies;
2. Misdemeanors.

Division of crimes.

Felony defined.

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

Misdemeanor defined.

SEC. 5. Every other crime is a misdemeanor.

When person punishable.

SEC. 6. No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof.

Indictment necessary except when.

SEC. 7. Every public offense must be prosecuted by indictment except:

1. Where proceedings are had for the removal of civil officers of the territory;

2. Offenses arising in the militia, when in actual service: and in the land and naval forces in time of war, or which this territory may keep, with the consent of congress, in time of peace;

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

Title of proceeding.

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

Criminal action how prosecuted.

SEC. 9. A criminal action is prosecuted in the name of The People of the Territory of Dakota as a party, against the person charged with the offense.

Which party, defendant.

SEC. 10. The party prosecuted in a criminal action is designated in this code as the defendant.

Rights of defendant.

SEC. 11. In a criminal action the defendant is entitled:

1. To a speedy and public trial;

2. To be allowed counsel, as in civil actions; or to appear and defend in person and with counsel; and

3. To produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court.

When person can be prosecuted more than once.

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

Defendant not compelled to be witness for prosecution

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

How conviction can be had.

SEC. 14. No person can be convicted of a public offense, unless by the verdict of a jury accepted and recorded by the court; or upon a plea of guilty; or upon judgment against him upon a demurrer to the indictment; in the case mentioned in section 269, or upon a judgment of a police or justices' court in cases in which such judgment may be lawfully given without the intervention of a jury and grand jury.

TITLE I.

OF THE COURTS HAVING JURISDICTION IN CRIMINAL ACTIONS.

Jurisdiction of district court.

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

District court, where held.

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

Jurisdiction of of district court.

SEC. 17. The district court has jurisdiction:

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

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

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

Final decisions, how reviewable.

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

Jurisdiction of justices of the peace.

SEC. 19. Justices of the peace shall have power and jurisdiction throughout their respective counties as follows:

1. As committing magistrates, or courts of inquiry as provided for in sections 314, 315, 316, 317, 318 and 319 of the justices' code, and any supplements thereto;

2. To exercise such lawful original jurisdiction under the organic act as is now or may hereafter be conferred upon them by virtue of said justices' code, or other laws of this territory.

TITLE II.

OF THE PREVENTION OF PUBLIC OFFENSES.

CHAPTER I.

OF LAWFUL RESISTANCE.

Resistance to commission of offense, by whom made.

SEC. 20. Lawful resistance to the commission of a public offense may be made;

1. By the party about to be injured;

2. By other parties.

Resistance to prevent commission of offenses by whom made.

SEC. 21. Resistance sufficient to prevent the offense may be made by the party about to be injured;

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

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

Same.

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

CHAPTER II.

OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

How public offenses to be prevented.

SEC. 23. Public offenses may be prevented by the intervention of the officers of justice;

1. By requiring security to keep the peace;

2. By forming a police in cities and villages, and by requiring their attendance in exposed places;

3. By suppressing riots.

Persons assisting officers of justice, justified.

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

CHAPTER III.

SECURITY TO KEEP THE PEACE.

Informations before whom laid.

SEC. 25. An information verified by the oath of the complainant, may be laid before any of the magistrates mentioned in section 94, that a person has threatened to commit an offense against the person or property of another.

When magistrate must issue warrant.

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

Proceedings where charge is controverted

SEC. 27. When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must on demand of the defendant be reduced to writing, and subscribed by the witnesses.

When person complained of is to be discharged.

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

When person complained of must give bond

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

Proceedings where bond is or is not given.

SEC. 30. If the undertaking required by the last section be given, the party complained of must be discharged. If he do not give it, the magistrate must commit him to prison,

specifying in the warrant the requirement to give security, the amount thereof, and the omission to give the same.

When person committed may be discharged.

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

Magistrate to transmit undertaking.

SEC. 32. The undertaking must be transmitted by the magistrate to the next district court of the county.

Assault in presence of magistrate.

SEC. 33. A person who in the presence of a court or magistrate, assaults or threatens to assault another, or commit an offense against his person or property, or who contends with another with angry words, may be ordered by the court or magistrate to give security as provided in section 29, or if he refuse to do so he may be committed as provided in section 30.

When person under bond must appear.

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

When person complained of may be discharged.

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

Proceedings when both parties appear.

SEC. 36. If both parties appear, the court may hear their proofs and allegations, and may either discharge the undertaking, or require a new one, for a time not exceeding one year.

When undertaking to keep the peace is broken.

SEC. 37. An undertaking to keep the peace is broken on the failure of a person complained of to appear at the district court as provided in section 34, or upon his being convicted of a breach of the peace.

When district court must order undertaking prosecuted.

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

What offense must be alleged in the action

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

Security to keep peace, how required.

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

CHAPTER IV.

POLICE IN CITIES AND THEIR ATTENDANCE AT EXPOSED PLACES.

How organization of policies governed.

SEC. 41. The organization and regulation of the police in the cities and villages of this territory, are governed by special statutes.

When officer may order force to attend public meeting.

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

CHAPTER V.

SUPPRESSION OF RIOTS.

When officer may demand assistance from the county.

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

What officer must certify.

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

When persons are guilty of misdemeanor.

SEC. 45. Every person commanded by a public officer to assist him in the execution of process, as provided in section 43, who, without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor.

When governor may order out additional force.

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

When governor may call on the military authorities.

SEC. 47. Under the facts and circumstances mentioned in the last section, and when the civil power of the county is not

deemed sufficient, it shall be the duty of the governor to apply to the military authorities of the United States for a force sufficient to execute the laws and to prevent resistance thereto, to suppress riots, execute process and preserve the peace.

Duty of sheriff in case of unlawful assemblage.

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

Proceedings where persons unlawfully assembled do not disperse.

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

Who deemed rioters.

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

When officer guilty of misdemeanor.

SEC. 51. If a magistrate or officer having notice of an unlawful or riotous assembly, mentioned in section 48, neglect to proceed to the place of the assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

When officer may disperse unlawful assemblage.

SEC. 52. If the persons assembled, and commanded to disperse, do not immediately disperse, any two of the magistrates or officers mentioned in section 48, may command the aid of a sufficient number of persons, and may proceed in such manner as in their judgment is necessary to disperse the assembly and arrest the offenders.

Precautions before endangering life.

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

Penalty for resisting process.

SEC. 54. A person, who after the publication of a proclamation by the governor or acting-governor, or who after lawful notice as aforesaid to disperse and retire, resists or aids

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

TITLE III.

OF JUDICIAL PROCEEDINGS FOR THE REMOVAL OF PUBLIC OFFICERS.

CHAPTER I.

OF THE REMOVAL OF CIVIL OFFICERS.

Proceedings to obtain judgment of removal from office.

SEC. 55. In addition to the proceedings mentioned in chapter II of title XIII of the code of civil procedure, and apart and distinct from any other criminal action or proceedings, the following provisions are adopted to obtain a judgment of removal from office.

Accusation of misconduct in office, how presented.

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

What accusation must state.

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

Duty of judge and attorney on receiving accusation.

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

Defendant must appear and answer.

SEC. 59. The defendant must appear at the time appointed in the notice, and answer the accusation, unless, for sufficient

cause, the court assigns another day for that purpose. If he do not appear, the court may proceed to hear and determine the accusation in his absence.

How defendant may answer.

SEC. 60. The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same.

How objection to be made.

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

How denial to be made.

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

When defendant must answer.

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

When court to render judgment, or proceed to trial.

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

How trial to be had.

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

Duty of court if defendant convicted.

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

Proceedings for removal of territorial officers.

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

Same.

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

Proceedings or removal of dirtrict attorney.

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

Proceedings and penalty for certain offenses.

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

TITLE IV.

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

CHAPTER I.

OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.

Public offenses punishable, how.

SEC. 71. Every person is liable to punishment for a public offense, as is prescribed by section 15 of the penal code, except it is by law cognizable exclusively in the courts of the United States.

Offenses committed without this territory, how punished.

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

Jurisdiction in case of duel

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

Jurisdiction when person leaves territory to evade law.

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

Jurisdiction when offense is committed in two counties.

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

Where offense is committed near boundary.

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

Where offense is committed on board vessels.

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

Where indictment has jurisdiction in certain cases.

SEC. 78. The jurisdiction of an indictment:

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

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

3. For inveigling, enticing or taking away an unmarried

female of previous chaste character, under the age of twenty-one years, for the purpose of prostitution; or

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

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

Where offense is bigamy or incest.

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

Jurisdiction and proceedings in certain cases.

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

Jurisdiction in case of accessory.

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

When prior conviction or acquittal is a bar.

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

Same.

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

Jurisdiction of indictment for escape.

SEC. 84. The jurisdiction of an indictment for escaping from prison is in any county of the territory.

For stealing.

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

For murder or manslaughter.

SEC. 86. The jurisdiction of an indictment for murder or manslaughter, when the injury which caused the death was inflicted in one county, and the party injured dies in another county, or out of the territory, is in the county where the injury was inflicted.

Against a principal.

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

CHAPTER II.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

Fine for prosecution for murder unlimited.

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

Limit in other cases.

SEC. 89. In all other cases, an indictment for a public offense must be found within three years after its commission.

Cases where defendant is out of the territory.

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

Where an indictment is found.

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

CHAPTER III.

OF THE INFORMATION.

Information defined.

SEC. 92. The information is the allegation in writing made

to a magistrate that a person has been guilty of some designated public offense.

Magistrate defined.

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

Who are magistrates.

SEC. 94. The following persons are magistrates:

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

CHAPTER IV.

THE WARRANT OF ARREST.

When magistrate must issue warrants.

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

Warrant of arrest defined—form of

SEC. 96. A warrant of arrest is an order in writing in the name of the people, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

"County of ————————,

"The people of the territory of Dakota. To any sheriff, constable, marshal or policeman in this territory [or in the county of ————————, or as the case may be.]

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

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

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

E. F., Justice of the peace [or as the case may be.]

What warrant to specify.

SEC. 97. The warrant must specify the name of the defendant, or if it be unknown to the magistrate, the defendant may be designated therein by any name. It must also state an

offense in respect to which the magistrate has authority to issue the warrant and the time of issuing it, and the county, city, town or village where it is issued, and be signed by the magistrate with his name of office.

To whom directed.

SEC. 98. The warrant must be directed to and executed by a peace officer.

Peace officer defined.

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

Warrant issued by certain judges, to whom directed.

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

Warrant to whom directed, and how endorsed when issued by other magistrates.

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

"This warrant may be executed in the county of ————," [as the case may be.]

Endorsement, when not to be made.

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

Duty of arresting officer if offense be felony

SEC. 103. If the offense charged in the warrant be a felony the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate in the same county as provided in section 107.

If a misdemeanor.

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

Proceedings where bail is taken.

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

Proceedings where bail is not given.

SEC. 106. If on the admission of the defendant to bail as provided in section 104, bail be not forthwith given, the officer must take the defendant before the magistrate who issued the warrant or some other magistrate in the same county as provided in the next section.

Proceedings where magistrate who issued warrant be absent.

SEC. 107. When by the preceding sections of this chapter, the defendant is required to be taken before the magistrate who issued the warrant, he may, if the magistrate be absent or unable to act, be taken before the nearest or most accessible magistrate in the same county. The officer must at the same time deliver to the magistrate, the warrant, with the return endorsed and subscribed by him.

Delay prohibited.

SEC. 108. The defendant must in all cases be taken before the magistrate without unnecessary delay.

Where defendant is taken before magistrate who did not issue warrant.

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

Proceedings where offense is in one county and defendant in another.

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

Duty of officers who executes warrant.

SEC. 111. The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, with his return

indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself.

If offense be a misdemeanor—duty of officer.

SEC. 112. If the offense charged in the warrant issued pursuant to section 110, is a misdemeanor, the officer must, upon being required by the defendant, take him before a magistrate of the county in which the warrant was issued, who must admit the defendant to bail, and immediately transmit the warrant, information, depositions, if any, and undertaking, to the clerk of the court in which the defendant is required to appear.

CHAPTER V.

ARREST BY WHOM AND HOW MADE.

Arrest defined

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

Arrest—how made.

SEC. 114. An arrest may be either;

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

Aid of officer.

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

If offense be felony, arrest when made—if misdemeanor.

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

Arrest defined

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

Restraint.

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

Officer must say he acts with warrant.

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

Duty if defendant resist.

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

When officer may break open door.

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

When officer may break open door.

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

When peace officer may arrest person.

SEC. 123. A peace officer may, without a warrant, arrest a person:

1. For a public offense, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it;

4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.

Officer may break open door.

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

When arrest may be made without warrant.

SEC. 125. He may also at night, without a warrant, arrest any person whom he has reasonable cause for believing to have commited a felony, and is justified in making the arrest though it afterwards appear that the felony had not been committed.

When officer must inform party arrested of his authority

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

Disposition of person arrested by bystander.

SEC. 127. He may take before a magistrate, a person, who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

Where offense committed in presence of magistrate.

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

When private person to make arrest.

SEC. 129. A private person may arrest another:

1. For a public offense committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

Must inform person arrested of cause thereof.

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

When private person may make arrest.

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

Duty of private person in such cases.

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

Offensive weapons—how disposed of.

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

CHAPTER VI.

RETAKING AFTER AN ESCAPE OR RESCUE.

Pursuing person escaping from arrest.

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

Officer may break open door or window

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

CHAPTER VII.

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

Magistrate's duty when defendant bro't before him.

SEC. 136. When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a

charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings and also of his right to waive an examination before any further proceedings are had.

Magistrate must allow defendant counsel.

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

When magistrate must proceed.

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

Adjournment of examination

SEC. 139. The examination must be completed at one session unless the magistrate for good cause adjourn it. The adjournment cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant.

Disposition of defendant on adjournment.

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

Form of commitment for examination.

SEC. 141. The commitment for examination is by an endorsement signed by the magistrate, on the warrant of arrest, to the following effect: "The within named A. B., having been brought before me under this warrant, and having failed to give bail for his appearance, is committed to the sheriff of the county of ——— [or to the marshal of the city of ——— or as the case may be,] to await examination on the —— day of ——— 18—, at —— o'clock, at which time you will have his body before me at my office."

Duty of magistrate on examination.

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

Rights of defendant.

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

Defendant may produce witnesses.

SEC. 144. When the examination of the witnesses on the part of the people is closed, any witnesses the defendant may produce must be sworn and examined.

Magistrate to keep depositions.

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

Certain violation a misdemeanor.

SEC. 146. A violation of the provisions of the last section is punishable as a misdemeanor.

When magistrate must discharge defendant.

SEC. 147. After hearing the proofs and the statement of the defendant, if he have made one, if it appear, either that a public offense has not been committed, or that there is no sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged, by an endorsement on the information over his signature, to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order him to be discharged."

When he must hold him to answer.

SEC. 148. If, however, it appear from the examination that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner endorse on the information an order signed by him, to the following effect "It appearing to me that the offense in the within information mentioned, [or any other offense, according to the fact, stating generally the nature thereof,] has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same."

Proceedings if offense be not bailable.

SEC. 149. If the offense be not bailable, the following words or words to the same effect, must be added to the endorsement: "And that he is hereby committed to [the sheriff of ———, or to the marshal of the city of ———, or as the case may be."]

If it be bailable

SEC. 150. If the offense is bailable, and bail is taken by the magistrate, the following words or words to the same effect must be added to the endorsement mentioned in section 148: "And I have admitted him to bail, to answer, by the undertaking hereto annexed."

If bailable and bail has not been taken.

SEC. 151. If the offense is bailable and the defendant is admitted to bail, but bail have not been taken, the following words or words to the same effect must be added to the endorsement mentioned in section 148: "And that he is admitted to bail in the sum of ——— dollars, and be committed to the sheriff of the county of ———, [or the marshal of the city of ———, or as the case may be,] until said bail be given."

Where magistrate commits defendant.

SEC. 152. If the magistrate order the defendant to be committed as provided in sections 149 and 151, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or if that officer be not present, to a peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment.

Form of commitment.

SEC. 153. The commitment must be to the following effect:

"County of ———:

The people of the Territory of Dakota. To the sheriff of the county of ———, or marshal of the city of ———, or as the case may be:

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

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

C. D., Justice of the Peace."

[or as the case may be.]

Witness to give undertaking.

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

When witness shall give security for appearance.

SEC. 155. When the magistrate is satisfied, by proof on oath, that there is reason to believe that any such witness will

not appear and testify, unless security be required, he may order the witness to enter into a written undertaking, with such sureties and in such sum as he may deem proper, for his appearance, as specified in the last section.

Infants and married women not excepted.

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

When witness may be committed.

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

Proceedings where material witness has been discharged.

SEC. 158. When, however, in pursuance of section 154, any material witness on the part of the people has been discharged on his undertaking, without surety, if afterwards on the sworn application of the district attorney or other person on behalf of the people, made to the magistrate or to any judge, it satisfactorily appears that the presence of such witness or any other person on the part of the people is material, or necessary on the trial in court, such magistrate, or judge, may compel such witness, or any other material witness on the part of the people, to give an undertaking, with sureties, to appear on the said trial and give his testimony therein; and, for that purpose, the said magistrate, or judge, may issue a warrant against any such person, under his hand, with or without seal, directed to a sheriff, marshal, or other officer, to arrest such person and bring him before such magistrate or judge.

When witness may be confined in jail.

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

What magistrate must return to district court.

SEC. 160. When a magistrate has discharged a defendant, or has held him to answer as provided in sections 147 and 148,

he must return immediately to the next district court of the county or sub-division, the warrant, if any, the information, the depositions, if any have been taken, of all the witnesses examined before him, the statement of the defendant if he have made one, and all undertakings of bail or for the appearance of witnesses taken by him, together with a certified record of the proceedings as they appear on his docket.

TITLE V.

OF PROCEEDINGS AFTER COMMITMENT AND BEFORE INDICTMENT.

CHAPTER I.

PRELIMINARY PROVISIONS.

All public offenses — how prosecuted.

SEC. 161. All public offenses triable in the district courts must be prosecuted by indictment, except as provided in the next section.

Proceedings for removal from office — how prosecuted.

SEC. 162. When the proceedings are had for the removal of county, township, city, municipal, or territorial officers, they may be commenced by an accusation in writing as provided in chapter I of title III, of this code.

CHAPTER II.

FORMATION OF THE GRAND JURY.

Grand jury defined.

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

Duty of court where challenges are allowed.

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

Twelve grand jurors to find indictment.

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

Who may challenge panel.

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

Causes of challenge to panel.

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

1. That the requisite number of ballots was not drawn from the jury box of the county or subdivision;

2. That notice of the drawing of the grand jury was not given;

3. That the drawing was not had in the presence of the officers designated by law, or in the manner prescribed by law.

When grand jury may be discharged.

SEC. 168. If a challenge to the panel be allowed, the grand jury must be discharged.

Causes of challenge to grand juror.

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

1. That he is a minor;

2. That he is not a qualified elector;

3. That he is otherwise disqualified under any of the provisions of section 1, chapter XIX of the act approved December 24, 1867;

4. That he is insane;

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

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

7. That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opin-

ion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the court upon his declaration under oath, or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him.

Challenges may be oral or written.

SEC. 170. Challenges may be oral or in writing, and must be tried by the court.

Duty of court and clerk.

SEC. 171. The court must allow or disallow the challenge, and the clerk must enter its decision upon the minutes.

Where challenge is allowed, grand juror cannot act.

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

Violation of last section.

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

Parties prohibited from taking certain advantage.

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

When court may order another grand jury.

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

Concerning special grand jury.

SEC. 176. A grand jury formed and impanelled as to and in a particular case, after a challenge or challenges to individual

grand jurors have been allowed, shall only be sworn to act in such particular case, and as to all other cases at the same term of the court the grand jury shall be formed in the usual manner provided by law.

Court to appoint foreman.

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

Oath of foreman.

SEC. 178. The following oath must be administered to the foreman of the grand jury:

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

Oath to other grand jurors.

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

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

Grand jury must be charged.

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

Grand jury must retire.

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

Grand jury must appoint clerk—his duty

SEC. 182. The grand jury must appoint one of their number as clerk, who must preserve minutes of their proceedings (except of the votes of the individual members,) and of the evidence given before them.

When grand jury discharged.

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

CHAPTER III.

POWERS AND DUTIES OF A GRAND JURY.

Powers and duties of grand jury.

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

Presentment defined.

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

Indictment defined.

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

Foreman may administer oath.

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

What evidence grand jury receive.

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

Same.

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

Evidence for defendant.

SEC. 190. The grand jury is not bound to hear evidence for the defendant, but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that

there is other evidence, they may by and with the consent of the district attorney order such evidence to be produced, and for that purpose the district attorney may issue process for the witnesses.

When indictment ought to be found.

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

When member of grand jury must give evidence.

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

What the grand jury must inquire into.

SEC. 193. The grand jury must inquire:

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

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

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

Shall have access to prisons.

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

District attorney privileged.

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

Grand jury to keep secret.

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

When grand juror may disclose testimony.

SEC. 197. A member of the grand jury may, however, be required by any court to disclose the testimony of a witness ex-

amined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor.

Grand juror cannot be questioned, except.

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

CHAPTER IV.

PRESENTMENT AND PROCEEDINGS THEREON.

Presentment—how found.

SEC. 199. A presentment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be signed by the foreman.

Presentment—how disposed of.

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

When bench warrant may be issued.

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

When clerk may issue bench warrant.

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

Form of bench waraant.

SEC. 203. The bench warrant, upon presentment, must be substantially in the following form:

"County of ————————,

"The people of the territory of Dakota. To any sheriff, constable, marshal or policeman in this territory.

"A presentment having been made on the —— day of ——, eighteen ——, to the district court of the county of ————, [or subdivision ————], charging C. D. with the crime of ———— [designating it generally,] you are therefore commanded forthwith to arrest the above named C. D., and take

him before E. F., a magistrate of the county of ————; or in case of his absence or inability to act, before the nearest and most accessible magistrate in ———— county.

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

By order of the court.

[SEAL.] A. F., Clerk.

Where bench warrant may be served.

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

How magistrate must proceed.

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

TITLE VI.

OF THE INDICTMENT.

Chapter I. Finding and presentation of the indictment.
II. Rules of pleading and form of the indictment.

CHAPTER I.

FINDING AND PRESENTATION OF THE INDICTMENT.

What is necessary to find an indictment.

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

How original information disposed where indictment not found.

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

Re-submission of charge.

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

Names of witnesses.

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

Indictment—how presented.

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

Proceedings when indictment is found before defendant is arrested.

SEC. 211. When an indictment is found against a defendant who has not been previously arrested, and is not under bail, the same proceedings must be had as are prescribed in sections 239 to 246 inclusive, against a defendant who fails to appear for arraignment.

CHAPTER II.

RULES OF PLEADING AND FORM OF THE INDICTMENT.

Forms of pleadings.

SEC. 212. All the forms of pleading in criminal actions and rules by which the sufficiency of pleadings is to be determined, are those prescribed by this code.

First pleading.

SEC. 213. The first pleading on the part of the people is the indictment.

What indictment must contain.

SEC. 214. The indictment must contain:

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

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

Indictment to be direct certain.

SEC. 215. The indictment must be direct and certain, as it regards:

1. The party charged;

2. The offense charged;

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

Where indictment is prosecuted by fictitious name.

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

Indictment to to charge but one offense.

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

Time when offense was committed.

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

Where certain errors not material.

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

Words of indictment—how construed.

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

Statute terms not strictly personal.

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

What is sufficient in an indictment.

SEC. 222. The indictment is sufficient if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated;

2. That it was found by a grand jury of the county or subdivision in which the court was held;

3. That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his true name is to the jury unknown;

4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county or subdivision, is triable therein;

5. That the offense was committed at some time prior to the time of finding the indictment;

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;

7. That the act or omission charged as the offense, is stated with such a degree of certainty, as to enable the court to pronounce judgment upon a conviction, according to the right of the case.

Certain informalities to be disregarded.

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

What need not be stated in indictment.

SEC. 224. Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment.

What need not be stated in pleading.

SEC. 225. In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. The facts constituting jurisdiction, however, must be established on the trial.

What is sufficient in pleading private statute.

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

What is sufficient in an indictment for libel.

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

In case of indictment for forgery.

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

In an indictment for perjury.

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

In an indictment for larceny or embezzlement.

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

In an indictment for selling obscene books.

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

Where several defendants are indicted.

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

Distinctions between accessories and principals, etc.

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

Accessory may be indicted

SEC. 234. An accessory to the commission of a felony, may be indicted, tried and punished, though the principal felon be

neither indicted nor tried, and though the principal may have been acquitted.

Person can be indicted for compounding a felony.

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

TITLE VII.

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

CHAPTER I.

OF THE ARRAIGNMENT OF THE DEFENDANT.

Defendant to be arraigned.

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

When defendant must be present.

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

Same—duty of court.

SEC. 238. When his personal appearance is necessary, if he be in custody, the court may direct the officer in whose custody he is, to bring him before it to be arraigned; and the officer must do so accordingly.

When bench warrant to be issued.

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

Same.

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

Form of bench warrant.

SEC. 241. The bench warrant, upon the indictment must, if the offense is a felony, be substantially in the following form:

"County of ————————,

"The people of the territory of Dakota. To any sheriff, constable, policeman or marshal in this territory.

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

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

By order of the court.

[SEAL.] E. F., Clerk.

Same, where offense is a misdemeanor.

SEC. 242. If the offense is a misdemeanor or a bailable felony, the bench warrant must be in a similar form, adding to the body thereof a direction to the following effect: "or if he requires it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer the indictment."

Court must fix amount of bail.

SEC. 243. If the offense charged is bailable, the court, upon directing the bench warrant to issue, must fix the amount of

bail; and an endorsement must be made on the bench warrant and signed by the clerk, to the following effect:

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

Where offense is not bailable, duty of sheriff.

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

Bench warrant may be served in any county.

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

How magistrate to proceed in taking bail.

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

Duty of court on indictment for felony.

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

Where defendant is present how disposed of.

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

Court must inform defendant of his right to counsel.

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

How arraignment must be made.

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

Defendant must declare his true name.

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

When court to proceed.

SEC. 252. If he gives no other name, the court may proceed accordingly.

If defendant allege another name.

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

Defendant to be allowed time to answer.

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

What motion defendant may make.

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

CHAPTER II.

SETTING ASIDE THE INDICTMENT.

When indictment must be set aside.

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

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

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

3. When a person is permitted to be present during the session of the grand jury, while the charge embraced in the indictment is under consideration, except as provided in section 195.

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

When defendant precluded from taking objections.

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

When motion to be heard.

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

When defendant must answer.

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

When defendant to be discharged.

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

Proceedings if court direct a re-submission of case.

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

What is not a bar.

SEC. 262. An order to set aside an indictment, as provided in this chapter, is no bar to a further prosecution for the same offense.

CHAPTER III.

DEMURRER.

Defendant's only pleadings.

SEC. 263. The only pleading on the part of the defendant is either a demurrer or a plea.

Pleadings to be made in open court.

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

When defendant may demur.

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

1. That the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county or subdivision;

2. That it does not substantially conform to the requirements of this act;

3. That more than one offense is charged in the indictment:

4. That the facts stated do not constitute a public offense;

5, That the indictment contains any matter, which if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

Demurrer.

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

Objections in demurrer to be heard.

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

Duty of court respecting demurrer.

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

Where demurrer is sustained.

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

When defendant must be discharged.

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

Proceedings where case is re-submitted.

SEC. 271. If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in this act, or in sections 259 and 260.

Plea where demurrer is overruled.

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

Concerning certain objections—how taken.

SEC. 273. When the objections mentioned in section 265 appear upon the face of the indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, and in arrest of judgment.

CHAPTER IV.

PLEA.

Kinds of pleas.

SEC. 274. There are three kinds of pleas to an indictment. A plea of:

1. Guilty;

2. Not guilty;

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

Plea to be oral.

SEC. 275. Every plea must be oral, and must be entered upon the minutes of the court.

Form of plea when entered.

SEC. 276. The plea must be entered in substantially the following form:

1. If the defendant plead guilty: "The defendant pleads that he is guilty of the offense charged in this indictment:"

2. If he plead not guilty: "The defendant pleads that he is not guilty of the offense charged in this indictment;"

3. If he plead a former conviction or acquittal: "The defendant pleads that he has already been convicted, [or acquitted, as the case may be,] of the offense charged in this indictment, by the judgment of the court of ————, [naming it,] rendered at ————, [naming the place,] on the —— day of ————."

How plea of guilty to be put in.

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

Plea may be withdrawn.

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

Issues on plea of not guilty.

SEC. 279. The plea of not guilty puts in issue every material allegation in the indictment.

Evidence under plea of not guilty.

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

When a former acquittal is not an acquittal of same offense.

SEC. 281. If the defendant was formerly acquitted on the ground of variance between the indictment and the proof, or the indictment was dismissed upon an objection to its form or

substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense.

Former acquittal.

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

When former acquittal or conviction is a bar.

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

When plea of not guilty to entered.

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

CHAPTER V.

THE REMOVAL OF THE ACTION BEFORE TRIAL.

Action may be removed—when—how.

SEC. 285. A criminal action, prosecuted by indictment, may at any time before trial is begun, on the application of the defendant, be removed from the court in which it is pending, if the offense charged in the indictment be punishable with death, or imprisonment in the territorial prison, whenever it shall appear to the satisfaction of the court by affidavits, (or if the court should so order by other testimony) that a fair and impartial trial cannot be had in such county or subdivision, in which case the court may order the person accused to be tried in some near or adjoining county, in any district where a fair and impartial trial can be had; but the party accused shall be entitled to a removal of the action but once, and no more; and if the accused shall make affidavit that he cannot have an impartial trial by reason of the bias or prejudice of the presiding judge of the district court where the indictment is pending, the judge of such court may call any other judge of a district court to preside at such trial; and it shall be the duty of such other judge to so preside at said trial, and do any other act with reference thereto, as though he was presiding judge of said district court.

Duty of clerk woen when action is removed

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

Disposition of defendant if in custody.

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

Court may require bail.

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

Witness may be recognized.

SEC. 289. When a removal of the action is allowed, the court may recognize the witnesses on the part of the people, to appear before the court in which the defendant is to be tried.

Duty of court to which action is removed.

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

District attorney may apply for removal of action.

SEC. 291. The district attorney on behalf of the people may also apply in a similar manner for a removal of the action; and the court being satisfied that it will promote the ends of

justice, may order such removal upon the same terms and to the same extent as are provided in this chapter, and the proceedings on such removal shall be in all respects as above provided.

CHAPTER VI.

THE MODE OF TRIAL.

When an issue of fact arises.

SEC. 292. An issue of fact arises:

1. Upon a plea of not guilty, or

2. Upon a plea of a former conviction or acquittal of the same offense.

How tried.

SEC. 293. Issues of fact must be tried by a jury.

Defendant to be present—when.

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

CHAPTER VII.

FORMATION OF THE TRIAL JURY.

Who are jurors

SEC. 295. The jurors duly drawn and summoned for the trial of civil actions, are also the jurors for the trial of criminal actions.

Trial jurors—how formed.

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

Clerk to prepare ballots.

SEC. 297. At the opening of the court the clerk must prepare separate ballots containing the names of the persons returned as jurors, which must be folded as nearly alike as possible, and so that the same can not be seen, and must deposit them in a sufficient box.

When names of all jurors may be called.

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

Manner of drawing jury.

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

Disposition of ballots.

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

Same.

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

Where juror is absent.

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

Where all the jurors do not appear — duty of court.

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

Names of jurors—how written.

SEC. 304. The names of the persons summoned to complete the jury must be written on distinct pieces of paper, folded each as nearly alike as possible, and so that the name cannot be seen, and must be deposited in the box mentioned in section 297.

Drawing the jury.

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

Number of jury — how sworn.

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

Proceedings where sufficient number are not drawn.

SEC. 307. If a sufficient number cannot be obtained from the box to form a jury, the court may, as often as is necessary, order the sheriff to summon from the body of the county or subdivision so many persons qualified to serve as jurors as it deems sufficient to form a jury. The jurors so summoned may

be called from the list returned by the sheriff, and so many of them not excused or discharged, as may be necessary to complete the jury, must be impanelled and sworn.

Affirmation.

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

CHAPTER VIII.

POSTPONEMENT OF THE TRIAL.

Postponement of trial.

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

TITLE VIII.

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

CHAPTER I.

CHALLENGING THE JURY.

Challenging jurors.

SEC. 310. A challenge is an objection made to the trial jurors, and is of two kinds:

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

Challenges of several defendants.

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

Panel defined.

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

Challenge to panel defined.

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

Challenge to panel — how formed.

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

When challenge to be taken.

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

Exceptions to the challenge.

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

Proceedings on exception.

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

Proceedings where challenge is denied.

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

Proceedings upon trial of challenge.

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

Challenge on account of bias of officer, when allowed.

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

Court must discharge jury, when.

SEC. 321. If, either upon an exception to the challenge, or a denial of the facts, the challenge be allowed, the court must

discharge the jury, and another jury can be summoned for the same term forthwith, from the body of the county or subdivision; or the judge may order a jury to be drawn and summoned in the regular manner. If it be disallowed, the court must direct the jury to be impanelled.

Challenging individual jurors.

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

Nature of challenge.

SEC. 323. A challenge to an individual juror is either:

1. Peremptory, or

2. For cause.

When challenges are to be taken.

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

Peremptory challenge.

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

Challenge to jurors in criminal cases.

SEC. 326. In all criminal cases the defendant is entitled to the following challenges:

1. For capital offenses, the defendant may challenge peremptorily twenty jurors;

2. In prosecutions for offenses punishable by imprisonment in the territorial prison, ten jurors;

3. In other prosecutions, three jurors.

Prosecuting attorney may challenge.

SEC. 327. The prosecuting attorney in capital cases may challenge peremptorily six jurors; in other cases, three jurors.

Challenge for cause.

SEC. 328. A challenge for cause may be taken either by the people or the defendant.

General and particular objections to jurors.

SEC. 329. It is an objection to a particular juror, and is either:

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

2. Particular, that he is disqualified from serving in the case on trial.

General and particular cause of challenges.

SEC. 330. General causes of challenges are:

1. A conviction for felony;

2. A want of any of the qualifications prescribed by law to render a person a competent juror, including a want of knowledge of the English language as used in the courts;

3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror.

SEC. 331. Particular cause of challenge are of two kinds:

Particular cause of challenge.

1. For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias;

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

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

When challenge for implied bias may be taken.

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

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

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

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

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

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

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

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

Exemption from jury service.

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

What causes to be stated on challenge.

SEC. 334. In a challenge for implied bias, one or more of the causes stated in section 332 must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section 331 must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered upon the minutes of the court.

Exception to challenges.

SEC. 335. The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon, as prescribed in section 316, except that if the exception be allowed the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

Challenges, how tried.

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

When juror challenged to be a witness.

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

Other witnesses.

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

Duty of court.

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

Manner of taken challenges.

SEC. 340. All challenges to an individual juror, except peremptory, must be taken, first by the defendant, and then by the people; and each party must exhaust all his challenges before the other begins.

Order of challenges for cause.

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

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

Peremptory challenges.

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

CHAPTER II.

THE TRIAL.

Order in which trial shall proceed.

SEC. 343. The jury having been impanelled and sworn, the trial must proceed in the following order:

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

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

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

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

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

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

When the order may be changed.

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

Court to decide questions of law.

SEC. 345. The court must decide all questions of law which arise in the course of the trial.

When jury to determine law and fact.

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

When jury to determine only fact.

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

When three counsel may argue cause.

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

Defendant presumed innocent.

SEC. 349. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

Verdict where there is doubt.

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

When defendants to be tried separately.

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

Discharge of one defendant that he may be witness.

SEC. 352. When two or more persons are included in the same indictment, the court may, at any time before the de-

fendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the people.

Same. Duty of court.

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

What rules of evidence applicable.

SEC. 354. The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this code.

Evidence necessary to convict of conspiracy.

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

Same.

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

Evidence in cases of false pretense.

SEC. 357. Upon a trial for having, with an intent to cheat or defraud another designedly by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing unless the pretense or some note or memorandum thereof, be in writing, either subscribed by, or in the handwriting of the defendant, or unless the pretense be proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. But this section does not apply to a prosecution for falsely representing or personating another, and in such assumed character, marrying or receiving money or property.

Evidence in case of seduction.

SEC. 358. Upon a trial for inveigling, enticing or taking away an unmarried female of previous chaste character,

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

When court may suspend proceedings.

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

When plea of former acquittal not sustained.

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

In case certain indictment not found.

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

When jury may be discharged.

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

Duty of court respecting prisoner, in case it has not jurisdiction.

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

Same. Bail and disposition of records.

SEC. 364. If the offense was committed within the exclusive jurisdiction of another county of this territory, the court must direct the defendant to be committed for such time as it deems reasonable to await a warrant from the proper county for his arrest, or if the offense be a misdemeanor only, it may admit him to bail in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, ren-

der himself amenable to a warrant for his arrest from the proper county, and if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a time particularly specified in the undertaking, to surrender himself upon the warrant, if issued, or that his bail will forfeit such sum as the court may fix, and to be mentioned in the undertaking, and the clerk must forthwith transmit a certified copy of the indictment, and all the papers in the action, filed with him, to the district attorney of the proper county, the expense of which transmission is chargable to that county.

When prisoner must be discharged.

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

Proceedings, where defendant is arrested.

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

When court must discharge prisoner.

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

Court may advise jury to acquit the defendant.

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

When jury may view place where offense was committed.

SEC. 369. When, in the opinion of the court, it is proper that the jury should view the place in which the offense was charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown to them by a person appointed by the court

for that purpose, and the officers must be sworn to suffer no person to speak to or communicate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

Where juror has knowledge of facts in controversy.

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

Custody and conduct of jury

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

Jury to be admonished by the court.

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

When juror becomes sick.

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

Proof on trial for murder.

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

Proof on trial for bigamy.

SEC. 375. Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or

other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this territory, proof of that fact, accompanied with proof of cohabitation thereafter in this territory, is sufficient to sustain the charge.

Proof on trial for forgery.

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

The courts charge to the jury.

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

Disposition of jury after being charged.

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

Defendant, who gives bail and appears.

SEC. 379. When a defendant, who has given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody

of the proper officer of the county, to abide the judgment or further order of the court; and he must be committed and held in custody accordingly.

When court to appoint substitute for district attorney.

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

CHAPTER III.

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

Who to provide jury room.

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

Jury to have comfortable accommodations.

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

What papers jury may take.

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

When jury may be brought into court.

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

Where juror becomes sick.

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

Jury cannot be discharged until, when.

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

When cause may be re-tried

SEC. 387. In all cases where a jury are discharged, or prevented from giving a verdict, by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term as the court may direct.

Court may adjourn while jury are absent.

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

Discharge of jury.

SEC. 389. A final adjournment of the court discharges the jury.

CHAPTER IV.

THE VERDICT.

Proceedings when jury have agreed.

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

In case of felony verdict to be given in presence of defendant.

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

Proceedings when jury appear.

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

Character of verdict.

SEC. 393. The jury may either render a general verdict, or where they are in doubt as to the legal effect of the facts

proved, they may, except upon an indictment for libel, find a special verdict.

Form of general verdict.

SEC. 394. A general verdict upon a plea of not guilty, is either "guilty," or "not guilty;" which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either "for the people," or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity." When the defendant is acquitted on the ground of variance between the indictment and the proof, the verdict must be "not guilty by reason of variance between indictment and proof."

Special verdict defined.

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

Special verdict to be written.

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

Form of special verdict.

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

Argument in case of special verdict.

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

Court to give judgment upon special verdict.

SEC. 399. The court must give judgment upon the special verdict as follows:

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

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

When court must order a new trial.

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

Duty of jury in giving verdict.

SEC. 401. Whenever a crime is distinguished into degrees, the jury, if they convict the defendant must find the degree of the crime of which he is guilty.

Same.

SEC. 402. In all other cases, the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or an attempt to commit the offense.

Same, on an indictment against several defendants.

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

Where court may direct jury to reconsider verdict.

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

Same.

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

Duty of court where jury persist.

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

When jury may be polled.

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

Clerk to record verdict.

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

When defendant to be discharged.

SEC. 409. If the judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as judgment is given: except that when the acquittal is for a variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention to the end that a new indictment may be preferred, in the same manner and with like effect, as provided in section 367.

Disposition of defendant where verdict is against him.

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

Proceedings where defense is insanity and jury acquits.

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

CHAPTER V.

BILLS OF EXCEPTION.

Exceptions to decision of court on trial.

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

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

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

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

Bill of exceptions to be signed and filed

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

Character of bill of exceptions.

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

When bill to be prepared if not settled at the trial.

SEC. 415. If the bill of exceptions be not settled at the trial, it must be prepared and served within three days thereafter, on the district attorney, who may, within three days thereafter serve on the defendant or his counsel, amendments thereto. The defendant may then, within three days, serve the district attorney with a notice to appear before the presiding judge of the court, at a specified time, not less than five, nor more than ten days thereafter, to have the bill of exceptions settled.

Judge to settle and sign exceptions.

SEC. 416. At the time appointed the judge must settle and sign the bill of exceptions.

Concerning time for preparing bills of exception.

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

When exceptions are deemed abandoned.

SEC. 418. If the bill of exceptions be not served within the time prescribed in section 415, or within the enlarged time therefor, as prescribed in the last section, the exceptions are deemed abandoned. If it be served and the parties omit, within the time limited by section 415, the one to prepare amendments, and the other to give notice of appearance before the judge, they are respectively deemed, the one to have agreed to the bill of exceptions, the other to the amendments.

What exceptions to contain.

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

To be filed.

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

Exceptions may be taken, when.

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

1. In granting or refusing a motion in arrest of judgment.

2. In granting or refusing a motion for a new trial.

CHAPTER VI.

NEW TRIALS.

New trial defined.

SEC. 422. A new trial is a re-examination of the issue in the same court, before another jury, after a verdict has been given.

Court has power to grant a new trial.

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

1. When the trial has been had in his absence, if the indictment is for felony.

2. When the jury has received any evidence out of court other than that resulting from a view of the premises;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial;

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

SEC. 424. The application for a new trial must be made before judgment. Application for new trial, when to be made.

CHAPTER VII.

ARREST OF JUDGMENT.

SEC. 425. A motion in arrest of judgment is an application on the part of the defendant, that no judgment be rendered on plea or verdict of guilty, or on a verdict against the defendant on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment mentioned in section 265, unless the objection to the indictment has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment. Motion in arrest of judgment.

SEC. 426. The court may also, on its own view of any of these defects, arrest the judgment without motion. When court may arrest judgment.

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

TITLE IX.

OF JUDGMENT AND EXECUTION.

CHAPTER I.

THE JUDGMENT.

SEC. 428. After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or ac- When court must appoint time for pronouncing judgment.

quittal, if the judgment is not arrested, or a new trial granted, the court must appoint a time for pronouncing judgment.

Time specified.

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

When judgment may be pronounced in defendants absence.

SEC. 430. For the purpose of judgment, if the conviction is for a misdemeanor, judgment may be pronounced in his absence.

When officer to produce prisoner.

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

When bench warrant may issue for defendant's arrest.

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

Same. Duty of clerk.

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

Form of bench warrant.

SEC. 434. The bench warrant must be substantially in the following form:

"County of ————————,

"The people of the territory of Dakota. To any sheriff, constable marshal or, policeman in this territory."

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

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

By order of the court.

[SEAL.] E. F., Clerk.

How bench warrant may be served.

SEC. 435. The bench warrant may be served in any county, in the same manner as a warrant of arrest; except that when served in another county, it need not be endorsed by a magistrate of that county.

Disposition of defendant when arrested.

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

What defendant must be informed by court.

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

Defendant may show cause against judgment. What.

SEC. 438. He may show for cause against the judgment:

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

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

When judgment must be rendered.

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

When court may hear further evidence.

SEC. 440. After a plea or verdict of guilty, in a case where a discretion is conferred upon the court as to the extent of the punishment, the court upon the suggestion of either party, that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may in its discretion, hear the same summarily at a

specified time, and upon such notice to the adverse party as it may direct.

How such evidence to be presented.

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

Evidence prohibited except as specified.

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

Judgment in case of conviction of two offenses.

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

Judgment of fine and imprisonment.

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

Judgment of fine constitutes a lien.

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

Papers to be filed by clerk.

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

1. The indictment and a copy of the minutes of the plea or demurrer.

2. A copy of the minutes of the trial.

3. The charges given or refused, and the indorsements, if any, thereon; and

4. A copy of the judgment.

CHAPTER II.

THE EXECUTION.

Papers furnished to officer to justify execution.

SEC. 447. When a judgment, except of death, has been pronounced, a certified copy of the entry thereof upon the min-

utes, must be forthwith furnished to the officer whose duty it is to execute the judgment; and no other warrant or authority is necessary to justify or require its execution.

Execution where judgment is for fine.

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

Execution where judgment is for imprisonment.

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

Who to execute judgment in certain cases

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

Where judgment is imprisonment in territorial prison.

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

Authority of officer while conveying prisoner.

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

Proceedings on judgment of death.

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

Duty of judge in case of judgment of death.

SEC. 454. The judge of a court at which a conviction requiring judgment of death is had, must, immediately after

the conviction transmit to the governor, by mail, or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.

Governor to require opinion of judges.

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

Governor only can reprieve.

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

After judgment of death, if defendant become insane.

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

Inquisition to try insanity of defendant.

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

Certificate of inquisition to be signed.

SEC. 459. A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerks of the court in which the conviction was had.

Duty of sheriff on the finding of the inquisition.

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

Same.

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

When female is pregnant. Inquisition.

SEC. 462. When there is good reason to suppose that a female, against whom judgment of death is rendered, is pregnant, the sheriff of the county or subdivision, with the con-

currence of the judge of the court by which the judgment was rendered, may summon a jury of three physicians of the territory to inquire into the supposed pregnancy. Immediate notice thereof must be given to the district attorney. The provisions of sections 460 and 461 apply to the proceedings upon the inquisition.

Duty of sheriff on finding of inquisition.

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

When governor to order execution.

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

Duty of court where judgment has not been executed.

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

Same.

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

How death to be produced.

SEC. 467. The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

Judgment of death, where executed.

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

Who to be present at execution.

SEC. 469. The sheriff or deputy-sheriff of the county must be present at the execution, and must invite the presence (by at least three days notice) of the district attorney, together

with one physician and twelve reputable citizens, to be selected by him. He must also, at the request of the defendant, permit any minister or ministers of the gospel whom the defendant may name, and any of his relatives, or friends, not to exceed five, to attend the execution; and also such peace officers as the sheriff or under-sheriff may deem proper. But no persons other than those mentioned in this section can be present at the execution; nor can any person under age be allowed to witness the same.

Duty of sheriff on executing judgment of death.

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

Sheriff to file certificate.

SEC. 471. The sheriff or deputy-sheriff must cause the certificate to be filed in the office of the clerk of the court.

TITLE X.

WRIT OF ERROR.

CHAPTER I.

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

Writ of error.

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

Proceedings to obtain writ of error.

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

Title of parties to writ of error.

SEC. 474. The party sueing out the writ is known as the plaintiff in error, and the adverse party as the defendant in error; but the title of the action is not changed in consequence of the writ.

When writ may be sued out by defendant.

SEC. 475. The writ may be sued out by the defendant:

1. From a final judgment of conviction;

2. From an order refusing a motion in arrest of judgment;

3. From an order refusing a motion for a new trial;

4. Upon bills of exception for any of the causes mentioned in section 412, of this code.

When by the people.

SEC. 476. The writ may be sued out by the people:

1. From a judgment for the defendant on a demurrer to the indictment;

2. From an order arresting the judgment;

3. From an order granting a new trial.

Limit of time in which writ may be taken.

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

Writ sued out by people not to affect defendant.

SEC. 478. A writ sued out by the people, in no case stays or affects the operation of a judgment in favor of the defendant, until judgment is reversed.

Effect of writ of error on judgment.

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

Duty of sheriff in certain cases.

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

When execution of judgment is suspended.

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

Duty of clerk where writ is sued out.

SEC. 482. Upon the writ of error being sued out, the clerk of the court upon whom it is served, must, within ten days thereafter or within such reasonable time as may be allowed to him, transmit to the clerk of the supreme court the writ with his return thereon, to which shall be annexed and returned an authenticated copy of the record of this action as mentioned in section 448, and of all bills of exception, together with an assignment of errors and prayer for reversal.

The return to contain certificate of judge.

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

Party excepting to specify matters to which he excepts.

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

Adverse party to be notified.

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

Concerning certiorari.

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

CHAPTER II.

DISMISSING THE WRIT FOR IRREGULARITY.

When court may dismiss.

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

Same.

SEC. 488. The court may also upon like motion dismiss the writ, if the return is not made as provided in sections 484 and 485, unless for good cause they enlarge the time for that purpose.

CHAPTER III.

ARGUMENT OF THE WRIT.

How writ may be brought to argument.

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

What plaintiff in error to furnish.

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

Affirmation or reversion of judgment.

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

Number of counsel that may argue case

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

CHAPTER IV.

JUDGMENT IN SUPREME COURT.

When court must give judgment.

SEC. 493. After hearing the writ, the court must give judgment without regard to technical errors or defects, or to ex-

ceptions which do not affect the substantial rights of the parties.

Power of supreme court.

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

Duty of court if judgment is reversed.

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

When original judgment must be enforced.

SEC. 496. On a judgment of affirmance against the defendant, the original judgment must be enforced.

Disposition of judgment from supreme court.

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

When supreme court has no further jurisdiction.

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

TITLE XI.

MISCELLANEOUS PROCEEDINGS.

XI. Proceedings against fugitives from justice.
XII. Dismissal of the action before or after indictment, for want of prosecution or otherwise.
XIII. General provisions and definitions applicable to this case.

CHAPTER I.

COMPELLING THE ATTENDANCE OF WITNESSES.

And be it further enacted by the Legislative Assembly of the Territory of Dakota:

Compelling attendance of witnesses.

SEC. 499. That chapter II of article VIII of title XI, of "an act to establish a code of criminal procedure for Dakota Territory," approved January 12, 1869, said chapter being headed "Compelling the Attendance of Witnesses," is hereby revived and re-enacted.

CHAPTER II.

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

Inquiring in to insanity.

SEC. 500. That chapter V of article VIII of title XI, of the aforesaid act, approved January 12, 1869, said chapter being headed "Inquiry into the Insanity of the Defendant before Trial or after Conviction," so far as the same is not in conflict with the provisions of this present act, is hereby revived and re-enacted.

CHAPTER III.

COMPROMISING MISDEMEANORS BY LEAVE OF THE COURT.

Compromising offenses.

SEC. 501. That chapter VI of the aforesaid article, and title XI of said act of January 12, 1869, said chapter being headed "Compromising Certain Public Offenses by leave of the Court," so far as the same is not inconsistent with the provisions of this code, is hereby revived and re-enacted.

CHAPTER IV.

PROCEEDINGS AGAINST CORPORATIONS.

Proceedings against corporations.

SEC. 502. That chapter VIII of article VIII of title XI, of the aforesaid act of January 12, 1869, said chapter being entitled "Proceedings Against Corporations," is hereby revived and re-enacted.

CHAPTER V.

ENTITLING AFFIDAVITS.

Entitling affidavits unnecessary.

SEC. 503. It is not necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment, or upon a writ of error; but if made without a title or with an erroneous title, it is as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment or writ of error, in which it is made.

CHAPTER VI.

ERRORS AND MISTAKES IN PLEADINGS OR OTHER PROCEEDINGS.

Informalities not fatal.

SEC. 504. Neither a departure from the form or mode prescribed in this code in respect to any pleadings or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

CHAPTER VII.

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

Disposal of stolen property

SEC. 505. That chapter XI of article VIII of title XI, of the aforesaid act of January 12, 1869, said chapter being entitled "Disposals of Property Stolen or Embezzled," is hereby revived and re-enacted.

CHAPTER VIII.

REPRIEVES, COMMUTATIONS AND PARDONS.

Reprieves, commutations and pardons.

SEC. 506. That chapter XII, of the same, as aforesaid, article and title of the act of January 12, 1869, said chapter being entitled "Reprieves, commutations and pardons," so far as the said chapter is in accordance with the organic act, and consistent with the provisions of this code, is hereby revived and re-enacted.

CHAPTER IX.

CORONERS' INQUESTS AND DUTIES OF CORONERS.

Coroner's inquests.

SEC. 507. That title I of part VI of the aforesaid act of January 12, 1869, entitled "Of coroners' inquests and the duties of coroners," with the exception of the last section thereof, to-wit: section 756, is hereby revived and re-enacted.

CHAPTER X.

OF SEARCH WARRANTS.

Search warrants.

SEC. 508. That title II of part VI of the aforesaid act of January 12, 1869, entitled "Of search warrants," is hereby revived and re-enacted.

CHAPTER XI.

PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

Governor may offer reward.

SEC. 509. The governor may offer a reward, not exceeding one thousand dollars, payable out of the territorial treasury, for the apprehension,

1. Of any convict who has escaped from the territorial prison; or,

2. Of any person who has committed, or is charged with the commission of, an offense punishable with death.

Proceedings against fugitives from justice.

SEC. 510. That chapters I and II of title III of part VI of the aforesaid act of January 12, 1869, entitled "Of proceedings against fugitives from justice," are hereby revived and re-enacted.

CHAPTER XII

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

When prisoner to be discharged.

SEC. 511. When a person has been held to answer for a public offense, if an indictment is not found against him at the next term of the court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown.

Same.

SEC. 512. If a defendant, prosecuted for a public offense, whose trial has not been postponed upon his application, is not brought to trial at the next term of court in which the indictment is triable after it is found, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown.

When court may order action continued.

SEC. 513. If the defendant is not prosecuted or tried, as provided in the last two sections, and sufficient reason therefor is shown, the court may order the action to be continued from term to term, and in the mean time may discharge the defendant from custody, on his own undertaking or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

When action is dismissed defendant discharged.

SEC. 514. If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him.

When reasons for dismissal must be set forth in order.

SEC. 515. The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed; but in that case the reasons of the dismissal must be set forth in the order which must be entered upon the minutes.

Nolle prosequi abolished.

SEC. 516. The entry of a *nolle prosequi* is abolished, and the district attorney cannot discontinue or abandon a prosecution for a public offense, except as provided in the last section.

Order of dismissal not a bar.

SEC. 517. An order for the dismissal of the action, as provided in this chapter is not a bar to any other prosecution for the same offense.

CHAPTER XIII.

GENERAL PROVISIONS AND DEFINITIONS APPLICABLE TO THIS CODE.

Certain common law rule does not apply to this code.

SEC. 518. The rule of common law that penal statutes are to be strictly construed, has no application to this code. This code establishes the law of this territory respecting the subjects to which it relates; and its provisions, and all proceedings under it are to be liberally construed, with a view to promote its objects, and in furtherance of justice.

This code not retroactive.

SEC. 519. No part of this code is retroactive unless expressly so declared.

Construction of words.

SEC. 520. Unless when otherwise provided, words used in this code in the present tense includes the future as well as the present. Words used in the masculine comprehend as well the feminine and neuter. The singular number includes the plural and the plural the singular. And the word person includes a corporation, as well as a natural person.

Same.

SEC. 521. The term writing includes printing.

Same.

SEC. 522. The term oath includes an affirmation.

What the term signature includes.

SEC. 523. The term signature includes a mark when the person cannot write; his name being written near it, and the mark being witnessed by a person who writes his own name as a witness, except to an affidavit or deposition, or a paper executed before a judicial officer, in which case the attestation of the officer is sufficient.

To what this code applies.

SEC. 524. This code applies to criminal actions and to all other proceedings in criminal cases which are herein provided for, from the time when it takes effect.

Certain modes of procedure abolished.

SEC. 525. All modes of procedure in criminal actions heretofore enacted in this territory having relation to any matters herein provided for shall, upon the taking effect of this code, be entirely abrogated, and from thence abolished: *Provided, however*, That all proceedings of every kind or character whatsoever, commenced before the taking effect of this code, shall not by reason of anything in this code contained, be deemed to have abated: *Provided*, That this code shall not be construed as repealing the procedure in justices' courts in cases in which they have lawful original jurisdiction: *And*

Certain proceedings not abated.

Concerning justices courts.

Concerning jurors.

provided further, That this code shall not be construed as repealing an act entitled "An act respecting grand and petit jurors of the district courts," approved December 24, 1867.

Procedure not provided for by this code to be according to common law.

SEC. 526. That from and after the taking effect of this act, the procedure, practice and pleadings in the district courts of this territory, in criminal actions or in matters of a criminal nature, not specifically provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law, and assimilated as near as may be with the procedure, practice and pleadings of the United States or federal side of said courts.

When to take effect.

SEC. 527. This act shall take effect at noon on the tenth day of March, A. D., one thousand eight hundred and seventy-five.

Approved, January 15, 1875.

CHANGE OF NAMES.

CHAPTER XXXVI.

DISTRICT COURTS AUTHORIZED TO CHANGE NAMES.

AN ACT to authorize district courts to change the names of persons, towns, villages and cities within this territory.

Be it enacted by the Legislative Assembly of the Territory of Dakota:

District courts may change names.

SECTION 1. That the district courts shall have authority to change the names of persons, towns, villages and cities within this territory.

Proceedings necessary to change the name of persons.

SEC. 2. That any person desiring to change his or her name may file a petition in the district court of the district in which such person may be a resident, setting forth: